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A TREATISE

ON

THE LAW OF

MUNICIPAL ORDINANCES

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OF THE ST. LOUIS BAR

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By

EUGENE McQUILLIN

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DEDICATION.

To my friend,

ROBERT E. McMATH, Member A. S. C. E., President Board of Public Improvements (1893 to 1901) of the City of St. Louis, Mo., this work is inscribed, as a tribute to his accurate knowledge of public improvement ordinances and matters relating to municipal work, also as a token of many years of beneficial friendship of its author.

PREFACE

Municipal administration is more closely associated with the daily life of the urban citizen than either federal or state administration: the taxpayer and property owner are more directly and vitally concerned.

In the usual American municipal organization the council or governing legislative body is created directly by the electors, and is, therefore, the popular branch; and it is through this department that the will of the inhabitants as rightful participants in the local civil government is manifested. This is done by corporate acts, legislative or quasi legislative in character. These acts when duly completed and promulgated become ordinances, if of a permanent nature, or resolutions, if designed for a temporary purpose. Chiefly by ordinance or resolution all money exaction from urban citizens for state or local purposes are levied and collected; public revenue distributed; streets, public ways, sewers, drains, water, lighting and public improvements of all kinds provided; the peace, good order and health of the local community preserved; and its trade and commerce advanced.

To municipal officers and their legal advisers, and to those interested in municipal government, for years, the value of a satisfactory treatise dealing exclusively with the subject of Municipal Ordinances has not been doubted. Practicing lawyers who have been called upon to investigate legal questions wherein municipal legislation was directly or indirectly involved have felt the need of such work. Such has been the experience time and time again of the author.

While much valuable matter appears in standard text books on the general subject, notably in the excellent commentaries of the eminent Judge Dillon on the Law of Municipal Corporations (1890), no work has been issued, as far as the author knows, which attempts to deal exclusively with the entire subject. The small volume on Municipal Police Ordinances prepared by Messrs. Horr and Bemis (1887) is limited, as its title indicates, to local police regulations. Moreover, since the works mentioned and others treating of certain branches of the general subject have appeared, marked developments in the legislative powers of

municipal councils and boards have occurred. These developments have been wrought by changes in state constitutions, statutes, and municipal charters, and judicial decisions construing such laws, in the light of the rapid progress made, particularly during the past decade, in municipal government. Municipal charters of the present day differ materially from those of earlier origin. True, the latter form the basis for the former, but the meager and sometimes vague expressions of the older charters have been exchanged for more precise and elaborate provisions. The needs and conveniences of crowded modern urban centers have resulted in due recognition of the desirability and, indeed necessity of entrusting such local governmental organs with broader and more efficient powers for local self-government.

President Roosevelt in his message to the Congress, December 3, 1901, timely observed that "the growth of cities has gone on beyond comparison faster than the growth of the country;" that "the most vital problem with which this country, and for that matter the whole civilized world, has to deal" relates to the "social conditions, moral and physical, in large cities;" but that "under our constitution there is much more scope for such action by the state and the municipality than by the nation."

The last census (1900) shows that 35 per cent of the entire population of the Republic dwell in eities having 8,000 or more population. When it is considered that there are hundreds of urban centers of smaller size, containing a population of from 1,000 to nearly 8,000, which have been excluded in the estimate, it may be conservatively stated that the city population is at least 40 per cent, or two-fifths. The population of these centers is rapidly increasing, and the inhabitants thereof are subjected constantly to ordinance and local police regulations.

The importance of the legal phase of municipal legislation, of which this work treats exclusively, is thus manifest.

The numerous judicial decisions dealing with every phase of the important subject of municipal ordinances have been studied, analyzed and compared, and the principles deduced therefrom, together with the reasons supporting them, wrought into text and notes in a form which it is believed will prove convenient and easily accessible. Nearly nine thousand cases have been cited. Besides the official reports, parallel references are made to the National Reporter System, American Decisions, American Reports and State Reports, and the Lawyers' Reports Annotated. The cross-references are numerous and specific. For greater con-

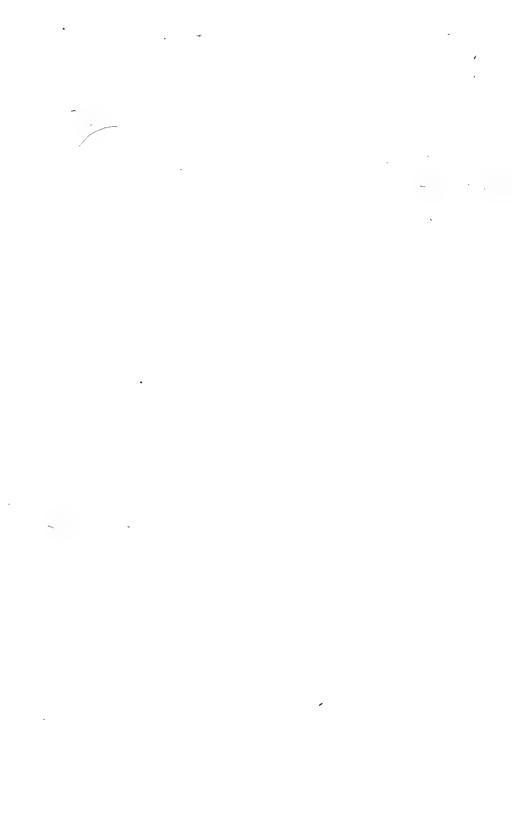
venience catch-words have been freely employed in text and notes. An index has been provided which gives specific information of the contents.

It will be of great satisfaction to the author if the exacting labor required in the preparation of this work (covering as it has over a period of some ten years—labor given at such times as could be spared from professional duties) should prove of material assistance to his legal brethren and others seeking information on the subject of Municipal Ordinances.

Acknowledgment is due to William S. Campbell, Esq., of the St. Louis Bar, for intelligent assistance on various parts of the work and for his painstaking and laborious task in verifying the cases.

EUGENE McQuillin.

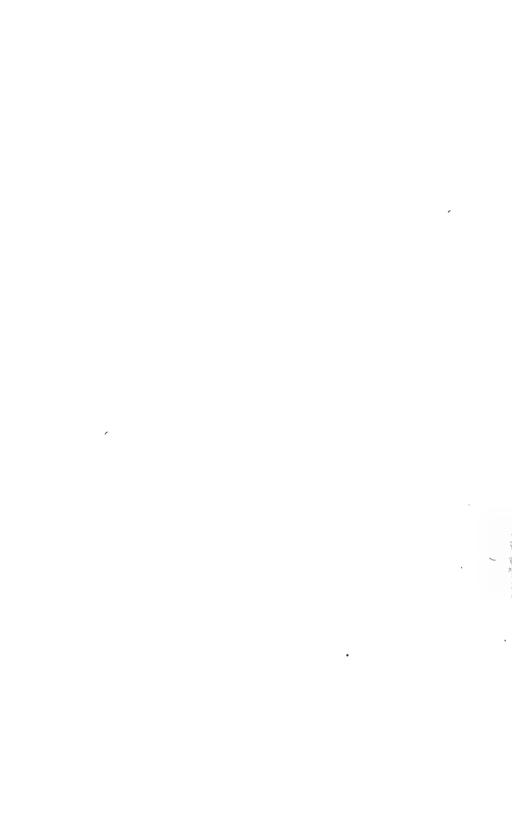
St. Louis, January, 1904.



CONTENTS BY CHAPTERS.

CHAPTER

- OF GENERAL NATURE AND REQUISITES OF VALID MUNICIPAL ORDI-NANCES.
- II. OF THE POWER TO ENACT ORDINANCES; and herein, the nature of Municipal Corporations, and the Source, Construction and Exercise of General Corporate Powers.
- III. OF ENACTMENT OF ORDINANCES.
 - Meetings and proceedings of council or governing legislative body—Records.
- IV. OF ENACTMENT OF ORDINANCES (Continued).
 - 2. The ordinance and its passage.
 - V. OF PENALTIES.
- VI. OF REASONABLENESS OF ORDINANCES; and herein Ordinances in Restraint of Trade.
- VII. OF AMENDMENT AND REPEAL OF ORDINANCES.
- VIII. OF CONSTITUTIONALITY OF ORDINANCES.
 - 1. In general.
 - 2. Ordinances impairing the obligation of contracts.
 - 3. Ordinances interfering with or attempting to regulate foreign or inter-state commerce.
 - IX. OF CONSIDERATION OF VALIDITY OF ORDINANCES; and herein Procedure to Test and Rules of Construction.
 - X. OF ACTIONS TO ENFORCE POLICE ORDINANCES.
 - 1. The Court and Its Jurisdiction.
 - 2. The Action-Its Form, Nature and Institution.
 - 3. The Statement, Complaint or Information.
 - 4. The Trial-Summary or Jury-Proceedings.
 - 5. The Evidence for the Corporation.
 - 6. Defenses.
 - 7. The Judgment, Record and Execution.
 - 8. Review.
- XI. OF PLEADING ORDINANCES IN CIVIL PROCEEDINGS.
- XII. OF EVIDENCE OF ORDINANCES.
- XIII. OF ORDINANCES RELATING TO TAXATION AND LICENSE TAX.
- XIV. OF ORDINANCES RELATING TO MUNICIPAL POLICE POWERS; and herein nuisances, public health, safety and convenience.
 - 1. General nature, scope and exercise of police power.
 - 2. Health and sanitary regulations-nuisances.
 - 3. Public safety-streets-buildings.
 - 4. Offenses against public morals and decency.
 - 5. Markets-weights and measures.
 - 6. Miscellaneous regulations.
- XV. OF MUNICIPAL CONTROL OF OFFENSES AGAINST STATE.
- XVI. OF PUBLIC IMPROVEMENT ORDINANCES.
- XVII. OF FRANCHISE ORDINANCES.



CONTENTS BY SECTIONS.

CHAPTER I.

OF GENERAL NATURE AND REQUISITES OF VALID MUNICIPAL

ORDINANCES.	
SECT	
Ordinances defined	1
Difference between ordinance and resolution	2
Illustrations as to when ordinance necessary	3
Same—Creating offices and situations	4
When action may be taken by resolution—Illustrations	5
How ordinances differ from regulations, orders, resolutions, etc	6
How ordinances differ from rules of procedure	7
Classification of ordinances	8
Same—General and special	9
Same—Penal and non-penal—General and special	10
Ordinance may combine contractual and police regulations	11
Force and effect of ordinances	12
Do ordinances differ as to force and effect from charter or statute?.	13
Requisites of a valid ordinance stated	14
Ordinances must conform to charter	15
Ordinances must not be inconsistent with the general laws of the	
state	16
Same—Exception	17
Ordinances must harmonize with the public policy and common	
law of the state	18
Ordinances must be enacted in good faith	19
Ordinances must be definite and certain	20
Ordinances of cities of same class may vary	21
Notice to be taken of ordinances	22
Who bound by ordinances	23
Ordinances operative upon property within the corporate limits	24
Same—Rule as applied to licenses	25
Territorial operation of ordinances	26
Places within municipal jurisdiction	27
Same—Wharves—Private property	28
Same—Regulating speed of trains	29
Judicial limitation of operation of ordinances	30
Ordinances operating in public or particular places only	31
Ordinances applying to part of city valid	32
Same—Improvement ordinance	33
When ordinances to take effect	34
Same—Illustrative cases	35
Same subject—Contingency	36
Expiration and suspension of ordinances	37

CHAPTER II.

OF THE POWER TO ENACT ORDINANCES; AND HEREIN, THE NATURE OF MUNICIPAL CORPORATIONS, AND THE SOURCE, CONSTRUCTION AND EXERCISE OF GENERAL CORPORATE POWERS.

SECT	TON
Public corporation empowered to pass ordinances	38
Corporate as distinguished from private affairs	39
Ordinance regulating civil rights and liabilities	40
Same—Civil action for breach of ordinance	41
Same—Limitation—Duty to public	42
The municipal charter—Its nature and purpose	43
Same subject	44
Usual municipal powers	45
General rule as to municipal powers stated	46
Powers of New England towns	47
Rules of construction	48
Same subject	49
Effect of specific enumeration of powers	50
Construction of power "to regulate"	51
Construction of charter	52
	-
IMPLIED POWERS.	
•	
Implied power to enact ordinances	53
General doctrine as to implied or incidental powers	54
Implied powers confined to municipal affairs	55
Implied powers respecting offices and officers	56
Implied power to acquire and hold property	57
Same—Property beyond corporate limits	58
Implied power to dispose of property	59
Same—Property held for particular purposes	60
Implied power to transfer, donate or dedicate property for particu-	
lar uses	61
Implied power to mortgage or pledge property	62
Implied powers as to police and sanitary regulations	63
Implied power to supply water	64
Implied power to purchase engines, etc., to prevent and suppress	
fires	65
Implied power as to lighting	66
Same—Implied power to regulate price of light	67
Appropriations as donations forbidden	68
Appropriations for celebrations, entertainments, etc., void	69
Bounties to soldiers	70
Expenditures to obtain or oppose legislation	71
Exercise of powers by virtue of usage or custom	72
Same subject	-
Miscellaneous illustrations of implied powers	73 74
- Imprior powers,	14

EXECUTION OF POWERS.

SECT	103
Method of exercise of powers	75
Judiciary will not control exercise of discretionary powers	76
Same subject	77
Limitation of rule of non-judicial interference	78
When ordinance necessary to exercise power	79
Same subject—Legislative or executive powers	80
Same subject—Self-enforcing charter provisions	81
Distinction between mandatory and discretionary powers	82
Same subject	83
Public powers cannot be surrendered or delegated	84
Powers and duties imposed upon particular departments or officers	01
cannot be delegated	85
Legislative authority cannot be delegated	86
Same—Illustrations	87
Same subject	88
Ministerial duties may be delegated	89
ministerial duries may be delegated	00
CHAPTER III. OF ENACTMENT OF ORDINANCES. 1. MEETINGS AND PROPERTY OF COMPANY	RO-
CEEDINGS OF COUNCIL OR GOVERNING LEGISLATIVE	
BODY—RECORDS.	
Municipal organization—Where corporate authority vested	90
Corporate meetings required	91
Kinds of corporate meetings stated—Notice	92
New England town meetings—Notice or warning indispensable	93
Sufficiency of notice or warning	94
What the notice or warning must specify	95
Legal governing body—De facto councils and officers	96
Conflicting councils—Injunction	97
Presiding officer—Mayor as member	98
Signing of bills by presiding officer	99
When hayors approval or processings	100
Alayor of approved and the	101
Casting vote by presiding officer	102
QUORUM AND MAJORITY.	
Quoi um ucimea	103
Quolum and majorro, as some	104
Quolum and majorro, or account	105
COMMO (1/ March 1/ Ma	106
Vote necessary in suspending rules	107
How quorum affected by interest of members	108
Quorum of joint assemblies of definite bodies	109

PROCEEDINGS.	TO CO	ron
Special meetings—Notice		110
Power to adjourn meetings		111
Business that may be transacted at adjourned meetings		112
Council as continuous body	• • •	
Action of legislative body consisting of two branches		
Rules for conducting business-Parliamentary law		
Form of corporate action-Mandatory and directory provisions		
Taking yeas and nays		
Reasons for requiring yeas and nays		
Reading bills on three different days		119
Ratification of void acts		120
Reconsideration—General powers respecting		121
Power to rescind prior acts		122
Committees		123
RECORDS.		
Record of proceedings		124
Who to keep municipal records		
Sufficiency of record—Presumptions		
Same—Taking yeas and nays		
Municipal records as evidence		
•		
Parol evidence to prove record		
Parol evidence to show omissions		
Same subject—Imperfect record—Rights of creditors		
Amendment of record		
Method of amending		
Court may order amendment—Mandamus		
Amendment after lapse of time—Estoppel—Ex post facto	• •	1 35
OH A DWID IV		
CHAPTER IV.		
OF ENACTMENT OF ORDINANCES—CONTINUED.		
2. THE ORDINANCE AND ITS PASSAGE.		
•		400
Charter method of enactment exclusive		
Form of ordinance		
The formal parts of an ordinance enumerated		
Recital of authority to enact not required		
Ordinance need not recite necessity of enactment		
One subject and title		
Same—Illustrative cases		
Title in revision of ordinances		143
Preamble		144
Ordaining or enacting clause		145
Time of introduction and passage		146
Same—Double board		
Reference to and report by committee		148
Signing and approval of ordinance by mayor		140
Veto of mayor		150

	MOITS
Return of bill or ordinance by mayor	151
Ordinances passed and approved by electors	152
Recording ordinances	153
Deposit and custody of ordinances	154
Publication of ordinances and notice of pendency	155
Time and frequency of publication	156
Method of publication	157
Amendment on passage	158
Publication of amendments on passage	159
Consideration of mayor's veto	
Courts will not inquire into legislative motive	
Same—Rule limited—Ministerial act	
Injunction to restrain passage of ordinance	
Validating void ordinance by municipality	
Curative power of legislature over void ordinances	
Same—Proceedings to subscribe for railroad stock	
Same—To collect taxes	
banc To conect taxes	101
CHAPTER V. OF PENALTIES.	
Power to enforce ordinances by penalties	168
Charter method of enforcing ordinances exclusive	169
Power to inflict penalty of forfeiture	170
Same—Proceedings	171
Same—Animals running at large	172
Penalty by imprisonment	173
Other penalties-Costs	
Penalty must be certain	175
Same—New Jersey Doctrine	
Same—North Carolina doctrine	
Penalty must be reasonable—Limit	
Limit of fine—Continuous or separate offense	
Heavier fine for second offense authorized	
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CHAPTER VI.	
OF REASONABLENESS OF ORDINANCES; AND HEREIN OF NANCES IN RESTRAINT OF TRADE.	RDI-
Express power to pass	181
Implied or incidental powers	
Mode of exercise of express power must be reasonable	
Same—Uniform rule necessary	
Reasonableness a question of law for the court	
Rules as to reasonableness under implied powers	
Same—English cases—Customs and usage	
Same—Illustrative cases	188

SECTION
Ordinances in restraint of trade 189
Same—Monopoly and exclusive privileges
Water and gas franchises as monopolies—Ferries 191
Exclusive market privileges
Ordinances must not unreasonably discriminate Classification 193
Same—Illustrative cases
CHAPTER VII.
OF AMENDMENT AND REPEAL OF ORDINANCES.
Amendment—Method of making
Void ordinance cannot be amended
Amendment of franchise and contract ordinances
Amendment of improvement ordinances
Power to repeal ordinances
Same—Franchise and contract ordinances
Same—Illustrative cases
Repeal of improvement ordinances
Implied repeals
Same subject—General and special ordinances 204
Effect of repeal—Revival
Same—Penal ordinances 206
Same—Improvement ordinances 207
Effect of repeal and re-enactment 208
Effect of revision of ordinances as to repeal 209
Repeal of ordinance by ordinance only 210
When ordinances superseded by charter amendments 211
Rule relating to repeals of charter and ordinance provisions by
general laws 212
Same subject—Question of intent 213
When charter provisions supersede general laws
When ordinances supersede general laws
Effect on ordinances by surrender of special charter—Change in
class or grade
Same—Dissolution and re-organization
Same—By consolidation or change of corporate limits 218
CHAPTER VIII.
OF CONSTITUTIONALITY OF ORDINANCES.
1. In general. 3. Ordinances interfering with
2. Ordinances impairing the or attempting to regulate foreign
obligation of contracts. or inter-state commerce.
1. IN GENERAL.
Ordinances must be constitutional—Enumeration

CONTENTS BY SECTIONS.

SEC	TION
Same—Use of private property	221
Same—Use of public property—Streets:	
Taking or damaging private property	223
Oppressive regulations	224
Relating to individual liberty	225
Discriminating on account of class, race, religious sect, etc	226
Same—The San Francisco Queue ordinance	227
Regulating personal association, employment, etc	
Personal liberty—Drunkenness	
Mode of trial	230
Officer has no vested right in office-Office may be changed or	
abolished	231
2. ORDINANCES IMPAIRING THE OBLIGATION OF CONTRACTS.	
Ordinances cannot impair the obligation of contracts	232
Ordinance as "Law"	233
Ordinances as contracts	234
The "Obligation" of the contract	235
Question is for decision of United States Supreme Court	236
Taxation by municipal corporation of its own bonds, etc	237
Ordinances granting franchises as contracts	238
Same—Imposing additional burdens	239
Same—Exclusive privileges	240
Franchise contracts authorized by state	241
Reservation of right to alter, amend or repeal franchise contracts	242
Contracts of contractors for public work	243
Same—Rights vested in the contractor	
Same subject—Illustrative cases	
Interest on special tax bills as part of obligation	
When new remedy controls	
When old law to be followed	
Track old law to be consensually the consensual consensually the consensual consensually the consensual c	
3. ORDINANCES INTERFERING WITH OR ATTEMPTING TO REGULATE IN	TER-
STATE OR FOREIGN COMMERCE.	
Ordinances cannot interfere with or regulate interstate or foreign	
commerce	249
Meaning of term "commerce"	250
No analogy between the power of taxation and the regulation of	251
commerce	252
License tax on those engaged in exporting and importing	253
License tax for privilege of selling goods, etc	254
Same—Discrimination is not the test	
Same—Where goods sold are in the state	
Same—Same—Peddlers	257
Personal contracts—Occupation tax	
License tax on brokers, agents, etc., engaged in interstate commerce	
Discriminating license tax void	
License tax under police power	400

SECTION

Same—Telephone and telegraph poles in streets	262 263 264 265 266 267 268 269 270 271 272 273
CHAPTER IX.	
OF CONSIDERATION OF VALIDITY OF ORDINANCES, AND HE IN PROCEDURE TO TEST AND RULES OF CONSTRUCTION	
Courts may determine validity of ordinances	276 277 278 279 280 281 282
Same—Mandamus	
Injunction to restrain enforcement	
Injunction to prevent violation of ordinances	
Quo warranto	
Rules of construction	
Same subject	
Title in construction	
Contemporaneous construction	
Construction of penal ordinances	
Construction of words and terms	
Construction where ordinance void in part	295
Construction of ordinance—Illustrative cases	296
Same—Who liable—Landlord and tenant	297
Dame who have pandiold and fenant	298

CHAPTER X.

OF ACTIONS TO ENFORCE POLICE ORDINANCES.

1. The Court and its jurisdiction.	5.		evidence	for	the	cor-
	pora	tion.				
2. The action—Its form, nature and institution.	6.	Defe	enses.			
3. The statement, complaint or	7.	The	judgmen	t, re	cord	and
information.	execu	ıtion.				
4. The trial—Summary or jury	8.	Revi	iew.			
Proceedings.						
1. THE COURT AND	ITS J	URISD	ICTION.			
						TION
Establishment and continuance of lo						
Jurisdiction of local courts	• • • • •	• • • • •				300
Territorial limits of jurisdiction						
Who authorized to act as judges, jur	rors a	na wi	tnesses			302
2. THE ACTION—ITS FORM,	NATU	RE AN	D INSTITUT	rion.		
How ordinances enforced-Form of	action	n				303
How far the proceedings are crimin						
Institution of proceedings-Notice-	-Appe	aranc	e			305
Arrest without warrant						306
Sufficiency of summons or warrant.						
Bail bond	<i>.</i>					308
Name in which action should be bro	ought			• • • •		309
3. THE STATEMENT, COMP	PLAINT	OR II	NFORM ATIO	N.		
Formal parts of complaint or inform	ation		. <i></i>			310
Allegation of notice of ordinance un						
Averment of power to pass ordinanc						
Requisites of statement, complaint or						
Form of complaint—Verification—Co						4
Pleading ordinance violated—Judicia						
Same—Reference to ordinance violat Negativing exceptions						
Several offenses—Joinder						
Same—Joint liability						
Statement or information for penalty						
Sufficiency of complaint or statement						
Sufficiency of report of police						
Amendment of statement or informa	tion					323
How defective statement or information	tion c	ured.				324
4. THE TRIAL—SUMMARY	or Ju	JRY—	PROCEEDING	s.		
Arraignment and plea						
Mode of conducting trial—Civil or cri	minal					326

SECT	
Pleading the defense	327
Summary trial—Origin	328
	329
Constitutional right of trial by jury does not apply to municipal	
offenses	330
Same—Crimes—Criminal prosecution	
Same—Crime, misdemeanor and municipal offense distinguished	
Same—Misdemeanor	
Jury trial on appeal	
Application for jury—Conditions—Waiver	
Method of Conducting jury trial	
Technical rules of procedure disregarded—Practice	
Costs	
Costs	000
5. THE EVIDENCE FOR THE CORPORATION.	
Proof of ordinance	
Proof of offense	
Same—Illustrative cases	
Proving the intent	
Liability of participants, keepers, subordinates, servants, etc	344
Liability of principal for acts of employes, servants, etc	345
Burden of proof—Negative averment	346
Variance	347
6. DEFENSES.	
Defenses enumerated	242
Corporate existence cannot be questioned as a defense	
No defense because prosecution under validated ordinance	
	_
Former acquittal or punishment	
	3 52
Transfer of the contract of th	
ordinance	
Defenses—Miscellaneous	
Defenses—Illustrative cases	355
7. THE JUDGMENT, RECORD AND EXECUTION.	
The verdict	356
The judgment	
Record of conviction	3 58
Execution	359
8. review.	
Right of review	360
Review by appeal	
Same—Time and Method of Taking	960
Same—Trial de novo on appeal	002
Review by certiorari	303
	504
Record on certiorari	90-

COL	STMATE	$\mathbf{R}\mathbf{Y}$	SECTIONS	

 Same—Writ of error
 366

 Habeas corpus
 367

 Injunction
 368

 Prohibition
 369

		٠
v	v	4

SECTION

CHAPTER XIII.

OF ORDINANCES RELATING TO TAXATION AND LICENSE TAX.
SECTION
General nature of taxes
Taxation limited to municipal or corporate purposes
Power to levy taxes
Method of levying taxes
Municipal power to license and regulate trades, occupations, etc 403 Mode of delegation—How power construed
middo of dologation from bounds and
Same—Enumeration followed by general words
Power "to regulate" as power to license
Power "to regulate" as power to prohibit
License taxes distinguished from general taxes
License taxes distinguished from general taxes
License for municipal purpose
Power to license non-residents 412
License tax to be levied by ordinance
Delegation of power to license forbidden
Same—Consent of property owners
Same—Permit to parade streets
License fee or tax must be uniform—Discrimination forbidden 417
Reasonableness of amount of license
Application for license—granting
Revocation of license or permit
Method of enforcement of payment of license 421
License on dogs 422
License on lawyers
Vehicle license—Double taxation
License on saloons and liquor selling 425
Same subject—Conditions
License on street railways and cars 427
License on miscellaneous trades, occupations, avocations, etc 428
CHAPTER XIV.
OF ORDINANCES RELATING TO MUNICIPAL POLICE POWERS
AND HEREIN NUISANCES, PUBLIC HEALTH, SAFETY
AND CONVENIENCE.
1. General nature, scope and 4. Offenses against public
exercise of police power. morals and decency.
2. Health and sanitary regu- 5. Markets — Weights and
lations—Nuisances. measures.
3. Public safety — Streets — 6. Miscellaneous regulations.
Buildings.
1. GENERAL NATURE, SCOPE AND EXERCISE OF POLICE POWER.
General nature and scope of the police power 429
Same—Basis of police power

	TION
Same—Extends to destruction of property	
Limitations of the police power	
Exercise of the police power by municipal corporations	
Same—Power under general welfare clause	434
Exercise of police power within and without corporate limits	435
Municipal liability for failure to enact and enforce police regu-	
lations	436
Same subject—Exception—Nuisances	437
General requisites of valid police regulations	
2. HEALTH AND SANITARY REGULATIONS—NUISANCES.	
Health and sanitary regulations—Power to make and enforce	
What constitutes a nuisance?	440
Municipal power to declare and define nuisances	
Same—Illustrative cases	442
Same—Doubt as to nuisance	443
Power to abate nuisances	444
Contagious diseases, etc—Quarantine	445
Burial of the dead—Cemeteries	446
Nuisances arising from trades, manufactures, etc	
Slaughtering of animals—Slaughter houses	
Dairies and cow stables	440
Livery stables	450
Hogs and hog pens	450
Dead animals, garbage, offal, etc	
House dirt, rubbish, privy vaults, etc	453
Drains, sewers, ponds, stagnant water, pollution of water supply,	
etc	
Wells	
Emission of dense smoke as a public nuisance	456
Regulating sale of cigarettes	457
3. PUBLIC SAFETY—STREETS—BUILDINGS.	
Regulating use of streets, etc., and keeping same free from ob-	450
struction	
Obstructions in public streets and highways as nuisances	
Power to remove obstructions and nuisances exists	
Awnings, signs, etc	461
Regulation of lamp posts, poles, electric wires, underground con-	
duits, gas pipes, etc	462
Bill boards and structures for advertising	463
Riding and driving on streets	464
Regulation of bicycles and velocipedes	
Regulating street parades	
Distribution of handbills, circulars, advertising matter, etc	
Animals at large—Regulating driving of, through streets	
Regulating dogs	
Fire limits—Wooden buildings	
Same—Building regulations—Permits	4/1

SECT	CION
Gunpowder and explosives—Blasting Power to regulate operation of locomotives, trains and cars in streets	473
Same—Enumeration of regulations	474
4. OFFENSES AGAINST PUBLIC MORALS AND DECENCY.	
Lewd conduct—Bawdy houses—Prostitution, etc	
etc. Regulating sale of intoxicating liquor. Public drunkenness Observance of the Sabbath.	477 478
Regulating hours of business	
5. MARKETS—WEIGHTS AND MEASURES.	
Markets—Establishment and regulation	481
Confining sales and purchases to public markets-Forbidding pri-	
vate markets	
Regulation of hucksters, hawkers, etc	
Milk inspection and adulteration	
Weights and measures	480
6. MISCELLANEOUS REGULATIONS.	
Offenses affecting the public order and peace	486
Same—Disturbing the peace	
Same—Carrying concealed weapons	488
Cruelty to animals	489
Vagrancy	
Regulations of various occupations	
Pawnbrokers	
Regulation of private property—Trespassing	
Regulation of tenement houses, etc	
Limiting day's work—Eight-hour laws	
Miscellaneous	496
CHAPTER XV.	
OF MUNICIPAL CONTROL OF OFFENSES AGAINST STATE	Đ.
State laws and municipal ordinances distinguished Municipal and state offenses	
Source of municipal power to legislate on offenses against the state	
The same act may be made an offense against the state and the	
municipal corporation	500
Same—Georgia	
Same—Illinois	502
Same—Kentucky	504
Same—Missouri	504 505
Same North Carolina	500

SECTION

Same—Rhode Island—Indiana	507
Same—lexas	
Offenses that may be made both state and municipal, enumerated	509
Can there be two punishments?	51 0
CHAPTER XVI.	
OF PUBLIC IMPROVEMENT ORDINANCES.	
Nature and purposes of public improvements	511
Municipal power to make public improvements	512
Public improvements outside of corporate limits	513
Nature of power—Where vested—State control	514
Same subject	515
Only officers duly authorized can provide for improvements	516
Same—Delegation of power forbidden	517
Improvement by property owners	518
Discretion of municipal authorities as to improvements	519
Boulevards	
Improvements interfering with franchise rights	
Special assessments or taxation for local improvements	522
Uniformity and equality of special assessments	
Purposes of special assessments	524
Preliminary proceedings	525
Petition or consent of property owners affected	526
Opening and establishment of streets	527
Establishment of street grade	528
Recommendation of ordinance by board	529
Water and gas pipes in advance of improvement	53 0
Estimate of cost of improvement	531
Submission to, and approval of, electors	532
Preliminary resolution or ordinance	533
Declaration of necessity of improvement	534
Providing for improvement-ordinance, resolution or order	535
Sufficiency of order for improvement	536
Ordinance for each distinct improvement	
Procedure in passage of ordinance	538
Recital of authority to pass	539
Description of the improvement	540
Sufficiency of description in street improvement ordinances	541
Sufficiency of description in sewer construction ordinances	542
Same—joint district sewer	543
Specification of material	544
Description by reference	545
Matters of detail need not be specified in the improvement ordi-	
nance	546
Ordinance must provide method of payment	
Sufficiency of ordinance relating to payment in installments	548
Sufficiency respecting basis of apportionment of tax	549

SEC	TION
Improvement ordinance must be reasonable	550
Certainty—validity	551
Agreements of citizens and property owners	552
Ordinances restricting competition—union labor	
Ordinances authorizing patented and monopolized articles	
Ordinances providing for maintenance of street for a term of years	
Validating void improvement ordinances	
-	
Same—Curative power of the legislature	
Construction of improvement ordinances	
Parol evidence of terms used in improvement ordinances	559
CHAPTER XVII.	
OF FRANCHISE ORDINANCES.	
Highway defined	
Street defined	
Sidewalk defined	562
Alley defined	563
Distinction between rural and urban ways—uses of streets	564
"Franchise" as applied to grants and privileges of municipal cor-	
porations	565
Same subject—franchise defined	
Same subject	
Legislative control of highways and streets	
Municipal control of streets	
Street railroad tracks, gas and water pipes, poles and wires as	000
nuisances	570
Use of street must be public	571
Same—right of abutters	572
Ordinance necessary to grant right to use streets	573
All mandatory requirements imposed by law must be duly observed	
The grantee—existence of corporation	
Conditions imposed on grantee	
Paving, repairing, etc., of streets by railway companies	
Exclusive privileges and monopolies	
Acceptance of franchise ordinance	
Right to occupy streets, etc., as contract	
Change in location of water mains—injunction to prevent Police regulations—grade crossings	
Power to regulate rates or charges	
Same—under general power—estoppel	
Reasonableness of water rates	
Regulating price of gas and light	
Regulating street car fares	
Reasonableness of street car fares	
Discrimination in street car rates forbidden	
Place of sale of street car tickets—transfers	
Duration of privileges or franchises to use streets, etc	591
Forfeiture of franchise	592

TABLE OF CASES.

(The references are to pages.)

- Aåron v. Broiles (64 Tex. 316), 675, 694.
- Abbeville v. Leopard (61 S. C. 99), 487, 771,
- Abbott v. Omaha Smelting etc. Co. (4 Neb. 416), 879.
- Abel v. Pembroke (61 N. H. 357), 114.
- Abendroth v. Greenwich (29 Conn. 356), 74.
- Abram, ex parte (34 Tex. Cr. Rep. 10), 759.
- Achley's Case (4 Abb. Pr. 35), 9 158, 241.
- Ada Jones, In re (90 Mo. App. 318), 482, 530.
- Adams v. Albany (29 Ga. 56), 24, 672, 784.
- Adams v. Brenan (177 Ill. 194), 302, 432, 862.
- Adams, In re (165 Mass. 497), 805. Adams v. Lindell (72 Mo. 198), 824, 851.
- Adams v. Memphis & L. R. Ry. Co. (2 Coldw. 645), 96.
- Adams v. Pratt (109 Mass. 59), 209.
- Adam v. Rome (59 Ga. 765), 96. Adams v. Saratoga R. R. (11 Barb.
- 414), 883. Adams v. Shelbyville (154 Ind.
- 467), 821. Adams v. Somerville (39 Tenn.
- 363), 621.
 Adams County v. Quincy (130 III.
- 566), 213, 215, 843, 848, 851. Adams Express Co. v. Ohio (166
- U. S. 185), 408.Adams Express Co. v. Ohio (165U. S. 194), 408.
- Adams Exp. Co. v. Owensboro (85 Cal. 265), 655.
- Aderhold v. Anniston (99 Ala. 521),
- Adkins v. Richmond (98 Va. 91). 400.

- Adley v. Reeves (2 M. & S. 60), 272.
- Administrator of Chambers v. Ohio Life Ins. Co. (1 Disney 327), 61.
- Aetna Fire Ins. Co. v. Reading (119 Pa. St. 417), 660.
- Agnew v. Brall (124 III. 312), 76, 102, 112.
- Agua Pura Co. v. Las Vegas (N. Mex. 1900, 60 Pac. Rep. 208), 905.
- Ah Lung, In re (45 Fed. Rep. 684), 683.
- Ah Kow v. Nunan (5 Sawyer 552), 353, 361, 363, 447.
- Ah Troy, In re (45 Fed. Rep. 795), 450.
- Ah You, In re (88 Cal. 99), 24, 69, 283, 285, 341, 755, 784, 788.
- Alberger v. Baltimore (64 Md. 1), 859.
- Albers v. Merchants' Exchange of St. Louis (138 Mo. 140), 474.
- Albert v. Bleecker Street Ry Co. (2 Daly 389), 604.
- Albertson v. Wallace (81 N. C. 479), 403.
- Albia v. O'Harra (64 Iowa 297), 247, 624, 802.
- Albright v. Fisher (164 Mo. 56), 160, 261.
- Albrittin v. Huntsville (60 Ala 486), 582.
- Alcorn v. C. & A. Ry. Co. (108 Mo. 81), 743.
- Alderman v. People (4 Mich. 414), 524.
- Aldrich v. Howard (7 R. I. 199), 57. Alexander v. Bennett (60 N. Y. 204), 464.
- Alexander v. Big Rapids (70 Mich. 224), 335.
- Alexander v. Greenville (54 Miss. 659), 487, 553, 735.

(The references are to pages.)

- Alexander v. O'Donnell (12 Kan. 608), 25.
- Alexander v. State (86 Ga. 246), 656.
- Alexander v. Tolletson Club (110 Ill. 65), 90.
- Alexandria v. Bethlehem (29 N. J. L. 375), 480, 481.
- Alexandria v. Mandeville (2 Cranch. C. C. 224), 840.
- Alexandria Canal Co. v. Swann (5 How. 83), 113.
- Alger v. Lowell (3 Allen 402), 713.
- Alford v. Dallas (Tex. Civ. App. 1896, 35 S. W. Rep. 816), 827, 841.
- Alma v. Guaranty Savings Bank (19 U. S. App. 622), 4, 6, 12.
- Almy v. California (24 How. 169), 411.
- Allegheny's Appeal (Pa. 1887, 11 Atl. Rep. 658), 884.
- Allegheny City v. Millville etc. Street Ry. Co. (159 Pa. St. 411), 897.
- Allegheny v. Ohio & P. Ry. Co. (26 Pa. St. 355), 96.
- Allegheny v. Zimmerman (95 Pa. St. 287), 716, 717.
- Allen v. Boston (159 Mass. 324), 714.
- Allen v. Cerro Gordo County (34 Iowa 54), 113,
- Allen v. Clausen (114 Wis. 244), 429.
- Allen v. Davenport (107 Iowa 90), 239, 245, 246, 251, 326, 338, 592, 822, 833, 866.
- Allen v. Drew (44 Vt. 174), 819, 858.
- Allen v. Duluth Gas & W. Co. (46 Minn. 290), 907.
- Allen v. Gray (11 Conn. 95), 492.
- Allen v. Jersey City (53 N. J. L. 522), 882.
- Allen v. Rogers (20 Mo. App. 290), 177.
- Allen v. Salem (10 Ind. App. 650), 831.
- Allen v. Somers (68 Me. 247), 468, 469.
- Allen v. State (51 Ga. 264), 524.
- Allen v. Taunton (19 Pick. 485), 98, 99.

- Allen County Comrs. v. Simons (Ind., 13 L. R. A. 512), 3.
- Allentown v. Grim (109 Pa. St. 113), 241, 243.
- Allentown v. Gross (132 Pa. St. 319), 633.
- Allentown v. Western Union Tel. Co. (148 Pa. St. 117), 300, 406, 407, 722.
- Alley v. Edgecomb (53 Me. 448), 75.
- Allison v. Richmond (51 Mo. App. 133), 688, 693, 738.
- Allerton v. Chicago (6 Fed. Rep. 555), 652.
- Alpers v. Brown (60 Cal. 447), 705.
- Alpers v. San Francisco (32 Fed. Rep. 503), 260, 261, 706.
- Altamont v. B. & O. S. W. R. R. (184 Ill. 47), 5.
- Alter v. Dodge (140 Mass. 594), 638.
- Altgeld v. San Antonio (81 Tex. 436), 440.
- Altman v. Dubuque (111 Iowa 105), 237, 239, 240.
- Alton v. Foster (74 Ill. App. 511), 449, 866.
- Alton v. Hartford Ins. Co. (72 III. 328), 589.
- Alton v. Kirsch (68 Ill. 261), 492, 566, 567, 568.
- Alton v. Middleton's Heirs (158 Ill. 442), 853, 855.
- Alton v. Mulledy (21 Ill. 76), 12, 136, 195.
- Altoona v. Bowman (171 Pa. St. 307), 186, 234, 589, 591.
- Alves Executors v. Henderson (16 B. Mon. 131), 92.
- Amboy v. Sleeper (31 III. 499), 285. 771.
- Ambrose v. State (6 Ind. 351), 794.
 American Furniture Co. v. Batesville (139 Ind. 77), 124, 311, 686.
- American Harrow Co. v. Shaffer (68 Fed. Rep. 750), 397.
- American Live Stock Com. Co. v. Chicago Live Stock Exchange (143 Ill. 210), 304.
- American Print Works v. Lawence (23 N. J. L. 9), 668.

(The references are to pages.)

American Refrigerator Transit Co. v. Hall (174 U. S. 70), 409.

American Waterworks Co. v. State (46 Neb. 194), 905.

American Union Express Co. v. St. Joseph (66 Mo. 675), 408, 630, 655.

Americus v. Mitchell (79 Ga. 807), 686, 707.

Amesbury v. Bowditch M. F. Ins. Co. (6 Gray 596), 452.

Amey v. Allegheny City (24 How. 364), 245, 592.

Ampt v. Cincinnati (17 Ohio Cit. Ct. 516), 128.

Amyx v. Taber (23 Cal. 370), 731. Amite City v. Holly (50 La. Ann.

627), 513, 520, 791. Andrews v. Boylston (110 Mass.

214), 209. Andrews v. Chicago (57 III. 239),

848. Andrews v. Insurance Co. (37 Me.

Andrews v. Insurance Co. (37 Me. 256), 21.

Andrews v. National Foundry & Pipe Works (61 Fed. Rep. 782), 798.

Andrews v. People (158 III. 477), 849.

Andrews v. People ex rel (164 Ill. 581), 857.

Andrew Co. ex rel v. Schell (135 Mo. 31), 444.

Anderson, Matter of (60 N. Y. 457), 249.

Anderson v. Byrnes (122 Cal. 272), 334.

Anderson v. Camden (58 N. J. L. 515), 7, 49, 189.

Anderson v. Com. (13 Bush. 485), 648.

Anderson v. De Urioste (96 Cal. 404), 829.

Anderson v. East (117 Ind. 126), 680.

Anderson v. Endicutt (101 Ind. 539), 803.

Anderson v. Equitable Gas Light Co. (12 Dailey 462), 196.

Anderson v. Hamilton County Comrs. (12 Ohio St. 635), 830.

Anderson, In re (60 N. Y. 457), 252, 829.

Anderson v. O'Connor (98 Ind. 168), 4, 112, 694.

Anderson v. O'Donnell (29 S. C. 355), 513, 566, 583.

Anderson v. Santa Anna (116 U. S. 356), 266.

Anderson v. Schubert (158 III. 75), 532.

Anderson v. State (22 Ohio 305), 541.

Anderson v. Wellington (40 Kan. 173), 294, 628, 728.

Angel v. Spring City (Tenn. 1899, 53 S. W. Rep. 191), 547.

Angle v. C. St. P. M. & C. R. Co. (151 U. S. 3), 260.

Angerhoffer v. State (15 Tex. Crim. App. 613), 26, 784.

Antoni v. Greenhow (107 U. S. 769), 382.

Anthony v. Adams (1 Metc. 284), 75.

Anna v. Leird (36 Ill. App. 49), 529.

Anne Arundel Co. Comrs. v. Duckett (20 Md. 468), 258.

Anniston v. Davis (98 Ala. 629), 213.

Apitz v. Mo. Pac. Ry. Co. (17 Mo. App. 419), 583, 584.

Archie v. State (99 Ga. 23), 569.

Argenti v. San Francisco (16 Cal. 255), 829.

Argus Co. v. Albany (55 N. Y. 495), 188.

Arkadelphia v. Clark (52 Ark. 23), 685, 698.

Arkadelphia Lumber Co. v. Arkadelphia (56 Ark. 370), 12, 590, 597, 624.

Arkansas v. McGinnis (37 Ark. 362), 402.

Arkell and Town of St. James, Re (38 Up. Can. Rep. 594), 443.

Arkenburgh v. Wood (23 Barb. 360), 94.

Armatage v. Fisher (74 Hun. 167), 158, 171, 183.

Armstrong v. Brown (106 Ky. 81), 732.

Armstrong v. Brown (20 Ky. Law Rep. 1766), 276.

Armstrong v. Building Inspectors (4 Pa. Co. Ct. Rep. 477), 736.

Armstrong v. Brunswick (79 Mo. 319), 675, 677, 680, 683, 692.

(The references are to pages.)

Armstrong v. Ft. Edwards (84 Hun. 261), 9.

Armstrong v. Ogden City (12 Utah 476), 830.

Armstrong v. Ware (20 Pa. St. 519), 737.

Arnaud v. Executor (3 La. 337), 381.

Arnold v. Hawkins (95 Mo. 569), 430.

Arnold v. Stanford (Ky. 1902, 69 S.W. Rep. 726), 676.

Arnold v. Stanford (24 Ky. Law Rep. 626), 677.

Arnold v. Weiker (55 Kan. 510), 428.

Arnold v. Yanders (56 Ohio St. 417), 404, 405.

Aron v. Wausau (98 Wis. 592), 676.

Aronheimer v. Stokley (11 Phila. 283), 738.

Asberry v. Roanoke (91 Va. 562), 822.

Ash v. People (11 Mich. 347), 616, 629, 634, 656, 763.

Ashbrook v. Com. (1 Bush. 139), 697.

Ashbrook v. Dale (27 Mo. App. 649), 751, 752.

Ashby v. Hall (119 U. S. 526), 883. Asher v. Hutchinson Water L. & P. Co. (Kan. 1903, 61 L. R. A. 52), 903.

Asher v. Texas (128 U. S. 129), 395, 400.

Ashland v. Wheeler (88 Wis. 607), 323.

Ashland & C. St. R. Co. v. Falkner (106 Ky. 332), 892.

Ashland Water Co. v. Ashland (87 Wis. 209), 327.

Ashley v. Board (60 Fed. Rep. 55), 546.

Ashley v. Newark (25 N. J. L. 399), 239.

Ashton v. Ellsworth (48 Ill. 299), 123, 284, 646.

Ashton v. Rochester (60 Hun. 372), 193, 337.

Ashton v. Rochester (133 N. Y. 187), 256.

Aspen Water & L. Co. v. Aspen (5 Colo. App. 12), 896.

Associates of Jersey Co. v. Jersey City (8 N. J. Eq. 715), 800.

Astor, In re (50 N. Y. 363), 252.

Astor v. New York (37 N. Y. Super, Ct. 539), 818, 821.

Astor v. New York (62 N. Y. 567), 845.

Astor v. New York (62 N. Y. 580), 869.

Atchison v. King (9 Kan. 550), 593.

Atchison Board of Education v. DeKay (148 U. S. 591), 6, 11.

Atchison & Neb. Ry. Co. v. Maquilkin (12 Kan. 301), 268.

Atchison St. Ry. Co. v. Mo. Pac. Ry. Co. (31 Kan. 661), 902.

Atchison St. R. Co. v. Nave (38 Kan., 744), 913, 916.

Athearn v. Independent District (33 Iowa 105), 145.

Athearn v. Millersburg (33 Iowa 105), 213.

Athens v. Georgia R. R. Co. (72 Ga. 800), 435, 454, 550, 668.

Atkins v. Fraker (32 Wis. 510), 461, 463, 468, 469.

Atkins v. Kinnan (20 Wend. 241), 828.

Atkins v. Phillips (26 Fla. 281), 169, 172, 183, 189, 281, 461, 616.

Atkinson v. Asheville Street Ry. 113 N. C. 581), 896.

Atkinson v. Atlanta (81 Ga. 625), 680.

Atkinson v. Goodrich Transp. Co. (60 Wis. 141), 297, 301, 740.

Atkinson v. New Castle & G. Waterworks Co. (L. R. 6 Exch. 404), 56.

Atkinson v. Newcastle Waterworks Co. (L. R. 2 Exch. Div. 441), 57.

Atkinson v. Wykoff (58 Mo. App. 86), 263, 883.

Atlanta v. Stein (111 Ga. 789), 302, 431, 862.

Atlanta v. The Gate City Gas Light Co. (71 Ga. 106), 436, 902.

Atlanta v. White (33 Ga. 229), 761. Atlanta Ry. & Power Co. v. Atlanta Rapid Transit Co. (113 Ga. 481), 194.

- Atlanta & W. P. R. R. v. Wyly (65 Ga. 120), 601.
- Atlantic City v. Goldstein (67 N. J. L. 517), 537, 653.
- Atlantic City v. Turner (67 N. J. L. 520), 538.
- Atlantic City Waterworks Co. v. Atlantic City (39 N. J. Eq. 367), 902.
- Atl. & Pac, R. R. Co. v. St. Louis (66 Mo. 228), 90, 882, 886, 915.
- A. & P. R. R. Co. v. St. Louis (3 Mo. App. 315), 884.
- Atlantic & Pacific Tel. Co. v. Philadelphia (23 Sup. Ct. Rep. 817), 406.
- Atlantic, S. R. & G. Ry. Co. v. State (Fla. 1900, 29 So. Rep. 319), 750
- Atty Gen. v. Board (64 Mich. 607), 119.
- Atty Gen. v. Boston (142 Mass. 200), 808,
- Atty. General v. Chicago & N. W. Ry. Co. (35 Wis. 425), 67.
- Attorney General v. Crocker (138 Mass. 214), 199.
- Atty. Genl. v. Detroit (71 Mich. 92), 762.
- Atty. General v. Eau Claire (37 Wis. 400), 798.
- Atty. Gen. v. Foster (10 Ves. 335), 108.
- Atty. Gen. v. Heidorn (74 Mo. 410), 245, 336.
- Atty. Gen. v. Jochim (99 Mich. 358), 366, 367.
- Atty. Gen. v. Leicester (9 Beav. 546), 348.
- Atty. General v. Norwich (2 Mylne & Cr. 406), 115.
- Atty. Gen. v. Oakland Bank (Walker Ch. 90), 498.
- Atty. Gen. v. Salem (103 Mass. 138), 441.
- Atty. Gen. v. Shepard (62 N. H. 383), 166, 167, 169.
- Atty. Genl. v. Steward (20 N. J. Eq. 415), 704.
- Atty. Gen. v. Simonds (111 Mass. 256), 178.

- Atty. General v. Utica Ins. Co. (2 Johns Ch. 371), 154.
- Auburn Comrs. of Excise v. Burtis (103 N. Y. 136), 488.
- Auburn Comrs. of Excise v. Merchant (103 N. Y. 143), 488.
- Auditor General v. Chase (Mich. 1903, 94 N. W. Rep. 178), 831.
- Augusta v. Burum (93 Ga. 68), 722. Augusta v. Leadbetter (16 Me. 45),
- 75, 112. Augusta v. McKibben (22 Ky. Law Rep. 1224), 821.
- Augusta v. Perkins (3 B. Mon. 437), 92, 93.
- Augusta v. Sweeney, (44 Ga. 463), 365, 367.
- Aull v. Lexington (18 Mo. 401), 694.
- Aurora v. Fox (78 Ind. 1), 208.
- Aurora v. Lamar (59 Ind. 400), 610.
- Aurora v. McGannon (138 Mo. 38), 632, 651, 657.
- Aurora Water Co v. Aurora (129 Mo. 540), 84, 87, 112, 122, 157, 172, 175, 176, 190, 197, 201, 244, 845.
- Austin v. Allen (6 Wis. 134), 212. Austin v. Austin City Cemetery Assn. (87 Tex. 330), 296, 297, 435, 442, 544, 696.
- Austin v. Coggeshall (12 R. I. 329),
- Austin v. McCall (95 Tex. 565), 431.
- Austin v. Murray (16 Pick. 121), 27, 283, 296, 299, 667, 697.
- Austin v. Nalle (85 Tex. 520), 798. Austin v. Seattle (2 Wash. St. 667), 824.
- Austin v. State (10 Mo. 591), 646. Austin v. State (101 Tenn. 563), 397, 712.
- Austin v. Walton (68 Tex. 507), 328, 583, 584.
- Averill v. Perrott (74 Mich. 296), 468.
- Avery v. Stewart (1 Cush. 496), 151.
- Avoca v. Pittston, J. & A. R. Co. (7 Kulp. 470), 198.
- Aycock v. Martin (37 Ga. 124), 381, 383.

Ayer v. Norwich (39 Conn. 376), 717.

Ayeridge v. Com'rs (60 Ga. 404), .225.

Ayers v. Schmohl (86 Mo. App. 349), 809.

B.

Baader v. Cullman (115 Ala. 539), 337.

Baar v. Kirby (118 Mich. 392), 237, 243.

Bab v. Clerk (Moore 411), 277.

Babbage v. Powers (130 N. Y. 281), 716.

Babbidge v. Astoria (25 Or. 417), 237, 240, 242.

Babbitt v. Savoy (3 Cush. 530), 114. Babcock v. Buffalo (56 N. Y. 268), 121

Babcock v. Helena (34 Ark. 499), 328.

Babcock v. New Jersey Stock Yards (20 N. J. Eq., 296), 704.

Bachelder v. Epping (28 N. H. 354), 75, 107.

Backus v. Depot Co. (169 U. S. 557), 882.

Backus v. Detroit (49 Mich. 110), 799.

Backhaus v. People (87 Ill. App. 173), 337.

Bacon v. Nanny (55 Hun. 606), 831. Bacon v. Savannah (105 Ga. 62),

Bacon v. Savannah (86 Ga. 301), 854.

Badgley v. St. Louis (149 Mo. 122), 85.

Badkins v. Robinson (53 Ga. 613), 765.

Bagley v. People (43 Mich. 355), 718, 875.

Bagwell v. Lawrenceville (94 Ga. 654), 754.

Bailey v. Com. (23 Ky. Law Rep. 1223), 443.

Bailey v. Com. (22 Ky. Law Rep. 512), 465.

Bailey v. Culver (84 Mo. 531), 64. Bailey v. Culver (12 Mo. App. 175), 875, 887.

Bailey v. Joy (132 Mass. 356), 528.

Bailey v. Philadelphia (184 Pa. St. 594), 298.

Bailey v. State (30 Neb. 855), 247, 450.

Bailey v. Trumbull (31 Conn. 581), 472.

Baileyville v. Lowell (20 Me. 178), 112.

Bain v. Mitchell (82 Ala. 304), 469, 560.

Bainbridge v. Reynolds (111 Ga. 758), 577.

Baisch v. Grand Rapids (84 Mich. 666), 837.

Baker v. Bohannan (69 Iowa 60), 688.

Baker v. Boston (12 Pick. 184), 356, 667, 682, 707.

Baker v. Lexington (21 Ky. Law Rep. 809), 136, 283, 284, 334, 449, 641.

Baker v. Neff (73 Ind. 68), 90.

Baker v. Normal (81 Ill. 108), 449. Baker v. Port Huron (62 Mich. 327), 8.

Baker v. Portland (58 Me. 199), 20.

Baker v. St. Louis (7 Mo. App. 429), 890.

Baker v. Shephard (24 N. H. 208), 152.

Baker v. State (27 Ind. 485), 258. Baker v. Washington (7 D. C. 134), 114.

Baldwin v. Chicago (68 III. 418), 479, 535, 564.

Baldwin v. Green (10 Mo. 410), 25, 344, 346.

Baldwin v. Ensign (49 Conn. 113), 602.

Baldwin v. Murphy (82 III. 485), 285, 343, 481, 786.

Baldwin v. North Branford (32 Conn. 47), 151.

Ball v. Fagg (67 Mo. 481), 46, 127, 209, 600.

Ball v. Tolman (135 Cal. 375), 334. Ball v. Woodbine (61 Iowa 83), 676. Ballard v. McCarty (11 Ill. 501), 482.

Ballentine v. Pulaski (83 Tenn. 633), 608.

Baltimore v. Clunet (23 Md. 499), 49, 443.

Baltimore v. Eschback (18 Md. 276), 831.

Baltimore v. Gorter (93 Md. 1), 243.

Baltimore v. Horn (26 Md. 194), 192, 869.

Baltimore v. Hughes (1 Gill & J. 480), 442.

Baltimore v. Porter (18 Md. 284), 83, 115, 192, 801, 841, 869.

Baltimore v. Poultney (25 Md. 18), 145.

Baltimore v. John Hopkins Hospital (56 Md. 224), 808.

Baltimore v. John Hopkins Hospital (56 Md. 1), 839.

Baltimore v. Johnson (62 Md. 225), 248.

Baltimore v. Keyser (72 Md. 106), 861.

Baltimore v. Little Sisters of the Poor (56 Md. 400), 248.

Baltimore v. Marriott (9 Md. 160), 676, 679, 682.

Baltimore v. Radecke (49 Md. 217), 79, 295, 428, 435, 627, 654, 655, 681, 687, 740.

Baltimore v. Reitz (50 Md. 574), 805.

Baltimore v. Scharf (54 Md. 499), 133, 134, 435, 827, 900.

Baltimore v. Stewart (92 Md. 535), 227.

Baltimore v. Ulman (79 Md. 469), 222, 264, 353, 867.

Baltimore City Pass Ry. v. Mc-Donnell (43 Md. 534), 603.

Baltimore Gas Light Co. v. Colliday (25 Md. 1), 897.

Baltimore & O. S. W. Ry. Co. v. Altamont (84 Ill. App. 274), 5.

B. & O. R. R. Co. v. State (33 Md. 542), 604.

Baltimore & P. R. Co. v. Reaney (42 Md. 117), 883.

B. & O. R. R. Co. v. State (36 Md. 366), 604.

Baltimore Trust & Guarantee Co. v. Baltimore (64 Fed. 153), 316, 321, 913.

Bambrick v. Campbell (37 Mo. App. 460), 836, 860, 861.

Bamford v. Turnley (113 Eng. C. L. 66), 684.

Bamberger v. Terry (103 U. S. 40), 527.

Bambrick Construction Co. v. Geist (37 Mo. App. 3), 121, 509.

Bancroft v. Cambridge (126 Mass.

Bancroft v. Cambridge (126 Mass. 438), 671, 708.

Bancroft v. Lynnfield (18 Pick. 566), 114.

Bangor v. Lansil (51 Me. 521), 810. Bangor v. Smith (83 Me. 422), 422.

Bangs v. Snow (1 Mass. 181), 71.

Bank of Augusta v. Earle (13 Pet. 519), 878.

Bank of Commerce v. Granada (10 U. S. App. 692), 199.

Bank of Commerce v. Tennessee (161 U. S. 134), 374,

Bank of Michigan v. Niles (1 Doug. 401), 76.

Bank of U. S. v. Dandridge (12 Wheat. 64), 148, 211.

Banta, In re (60 N. Y. 165), 830.

Baptist Church v. Schenectady & T. Ry. Co. (5 Barb. 79), 696.

Barbier v. Connolly (113 U. S. 27), 44, 312, 356, 361, 672, 773.

Barbour v. Camden (51 Me. 608), 104.

Barbour v. Ellsworth (67 Me. 294), 675.

Barber v. Chicago (152 Ill. 37), 852.Barber, A. P., Co. v. Edgerton (125 Ind. 455), 829, 839, 841.

Barber, A. P., Co. v. French (158 Mo. 534), 812, 821.

Barber Asphalt P. Co. v. Gaar (24 Ky. Law Rep. 2227), 836, 854, 855, 866.

Barber, A. P., Co. v. Gogreve (41 La. Ann. 251), 838, 864.

Barber, A. P., Co. v. Hezel (76 Mo. App. 135), 813, 837, 862, 866.

Barber, A. P., Co. v. Hezel (155 Mo. 391), 851.

Barber Asphalt Paving Co. v. Hunt (100 Mo. 22), 159, 190, 200, 242, 865.

Barber, A. P., Co. v. New Orleans, etc., R. R. Co. (49 La. Ann. 1608), 898.

Barber Asphalt Paving Co. v. Ullman (137 Mo. 543), 326, 854, 855, 866.

Barelay v. Com. (25 Pa. St. 503), 718.

Barclay and Township of Darlington, In re (12 Up. Can. Q. B. 86),

Barhite v. Home Tel. Co. (50 N. Y. App. Div. 25), 258, 722, 885.

Y. App. Div. 25), 258, 722, 885. Barker v. Bates (13 Pick. 255), 4.

Barker v. Dixmont (53 Me. 575), 75. Barker v. Fogg (34 Me. 392), 207.

Barker v. Hartman Steel Co. (129 Pa. St. 551), 890.

Barker v. Smith (10 S. C. 226), 330. Barling v. West (29 Wis. 307), 27,

Barling v. West (29 Wis. 307), 27, 83, 302, 718.

Barnert v. Paterson (48 N. J. L.

395), 114, 165, 166. Barnes v. Ackroyd (26 L. T. (N. S.)

692), 710. Barnes v. Chapin (4 Allen 444),

602.

Barnes v. Dist. of Columbia (91 U. S. 540), 800.

Barnes v. Gottschalk (3 Mo. App. 222), 578.

Barnes v. Hawthorn (54 Me. 124), 696, 697.

Barnes v. Mobile (19 Ala. 707), 446. Barnes v. State (19 Conn. 398), 541.

Barnes v. Suddard (117 Ill. 237), 90.

Barnett v. Newark (28 III. 62), 248. Barney v. Keokuk (94 U. S. 324), 881.

Barney v. Washington (1 Cranch. C. C. 248), 48, 485.

Barnitz v. Beverly (163 U. S. 118), 382.

Barr v. Auburn (89 Ill. 361), 168, 187, 205, 206, 590.

Barr v. New Brunswick (58 N. J. L. 255), 200, 249, 895.

Barrett v. New Orleans (32 La. Ann. 101), 865.

Barron v. Baltimore (7 Pet. 243), 365.

Barron v. Krebs (41 Kan. 338), 841. Barrow v. Nashville & C. T. Co. (9 Hump. 304), 90.

Bartemeyer v. Rohlfs (71 Iowa 582), 610.

Barter v. Com. (3 Pa. 253), 231, 273, 278, 475, 476.

Barter v. Com. (3 Pen. & W. 253), 875, Barthet v. New Orleans (24 Fed. Rep. 563), 295, 435, 626, 681.

Bartlett v. Bangor (67 Me. 460), 873.

Bartlett v. Clarksburg (45 W. Va. 393), 676.

Bartlett v. Kinsley (15 Conn. 327), 200,

Bartlett v. Kurg (12 Mass. 545). 339.

Barto v. Himrod (8 N. Y. 483), 50. Barto v. San Francisco (135 Cal. 494), 438.

Barton v. Gadsen (79 Ala. 495), 327, 334.

Barton v. La Grande (17 Oreg. 577). 501, 574.

Barton v. Pittsburg (4 Brewst. 373), 172, 190, 198, 212, 226, 245. 438.

Bass v. State (34 La. Ann. 494), 665.

Bassett v. El Paso (88 Tex. 168). 371.

Bassett v. El Paso (Tex. Civ. App. 1894; 28 S. W. Rep. 554), 450.

Batchelor v. U. S. (156 U. S. 426). 491.

Bate v. Sheets (64 Ind. 209), 390. Bates v. District of Columbia (1

MacArthur 433), 687, 688. Bates v. Bassett (60 Vt. 530), 75, 608, 609, 797.

Bates v. Mobile (46 Ala. 158), 623. Bathurst v. Course (3 La. Ann. 260), 245.

Baton Rouge v. Cremonine (36 La. Ann. 247), 313.

Baton Rouge v. Cremonini (35 La. Ann. 366), 566, 578.

Baton Rouge v. Dearing (15 La. Ann. 208), 465.

Batsel v. Blaine (4 Tex. App. 195), 244.

Batsel v. Blaine (Tex. 1901, 15 S. W. Rep. 283), 681.

Batters v. Dunning (49 Conn. 479), 722.

Baugh v. Sheriff (7 Phila. 82), 698. Baumgartner v. Hasty (100 Ind. 575), 84, 99, 140, 221, 224, 248, 671, 691, 734, 735, 738.

Bautsch v. Galveston (27 Tex. App. 342), 487.

- Bayard v. Baker (76 Iowa 220), 171, 187, 189, 204, 227, 251, 499, 593, 594, 598.
- Bayonne v. Herdt (40 N. J. L. 264), 280, 531.
- Baxter, Petitioner (12 R. I. 13), 790. Baxter v. Seattle (3 Wash. St. 352), 735, 738.
- Baxter v. Thomas (4 Okla. 605). 402.
- Beach v. Haynes (12 Vt. 15), 91, 92.
- Beach v. People (157 III. 659), 844, 849.
- Bean v. Barton County Court (33 Mo. App. 635), 646.
- Bean v. Jay (23 Me. 117), 112, 113. Bearce v. Fassett (34 Me. 575), 8
- Bearden v. Madison (73 Ga. 184), 4, 17, 270, 686.
- Beardstown v. Virginia (76 Ill. 34), 446.
- Beasley v. Beckley (28 W. Va. 81), 485, 570.
- Beatrice v. Edminson (117 Fed. Rep. 427), 223, 244.
- Beaver Creek v. Hastings (52 Mich. 528), 147, 176.
- Beaudrias v. Hogan (16 N. Y. App. Div. 38), 559.
- Beaudry v. Valdez (32 Cal. 269), 846.
- Beaufort v. Ohlandt (24 S. C. 158), 509, 518, 563.
- Beaumont v. Wilkes-Barre (142 Pa. St. 198), 247, 823, 832.
- Beck v. Carter (6 Hun. 604), 717.
- Beck v. Hanscom (29 N. H. 213), 175.
- Becker v. Henderson (100 Ky. 450), 214.
- Becker v. Schutte (85 Mo. App. 57), 61, 601, 732.
- Becker v. Washington (94 Mo. 375), 247, 581, 854, 855.
- Beckley v. Skroh (19 Mo. App. 75). 685.
- Beckham v. Nacke (56 Mo. 546), 539.
- Bedell, ex parte (20 Mo. App. 125), 239, 245, 250, 252, 283.
- Bedford v. Rice (58 N. H. 227), 510.
- Beecher v. Detroit (92 Mich. 268), 839.

- Beecher v. People (38 Mich. 289), 875.
- Beekmans' Case (11 Abb. Pr. 164), 180, 182, 235, 316.
- Beekman v. Third Ave. R. Co. (153 N. Y. 144), 881, 894.
- Beesman v. Peoria (16 Ill. 484), 468.
- Beeson v. Chicago (75 Fed. Rep. 880), 895.
- Begein v. Anderson (28 Ind. 79), 673, 695, 696.
- Behan v. New Orleans (34 La. Ann. 128), 24.
- Beiling v. Evansville (144 Ind. 644), 289, 671, 701.
- Belatti v. Pierce (8 S. D. 456), 518. Belcher v. Farrar (8 Allen 325). 697.
- Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co. (101. Mo. 192), 92, 93, 94, 130, 742, 889.
- Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co. (82 Mo. 121), 94, 130, 709, 888.
- Belfast v. Morrill (65 Me. 580), 175, Belknap v. Louisville (93 Ky. 444), 802.
- Belknap v. Miller (52 III. App., 617), 168, 186, 187, 214.
- Belmar v. Barkalow (67 N. J. L. 504), 284, 353, 642.
- Bell v. Dole (11 John, 173), 545. Bell, ex parte (32 Tex. Cr. Rep. 308), 753.
- Bell v. Tp. Manvers (2 Up. Can. Com. Pl. 507), 55,
- Bell v. McKinney (63 Miss. 187), 473.
- Bell v. Pike (53 N. H. 473), 206, 208.
- Bell v. Platteville (71 Wis. 139), 72.
- Bell v. Quinn (2 Sandf. 146), 19, 63. Bell v. Rochester (58 Hun. 602), 707.
- Belleville v. Citizens' Horse Ry. (152 Ill. 171), 377, 450, 879.
- Bellevue v. Peacock (89 Ky. 495), 868.
- Bellinger v. Gray (51 N. Y. 610), 611.
- Bells' etc. Co. R. R. v. Pennsylvania (134, U. S. 232), 821.

- Belton v. Baylor Female College (Tex. Civ. App. 1896, 33 S. W. Rep. 680), 707.
- Belton v. Central Hotel Co. (Tex. Civ. App., 1895), 33 S. W. Rep. 297), 707.
- Benjamin v. Met. St. Railroad Co. (133 Mo. 274), 64.
- Benjamin v. Webster (100 Ind. 15), 70, 132.
- Benjamin v. Wheeler (8 Gray 409), 118.
- Bennington v. Park (50 Vt. 178), 74.
- Bennington v. Smith (29 Vt. 254), 803.
- Bennett v. Birmingham (31 Pa. St. 15), 35, 294, 633. Bennett v. People (30 III. 389),
- Bennett v. People (30 III. 389), 343, 794.
- Bennett v. New Bedford (110 Mass. 433), 170, 183, 189, 853.
- Bennett v. Pulaski (Tenn. 1899, 47 L. R. A. 278), 757, 758, 761.
- Bennett v. Seibert (10 Ind. App., 369), 827.
- Benoist v. St. Louis (19 Mo. 179), 610.
- Benoist v. St. Louis (15 Mo. 668), 608.
- Benoit v. Conway (10 Allen 528), 108.
- Benson v. Carrollton (96 Ga. 761), 567.
- Benson v. Waukesha (74 Wis. 31), 814.
- Benton Harbor v. St. Joseph, etc. St. Ry Co. (102 Mich. 386), 899. Benwood v. Wheeling Ry. Co. (W.
- Va. 1903, 44 S. E. Rep. 271), 894. Bequette v. Patterson (104 Cal.
- 282), 717.
 Bessonies v. Indianapolis (71 Ind.
- 189), 683, 798.
 Rethalto y Conley (9 III Ann
- Bethalto v. Conley (9 Ill. App. 339), 567.
- Bethune v. Hughes (28 Ga. 560), 765.
- Berg v. Grace (1 N. Y. St. Rep. 418), 814.
- Bergen v. Clarkson (1 Halst. 352), 177.
- Bergen v. Clarkson (6 N. J. L. 352), 273.

- Bergen v. State (32 N. J. L. 490), 866.
- Bergen v. Van Horne (32 N. J. L. 490). 810.
- Bergin, in re (31 Wis. 383), 522.
- Bergman v. Mo. Pac. Ry. Co. (88 Mo. 678), 748.
- Bergman v. St. Paul M. B. Association (29 Minn. 275), 67.
- Bergman v. St. Louis, Iron Mountain & Southern R. R. Co. (88 Mo. 678), 225, 228, 601.
- Berka v. Woodward (125 Cal. 119), 172.
- Berry v. People (36 III. 423), 343, 344, 789, 794.
- Berry-Horn Coal Co. v. Scruggs-McClure Coal Co. (62 Mo. App., 93), 889.
- Bertholf v. O'Reilly (74 N. Y. 509), 351.
- Bickerstaff, in re (70 Cal. 35), 626, 638, 648.
- Bidleson v. Whytel (3 Burrow 1545), 388.
- Bigelow v. Hillman (37 Me. 52), 195.
- Bigelow v. Perth Amboy (25 N. J. L. 297), 11, 212.
- Bigelow v. West Wisconsin Railroad Co. (27 Wis. 478), 442.
- Bills v. Belknap (36 Iowa 583), 687.
- Bills v. Goshen (117 Ind. 221), 3, 240, 248, 294, 625.
- Billings v. Dunnaway (54 Mo. App. 1), 546, 596.
- Biloxi v. Borries (78 Miss. 657), 636.
- Binghampton Bridge (3 Wall 51), 306, 378.
- Binghamton v. Binghamton & Port Dickinson Ry. Co. (61 Hun. 479), 901.
- Birdsall v. Clark (73 N. Y. 73), 134, 435, 808.
- Birdsall v. Phillips (17 Wend, 464), 570.
- Birge v. Gardiner (19 Conn. 507), 717.
- Birmingham v. Alabama G. S. R. Co. (98 Ala. 134), 449.
- Birmingham v. Rumsey & Co. (63 Ala. 352), 100.

- Birmingham v. Tayloe (105 Ala. 170), 596.
- Birmingham & P. M. St. Ry. Co. v. Birmingham St. Ry. Co. (79 Ala. 465), 913.
- Bishoff v. State ex rel. Tampa Waterworks Co. (Fla. 1901, 30 So. Rep. 808), 544, 622.
- Bishop v. Banks (33 Conn. 118), 688.
- Bishop v. Cone (3 N., H. 513), 214, 216.
- Bishop v. Tripp (15 R. I. 466), 823.
- Bitzer v. Dinwiddie (20 Ky. Law Rep. 298), 450.
- Bizzle, ex parte (112 Ala. 210), 449. Blanchard v. Bissell (11 Ohio St. 965), 161, 186, 610.
- Blanchard v. Bristol (100 Va. 469), 639, 641.
- Blanchard v. State (30 Fla. 223), 641.
- Blackburn v. Oklahoma City (1 Okla. 292), 348.
- Blackburn v. Walpole (9 Pick. 97),
- Blake v. McClung (172 U. S. 239), 354.
- Blake v. P. & Co. R. R. (39 N. H. 435), 125,
- Blake v. St. Louis (40 Mo. 569),
- 897. Blakemore v. Dolan (50 Ind. 194),
- 327, 336. Blackett v. Blizard (9 Barn & C. 851), 164.
- Blackford v. State (8 Heisk. 538), 656.
- Blackpool L. B. of Health v. Bennett (4 H. & N. 138), 450.
- Blair v. Forehand (100 Mass. 136), 640, 667, 734.
- Blair v. Williamson (4 Litt. 34), 372.
- Blan v. Bailey (25 Ind. 165), 329.
- Blanton v. Merry (116 Ga. 288), 430.
- Blaschko v. Wurster (156 N. Y. 437), 912.
- Blatchley v. Moser (15 Wend, 215), 792, 794.
- Blazier v. Miller (10 Hun. 435), 768.

- Bledsoe v. Gary (95 Ala. 70), 468. Blessing v. Galveston (42 Tex. 641), 631.
- Bliss v. Chicago (156 Ill. 584), 849. Bliss v. Kraus (16 Ohio St. 54), 707, 708.
- Bliss's Petition (63 N. H. 135), 403.
- Block v. Jacksonville (50 III. 39), 646,
- Block v. Jacksonville (36 III. 301), 599, 689.
- Blocker v. State (72 Miss. 720),
- Bloom v. Xenia (32 Ohio St. 461), 170, 186, 189.
- Bloomfield v. Charter Oak Bank (121 U. S. 121), 149, 151.
- Bloomfield v. Trimble (54 Iowa 399), 42, 758, 782, 786, 792.
- Bloomington v. Bourland (137 Ill. 534), 402.
- Bloomington v. Chicago & A. R. Co. (134 Ill. 451), 825.
- Bloomington v. Illinois Cent. Ry. Co. (154 III. 539), 582.
- Bloomington v. Pollock (141 Ill. 346), 835.
- Bloomington v. Richardson (38 III. App. 60), 537, 729, 770.
- Bloomington v. Wahl (46 III. 489), 765.
- Bloomington Cemetery Assn. v. People (129 Ill. 16), 802.
- Blount v. Munroe (60 Ga. 61), 411. Bluedorn v. Mo. Pac. Ry. Co. (131 Mo. 258), 748.
- Bluedorn v. Mo. Pac. R. R. (108 Mo. 439), 601, 744.
- Bluffton v. Studabaker (106 Ind. 129), 99.
- Board v. Pritchard (36 N. J. L. 101), 366.
- Board v. Reynolds (44 Ind. 509),
- Board of Commissioners, etc. v. Ruckman (57 Ind. 96), 390.
- Board of Comrs. of Allen County v. Silvers (22 Ind. 491), 840.
- Board of Education v. Fowler (19 Cal. 11), 95.
- Board, etc. v. Moore (17 Minn. 412), 208.

Board, etc. v. Norman (51 La. Ann. 736), 687.

Board of Health, in re (14 Pa. Co. Ct. Rep. 116). 143.

Board of Health v. Maginnis Cotton Mills (46 La. Ann. 806), 707.

Board of Liquidation v. Louisiana (179 U. S. 622), 374.

Board of Liquidation of City Debt v. New Orleans (32 La. Ann. 915), 894, 895.

Board of Police v. Giron (46 La. Ann. 1364), 787.

Board of Rapid Transit Railroad Comrs., in re (18 N. Y. Suppl. 320), 201.

Board of Richmond County v. Ellis (59 N. Y. 620), 861.

Board of Supervisors v. Horton (75 Iowa 271), 175, 176.

Board of Supervisors v. Judges 106 Mich. 166), 177, 201.

Board of Water Com'rs of Clinton v. Dwight (101 N. Y. 9), 225, 226, 229.

Bode v. Cincinnati (9 Ohio Cir. Ct. Rep. 382), 845.

Bodine v. Trenton (36 N. J. L. 198), 808.

Boehm v. Baltimore (61 Md. 259), 86, 638, 668, 670, 682, 706.

Boehme v. Monroe (106 Mich. 401), 47, 185, 243, 246, 247, 855.

Boehm & Loeber v. Baltimore (61 Md. 259), 655.

Boenninghausen, ex parte (91 Mo. 301), 574, 576, 794.

Bogart v. New Albany (1 Ind. 38), 482, 492, 563.

Bogert v. Indianapolis (13 Ind. 134), 695.

Boggero v. Southern Ry. Co. (64 S. C. 104), 744.

S. C. 104), 744.

Bohan v. Weekawken Tp. (65 N.

J. L. 490), 50. Bohen v. Waseca (32 Minn. 176), 721.

Bohle v. Stannard (7 Mo. App. 51), 118, 223, 425, 446, 814, 869.

Bohmy v. State (21 Tex. Crim. App. 597), 26.

Bolles v. Brimfield (120 U. S. 759), 266.

Bollig, ex parte (31 Ill. *88), 277.

Bolling v. Mayor (8 Leigh 224), 92.

Bolte v. New Orleans (10 La. Ann. 321), 272, 475.

Bolton v. Gilleran (105 Cal. 244), 847.

Bolton v. New Rochelle (84 Hun. 281), 680.

Bolton v. Vellines (94 Va. 393), 269, 731.

Bond v. Kenosha (17 Wis. 284), 824.

Bond v. Smith (44 Hun. 219), 716. Bonds of Madera Irrigation Dist., in re (92 Cal. 296), 822.

Bonnell v. Smith (53 Iowa 281), 684.

Bonner v. McPhail (31 Barb, 106), 469.

Bonsall v. Lebanon (19 Ohio 418), 823.

Booker v. Young (12 Gratt. 303), 166, 167.

Boom v. Utica (2 Barb. 104), 694. Boonville v. Trigg (46 Mo. 288), 315.

Booraem v. N. H. C. R. R. (44 N. J. Eq. 70), 110.

Boorman v. Santa Barbara (65 Cal. 313), 842.

Booth v. Bayonne (56 N. J. L. 268), 190, 237, 238.

Booth v. Carthage (67 Ill. 102), 327, 336.

Booth v. State (4 Conn. 65), 737. Booth v. Woodbury (32 Conn. 118), 74, 104.

Boothe v. Georgetown (2 Cranch. C. C. 356), 485, 558.

Borough v. Hoagland (3 Pa. Co. Ct. Rep. 283), 465.

Borthwick and City of Ottawa, in re (6 Ontario Rep. 401), 442.

Boscobel v. Bugbee (41 Wis. 59), 479.

Boston v. Baldwin (139 Mass. 315), 471.

Boston v. Brazer (11 Mass. 447), 113.

Boston v. Gray (144 Mass. 53), 457.

Boston v. Richardson (13 Allen 146), 880.

Boston v. Schaffer (9 Pick. 415), 615, 616, 634, 659,

- Boston v. Shaw (1 Met. 130), 294, 296.
- Boston Beer Co. v. Massachusetts (97 U. S. 25), 129, 320, 323, 419, 665, 666, 743.
- Boston Iron Co. v. U. S. (118 U. S. 37), 113.
- Boston & M. R. Co. v. Lawrence (2 Allen 107), 813.
- Boston S. D. & T. Co. v. Salem Water Co. (94 Fed. Rep. 238), 120, 433.
- Boston Turp. Co. v. Pomfret (20 Conn. 590), 213, 214, 215.
- Bossidy v. Branniff (135 Mass. 290), 467.
- Bosworth v. Swansey (10 Met. 363), 605.
- Bott v. Pratt (33 Minn. 323), 17, 32, 59, 61, 603.
- Boucher v. Moberly (74 Mo. 113), 22.
- Bouldin v. Baltimore (15 Md. 18), 831.
- Bourgeois, ex parte (60 Miss. 663), 787.
- Bousquet v. State (78 Miss. 478), 162.
- Bowen v. Lease (5 Hill. 221), 329, 339.
- Bowers v. Barrett (85 Me. 382), 808.
- Bowler, ex parte (16 Mo. App. 14), 574, 576.
- Bowlin v. Furman (28 Mo. 427), 91, 92.
- Bowling Green v. Carson (10 Bush. 64), 765.
- Bowling Green v. C., H. & D. R. Co. (10 Ohio Cir. Ct. Rep. 63), 428
- Bowie v. Kansas City (51 Mo. 454), 583.
- Bowman's Case (67 Mo. 146), 578. Bowman v. St. John (43 Ill. 337), 284.
- Boyce v. Peterson (84 Mich. 490), 610.
- Boyd v. Alabama (94 U. S. 645), 129, 131, 742.
- Boyd v. Chambers (78 Ky. 140), 463, 464.
- Boyd v. Chicago, B. & Q. R. & R. Co. (103 III. App. 199), 183.

- Boyd v. Farm Ridge (103 Ill. 408), 717.
- Boyd v. Milwaukee (92 Wis. 456), 840, 865.
- Boyd v. Montgomery (117 Ala. 677), 700.
- Boyer v. Yates City (47 Ill. App. 115), 597.
- Boylan and City of Toronto, in re (15 Ontario Rep. 13), 36.
- Boylan v. Newark (58 N. J. L. 133), 367.
- Boyle v. Hazleton (171 Pa. St. 167), 894.
- Boylston Market Association v. Boston (113 Mass. 528), 113.
- Bozeman v. Cadwell (14 Mont. 480), 313.
- Bozant v. Campbell (9 Rob. 411), 312, 314.
- Braceville v. Doherty (30 Ill. App. 645), 294, 313.
- Braceville Coal Co. v. People (147 Ill. 66), 778.
- Braddy v. Milledgeville (74 Ga. 516), 535, 753, 788.
- Bradford v. Fox (171 Pa. St. 343), 846.
- Bradley v. Baldwin (5 Conn. 288), 488.
- Bradley v. Fisher (13 Wall. 335), 472.
- Bradley v. People (56 Barb. 72), 741.
- Bradley v. Rochester (54 Hun. 140), 626, 632.
- Bradley v. West Duluth (45 Minn. 4), 831.
- Bradley-Ramsay Lumber Co. v. Perkins (La. 1903) 33 So. Rep. 351), 49.
- Bradshaw v. Camden (39 N. J. L. 416), 17, 367.
- Brady v. Brooklyn (1 Barb. 584), 113, 208.
- Brady v. Moulton (61 Minn. 185), 67.
- Brady v. New York (20 N. Y. 312), 861.
- Brady v. Northwestern Insurance Co. (11 Mich. 425), 734, 737.
- Brady v. Supervisors, etc. (2 Sandf. 460), 140.

- Brambrick v. Campbell (37 Mo. App.), 460, 861.
- Bramtree Board of Health v. Boyton (52 L. R. 99), 698.
- Branahan v. Hotel Co. (39 Ohio St. 333), 354.
- Brand v. San Antonio (Tex. Civ. App. 1896, 37 S. W. Rep. 340), 4. Brandon v. Avery (22 N. Y. 469).
- Brandon v. Avery (22 N. Y. 469), 470. Brandt v. Milwaukee (69 Wis. 386),
- 803. Branham v. San Jose (24 Cal.
- 585), 96.
- Brannock v. Elmore (114 Mo. 55), 601.
- Branson v. Phila. (47 Pa. St. 329), 875.
- Brant, in re Corporation of (19 Up. Can. Q. B. 450), 113.
- Brassford, Matter of (50 N. Y. 509), 249.
- Brasington v. South Bound Ry Co. (62 S. C. 325), 582, 585, 587, 601.
- Braun v. Chicago (110 Ill. 186), 613, 629, 630.
- Brazil v. McBride (69 Ind. 244), 7, 581.
- Breaux's Bridge v. Dupuis (30 La. Ann. 1105), 219, 220, 236, 237, 252, 590.
- Bregguglia v. Vineland (53 N. J. L. 168), 277, 776.
- D. 168), 277, 776. Breitenberger v. Schmidt (38 Ill. App. 168), 524.
- Breninger v. Belvidere (44 N. J. L. 350), 25, 290, 756.
- Brenham v. Brenham Water Co. (67 Tex. 542), 72, 304, 308.
- Brennan v. Sewerage & Water Board of New Orleans (La. 1902, 32 So. Rep. 563), 438.
- Brennan v. Titusville (153 U. S. 289), 395, 396, 400.
- Brennan v. Wheatherford (54 Tex. 330), 547.
- Brewer v. Otoe County (1 Neb. 373), 386.
- Brewster v. Davenport (51 Iowa 427), 201, 205, 208.
- Browster v. Hyde (7 N. H. 206), 149, 151.
- Brewster v. Peru (180 III. 124), 855. Brewster v. Syracuse (19 N. Y. 116), 226, 832.

- Brevoort v. Detroit (24 Mich. 322), 867.
- Brice, appeal of (89 Pa. St. 85), 737.
- Brickerdike v. Chicago (185 Ill. 280), 853.
- Brick Prs. Church v. New York (5 Cow. 538), 321, 345, 695.
- Bridgeford v. Tuscumbia (16 Fed. 910), 98, 212.
- Bridgeport v. Housatonuc R. R. Co. (15 Conn. 475), 78, 117, 266.
- Bridgeport v. N. Y. & N. H. R. R. Co. (36 Conn. 255), 879.
- Bridge Proprietors v. Hoboken (1 Wall. 116), 306, 379.
- Brieswick v. Brunswick (51 Ga. 639), 225, 277.
- Briggs v. A Light Boat (7 Allen 287), 768.
- Briggs v. Matsell (2 Abb. Pr. 156), 196.
- Briggs v. Whitney (159 Mass. 97), 825.
- Bright v. McCullough (27 Ind. 223), 629.
- Brimmer v. Boston (102 Mass. 19), 113.
- Brink's Chicago City Exp. Co. v. Kinnare (168 Ill. 643), 61.
- Brinkley v. Swicegood (65 N. C. 626), 331.
- Brinkman v. Eisler (40 N. Y. S. R. 865), 721.
- Bristol v. Burrow (5 Lea 128), 478, 485.
- Broadway Baptist Church v. Mc-Atee (8 Bush. 508), 234, 828.
- Broadway & S. A. R. R. Co. v. New York (49 Hun. 126), 450, 751.
- Brockman v. Creston (79 Iowa 587), 96, 431.
- Brockway v. Carter (25 Wis. 510), 469.
- Brodie and Town of Bowmanville, in re (38 Up. Can. Q. B. 580), 28, 304.
- Brohead v. Milwaukee (19 Wis. 624), 104, 105.
- Brome v. Cuming County (31 Neb. 362), 339.
- Bronson v. Kinzie (1 How. 311), 390.

Brookbank v. Jeffersonville (41 Ind. 406), 168, 202. Brookfield v. Kitchen (163 Mo.

546), 81, 398, 657.

Brookline v. Mackintosh (133 Mass. 215), 707.

Brooklyn v. Breslin (57 N. Y. 591), 290, 296, 626.

Brooklyn v. Cleves (Hill & Denio Supp. 231), 44, 304, 476, 499, 700.

Brooklyn v. Furey (9 Misc. Rep. 193), 79, 83, 739.

Brooklyn, in re (143 N. Y. 596), 308.

Brooklyn Elevated R. R. Co., in re (125 N. Y. 434), 915.

Brooklyn Winfield & Newtown Ry. Co., in re (72 N. Y. 245), 916.

Brooklyn v. Meserole (26 Wend. 132), 806.

Brooklyn v. Patchen (8 Wend. 47), 831.

Brooklyn v. Toynbee (31 Barb. 282), 287, 787.

Brooklyn Central Ry. Co. v. Brooklyn City Ry. Co. (32 Barb. 358), 321.

Brooklyn Crosstown R. R. v Brooklyn (37 Hun. 413), 743.

Brooklyn Park Comrs. v. Armstrong (45 N. Y. 234), 93, 94.

Brooklyn Steam Transit Co. v Brooklyn (78 N. Y. 524), 742.

Brooklyn Trust Co. v. Hebron (51 Conn. 22), 151.

Brooks v. Cotton (48 N. H. 50), 779. Brooks v. Fischer (79 Cal. 173), 11, 82.

Brook v. Horton (68 Cal. 554), 884. Brooks v. Mangan (86 Mich. 576), 473, 630, 637.

Brooks v. Memphis (U. S. Cir. Ct. W. D. Tenn.), 4 Federal Cas. No. 1, 954), 391.

Brookville v. Arthurs (130 Pa. St. 501), 63.

Brookville v. Gagle (73 Ind. 117), 466, 476, 492, 506.

Brophy v. Landman (28 Ohio St. 542), 836.

Brophy v. Hyatt (10 Colo. 223), 161, 187, 188, 200, 204, 276, 731.

Brown v. Asbury Park (44 N. J. L. 162), 279.

Brown v. Atlantic Ry. & Power Co. (113 Ga. 462), 330.

Brown v. Barstow (87 Iowa 344), 813.

Brown v. B. & S. L. R. R. Co. (22 N. Y. 191), 56.

Brown v. Carpenter. (26 Vt. 638), 733.

Brown v. Catlettsburg (11 Bush. 435), 437.

Brown's Case (152 Mass. 1), 466. Brown v. C. G. W. Ry. (137 Mo. 529), 888, 889.

Brown v. Com'rs. (21 Pa. St. 37), 330.

Brown v. Denver (7 Colo. 305) 444, 829, 840.

Brown, ex parte (42 S. C. 184), 563. Brown v. Foster (88 Me. 49), 163.

Brown v. Gates (15 W. Va. 131), 140.

Brown v. Guyandotte (34 W. Va. 299), 675.

Brown v. Houston (114 U. S. 622), 396, 400, 412.

Brown v. Hunn (27 Conn. 332), 737.

Brown v. Jenks (98 Cal. 10), 866.

Brown v. Langlois (70 Mo. 226), 481,

Brown v. Lutz (36 Neb. 527), 16, 170, 189.

Brown v. Maryland (12 Wheat 419), 352, 392, 400, 408.

Brown v. Mobile (28 Ala. 722), 509, 529.

Brown v. Murdock (140 Mass. 314), 694.

Brown v. New York (63 N. Y. 239), 868.

Brown v. Piper (91 U. S. 37), 447.

Brown v. Social Circle (105 Ga. 834), 789.

Brown v. Turner (70 N. C. 93), 366. Brown v. Vinalhaven (65 Me. 402),

Brown v. White (202, Pa. St. 297),

Brown v. Winterport (79 Me. 305), 149, 152, 191, 195.

Browne v. Boston (166 Mass. 229), 852.

Browne v. New Orleans (38 La. Ann. 517), 437.

- Browne v. Selser (106 La. 691), 630, 659.
- Brownell v. Palmer (22 Conn. 107), 150.
- Browning v. Chicago (155 Ill. 314),
- Brownville v. Cook (4 Neb. 101), 486, 487, 775, 787, 793.
- Brownback v. North Wales (194 Pa. St. 609), 658.
- Bruce v. Schuyler (9 Ill. 221), 329. Bruner v. Marcum (50 Mo. 405), 528.
- Bruner v. Stanton (102 Ky. 459),
- Brunswick v. King (91 Ga. 522), 807.
- Brush v. Carbondale (78 Ill. 74), 118.
- Brush Elec. L. Co. v. Jones, etc., Co. (5 Ohio Cir. Ct. Rep. 340), 882.
- Bryan v. Bates (15 Ill. 87), 483.
- Bryan v. Chicago (60 Ill. 507), 808.
- Bryan v. Page (51 Tex. 532), 7, 116, 123, 124, 132.
- Bryant v. Robbins (70 Wis. 258), 707.
- Buchan v. Broadwell (88 Mo. 31), 389, 882.
- Buck v. Danzenbacker (37 N. J. L. 359), 558.
- Buckland v. Conway (16 Mass. 395), 113.
- Buckley v. Tacoma (9 Wash. 253), 12, 841.
- Buckley v. Tacoma (9 Wash. 269), 842, 846.
- Budd v. Camden Horse R. Co. (63 N. J. Eq. 804), 330.
- Budd v. New York (143 U. S. 517), 910.
- Buell v. Ball (20 Iowa 282), 258, 810, 811.
- Buell v. Buckingham (16 Iowa
- 284), 164, 165. Buell v. State (45 Ark. 336), 222,
- 360. 672, 752. Buesching v. St. Louis Gas Light Co. (73 Mo. 219), 64.
- Buffalo v. Chadeayne (134 N. Y. 163), 49, 337, 737.
- Buffalo v. Chadeayne (134 N. Y. 173), 739.

- Buffalo v. Chadeayne (7 N. Y. Suppl. 501), 639.
- Buffalo, in re City of (78 N. Y. 362), 201, 846.
- Buffalo, in re (68 N. Y. 167), 88.
- Buffalo v. Marion (13 Misc. Rep. 639), 761, 772.
- Buffalo v. Mulchady (Sheld. 431), 535.
- Buffalo v. New York, etc. R. Co. (6 Misc. 630), 744.
- Buffalo v. N. Y., etc., R. R. Co. (23 N. Y. Supp. 303), 313.
- Buffalo v. Reavey (55 N. Y. Supp. 792), 400, 403.
- Buffalo v. Schleifer (Buffalo Sup. Ct. General Term 2 Misc. Rep. 216), 766.
- Buffalo v. Webster (10 Wend. 99), 31, 32, 296, 764, 766.
- Buffalo & N. Y. R. R. Co. v. Buffalo (5 Hill, 209), 592, 747.
- Buffington Wheel Co. v. Burnham (60 Iowa 493), 172.
- Buhler, in re (32 Barb, 79), 832.
- Bull v. Quincy (9 Ill. App. 127), 124, 625.
- Bull v. Southfield (14 Blatch. 216), 349.
- Bullen v. Higgins (115 Ill. 155), 886.
- Bullitt v. Paducah (8 Ky. Law Rep. 870), 630.
- Bullitt v. Selvage (20 Ky. Law Rep. 599), 866.
- Bullitt County v. Washer (130 U. S. 142), 195.
- Bullock v. Geomble (45 III. 218). 274, 275.
- Bunyan v. Citizens' Ry. Co. (127 Mo. 749).
- Burckholter v. McConnellsville (20 Ohio St. 308), 26, 670.
- Burdett v. Allen (35 W. Va. 347), 275, 732.
- Burditt v. Swenson (17 Tex. 489), 703.
- Burford v. Grand Rapids (53 Mich. 98), 676, 679.
- Burg v. C., R. I. & P. Ry. Co. (90 Iowa 106), 42, 745.
- Burger v. Mo. Pac. Ry. Co. (112 Mo. 238), 746.

Burgess v. Fennel (3 Del. Co. R. 354), 631.

Burgess v. Jefferson (21 La. Ann. 143), 864.

Burgess v. Pue (2 Gill. 254), 175. Burghard v. Fitch (24 Ky. Law Rep. 1983), 859.

Burhans v. Norwood Park (138 Ill. 147), 818.

Burk v. Baltimore (77 Md. 469), 855.

Burke v. State (5 Lea 349), 331. Burkley v. Eisendrath (58 Ill. App.

364), 581.

Burlington v. Bumgardner (42 Iowa 673), 615.

Burlington v. Burlington Street Ry. Co. (49 Iowa 144), 318, 324, 378.

Burlington v. Dennison (42 N. J. L. 165), 5, 11, 137, 195, 238.

Burlington v. Estlow (43 N. J. L. 13), 327, 328.

Burlington v. Kellar (18 Iowa 59), 24, 271, 272, 277.

Burlington v. Lawrence (42 Iowa 681), 346, 616.

Burlington v. Putnam Ins. Co. (31 Iowa 102), 12, 614, 624, 635.

Burlington v. Quick (47 Iowa 222), 843.

Burlington v. Schwartzman (52 Conn. 181), 717.

Burlington v. Stockwell (5 Kan. App. 569), 269, 551, 554, 684, 704.

Burlington v. Stockwell (56 Kan. 208), 563.

Burlington & M. R. R. Co. v. Spearman (12 Iowa 112), 813.

Burlington Water Works Co. v. Burlington (43 Kan. 725), 798.

Burmeister v. Howard (1 Wash. Ty. 207), 4, 31.

Burnett v. Craig (30 Ala. 135), 437. Burnett, ex parte (30 Ala. 461), 278, 559, 617, 648.

Burnett v. Sacramento (12 Cal. 76), 823, 830.

Burnham v. Chicago (24 Ill. 496), 901.

Burnham v Hotchkiss (14 Conn. 311), 716.

Burns, ex parte (7 Mo. App. 563), 560.

Burns v. State (104 Ga. 544), 225. Burns v. LaGrange (17 Tex. 415), 518, 570, 793.

Burnstein v. Cass Ave. & F. G. Ry. Co. (56 Mo. App. 45), 749.

Burr v. Newcastle (49 Ind. 322), 832, 834, 849.

Burrton v. Harvey County Savings Bank (28 Kan. 390), 100.

Bush v. Seabury (8 Johns 418), 764, 765.

Bushey, in re (105 Mich. 64), 505, 575, 770.

Business Men's League v. Waddill (143 Mo. 495), 436.

Bussey v. Gilmore (3 Me. 191), 75.

Butchers v. Bullock (3 Bos. & P. 434), 492.

Butcher v. Camden (29 N. J. Eq. 478), 367.

Butcher's Co. v. Bullach (3 Bos. & Pul. 434), 288.

Butchers Co. v. Morey (1 Bla. 370), 32.

Butchers' Union Slaughter House, etc. Co. v. Crescent City Live Stock, etc. Co. (111 U. S. 746), 313, 665, 699, 760.

Butman v. Fowler (17 Ohio 101), 803.

Butin, ex parte (28 Tex. App. 304), 397.

Butler v. Charleston (7 Gray 12), 108, 145.

Butler v. McLean County (32 Ill. App. 397), 114.

Butler v. Milwaukee (15 Wis. 493), 70, 84, 114.

Butler v. M. A. L. & I. Co. (94 Ga. 562), 467.

Butler v. Passaic (44 N. J. L. 171), 11.

Butler v. Robinson (75 Mo. 192), 582.

Butler v. Sullivan County (108 Mo. 630), 133.

Butner v. Boifeuillett (100 Ga. 743), 225.

Butolph v. Blust (5 Lans. 84), 483. Button v. Kremer (24 Ky. Law Rep. 1194), 822.

Buttrick v. Lowell (1 Allen 172), 345.

- Butz v. Cavanaugh (137 Mo. 503), 64, 601, 677.
- Byars v. Mt. Vernon (77 III. 467), 252, 528, 534.
- Bybee v. Smith (22 Ky, Law Rep. 467), 166, 436.
- Bybee v. State (94 Ind. 443), 718.

 Byer v. New Castle (124 Ind. 86)
- Byer v. New Castle (124 Ind. 86), 206.
- Byers v. Com. (42 Pa. St. 89), 513, 515, 558.
- Byers v. Olney (16 Ill. 35), 646.
- Byington v. St. Louis Ry. Co. (147 Mo. 673), 586, 749.
- Byrd, ex parte (84 Ala. 17), 24, 449, 764.
- Byrne v. Chicago General Ry. Co. (63 Ill. App. 438), 650.
- Byrne v. Parish of East Carroll (45 La. Ann. 392), 838.
- Byrnes v. Riverton (64 N. J. L. 210), 248, 249.

C.

- Cabot v. Britt (36 Vt. 349), 209.
 Cadmus v. Farr (47 N. J. L. 208), 165.
- Cady v. Barnesville (4 Weekly Cin. Law Bul. 101), 364, 753.
- Cady v. Ihnken (Mich. 1902, 89 N. W. Rep. 72), 199.
- Cahill, in re (110 Pa. St. 167), 461.
- Cahill v. Kalamazoo Mut. Ins. Co. (2 Doug. 124), 164.
- Cahoon v. Com. (21 Gratt. 822), 463.
- Cain v. Davie County Comrs. (86 N. C. 8), 823.
- Cain v. Goda (84 Ind. 209), 265.
- Cain v. Syracuse (95 N. Y. 83), 716. Cairo v. Adams Express Co. (54
- Ill. App. 87), 643.
- Cairo v. Bross (101 Ill. 475), 79, 347.
- Cairo v. Coleman (53 Ill. App. 680), 763, 769.
- Cairo v. Feuchter (159 III. 155), 864.
- Caldwell, ex parte (138 Mo. 233), 284, 771, 787.
- Caldwell v. Alton (33 Ill. 416), 302, 761, 765.

- Caldwell v. Carthage (49 Ohio St. 334), 839.
- Caldwell v. Lincoln (19 Neb. 569), 617, 637.
- Caldwell v. North Carolina (187 U. S. 622), 392, 395.
- Caldwell v. Rupert (10 Bush. 179), 822.
- Caldwell v. State (55 Ala. 133), 280.
- Calhoun v. Little (106 Ga. 336), 269, 278, 473.
- California v. Central Pac. Ry Co. (127 U. S. 1), 878.
- California Steam Nav. Co. v. Wright (6 Cal. 258), 304.
- Call Pub. Co. v. Lincoln (29 Neb. 149), 172.
- Callaghan v. Alexandria (52 La. Ann. 1013), 224.
- Callahan v. New York (66 N. Y. 656), 462.
- Callam v. Saginaw (50 Mich. 7), 806.
- Callan v. Wilson (127 U. S. 540), 516, 517, 518, 521, 523, 526, 577.
- Callanan v. Gilman (107 N. Y. 360), 716.
- Callender v. Marsh (1 Pick. 418), 807.
- Callon v. Jacksonville (147 Ill. 113), 802, 855.
- Callopy v. Cloherty (95 Ky. 330), 581.
- Cambria Iron Co. v. Union Trust Co. (154 Ind. 291), 897.
- Cambridge v. Monroe (126 Mass. 496), 708.
- Cambridge v. Railroad Comrs. (153 Mass. 161), 801.
- Camden v. Bloch (65 Ala. 236), 482, 531, 532, 562, 564, 566, 570, 571, 572, 573.
- Camden v. Mulford (26 N. J. L. 49), 260, 427, 429, 439, 571.
- Camden v. Varney (63 N. J. L. 325), 108.
- Cameron and Tp. of East Missouri, re (13, Up. Can. Q. B. 190), 222, 442.
- Cameron v. Kenyon-Connell C. Co. (22 Mont. 312), 741.
- Cameron v. Middough (57 Mo. App. 312), 646.

- Cameron v. North Hero (43 Vt. 507), 209.
- Cameron v. Stephenson (69 Mo. 372), 643.
- Camp v. Minneapolis (33 Minn. 461), 349.
- Campau v. Detroit Board of Public Works (86 Mich. 372), 807, 875.
- Campau v. Langley (39 Mich. 451), 276.
- Campbell v. Cincinnati (49 Ohio St. 463), 170, 172, 187, 189, 845.
- Campbell v. Hale (25 N. J. L. 324), 803.
- Campbell v. Kansas City (102 Mo. 326), 696.
- Campbell v. Seaman (63 N. Y. 568), 685.
- Campbell v. Thompson (16 Me. 117), 489, 493.
- Campbell v. Tp. of Elma (13 Up. Can. Com. Pleas 296), 102.
- Campbell v. Wainright (50 N. J. L. 555), 546.
- Campbell v. Wolfender (74 N. C. 103), 155.
- Campbell v. Wyandotte (105 Mich. 1). 837.
- Campion v. Buffalo (8 N. Y. St. Rep. 329), 736, 737.
- Canadian Atlantic R. W. Co. v. Ottawa (8 Ont. Rep. 183), 181.
- Canajoharie v. Buel (43 How. Pr. 155), 310.
- Canandaigua v. Foster (156 N. Y. 354), 457.
- Canepa v. Birmingham (92 Ala. 358), 734.
- Caniff v. New York (4 E. D. Smith 430), 176.
- Cannon v. New Orleans (20 Wall. 577), 39, 416, 417.
- Canova v. Williams (41 Fla. 509), 451.
- Canthorn v. State (43 Ark. 138), 486. Canto, ex parte (21 Tex. App. 61), 596
- Canton v. Dawson (71 Mo. App. 235), 755.
- Canton v. Ligon (71 Mo. App. 407), 277, 597.
- Canton v. Nist (9 Ohio St. 439), 26, 759.
- Cantril v. Sainer (59 Iowa 26), 229, 451, 453, 757.

- Cape Girardeau v. Campbell (26. Mo. App. 12), 39, 416.
- Cape Girardeau v. Fougeu (30 Mo. App. 551), 4, 6, 21, 237, 251.
- Cape Girardeau v. Houck (129 Mo. 607), 847.
- Cape Girardeau v. Riley (72 Mo. 220), 292, 425, 656.
- Cape Girardeau v. Riley (52 Mo. 424), 232.
- Cape May v. Cape May, etc. Ry Co. (60 N. J. L. 224), 230, 248, 720, 747.
- Cape May v. Cape May Transp. Co. (64 N. J. L. 80), 581.
- Cape May, etc., Ry Co. v. Cape May (35 N. J. Eq. 419), 121, 260, 435.
- Capital City L. & F. Co. v. Tallahasse (Fla. 1900, 28 So. Rep. 810), 304.
- Capital Traction Co. v. Hof (174 U. S. 1), 526.
- Carbondale v. Vail (2 Del. Co. Ct. R.), 387, 613.
- Carleton v. People (10 Mich. 250), 140, 158.
- Carleton v. Rugg (149 Mass. 550), 691.
- Carleton v. Washington (38 Kan. 726), 98, 100.
- Carlin v. Cavender (56 Mo. 286), 854.
- Carline v. Shallenberger (13 Pa. County Ct. Rep. 145), 155.
- Carlinville v. McClure (156 III. 492), 835, 849, 855.
- Carlson v. Segog (60 Minn, 498), 467.
- Carlyle v. Carlyle Water L. & P. Co. (52 Ill. App. 577), 906.
- Carlyle v. Clinton County (140 Ill. 512), 840, 841.
- Carlyle, W. L. & P. Co. v. Carlyle (31 III. App. 325), 305.
- Carney v. Marseilles (136 Ill. 401), 346.
- Carondelet v. Wolfert (39 Mo. 305), 237.
- Carpenter v. Capital Electric Co. (178 Ill. 29), 893.
- Carpenter v. Mills (29 How. Pr. 473), 483.
- Carpenter v. Nixon (5 Hill 260), 523.

- Carpenter v. People (8 Colo. 116), 338.
- Carr v. Conyers (84 Ga. 287), 279.
- Carr v. Doley (122 Mass. 255), 813.
- Carr v. Northern Liberties (35 Pa. St. 324), 126, 676.
- Carr v. St. Louis (9 Mo. 191), 25.
- Carrington v. St. Louis (89 Mo. 208), 675.
- Carroll v. Campbell (110 Mo. 557), 309.
- Carroll v. Campbell (108 Mo. 550), 450.
- Carroll v. Irvington (50 N. J. L. 361), 803, 811.
- Carroll v. Lynchburg (84 Va. 803), 737.
- Carroll v. St. Louis (12 Mo. 444), 9, 133, 531.
- Carroll v. St. Louis (4 Mo. App. 191), 692.
- Carroll v. Tuskaloosa (12 Ala. 173), 440, 611, 653.
- Carroll v. Wall (35 Kan. 36), 158, 163.
- Carrollton v. Bazzette (159 Ill. 284), 396, 403, 532, 636.
- Carrolton v. Clark (21 III. App. 74), 156, 157, 158, 163, 168.
- Carrollton v. Rhomberg (78 Mo. 547), 531.
- Carron v. Martin (26 N. J. L. 594), 72, 571, 831.
- Carskadden v. South Bend (141 Ind. 596), 315.
- Carson v. Bloomington (6 Ill. App. 481), 277, 352, 556.
- Carson v. Forsythe (94 Ga. 617), 644.
- Carter v. Dow (16 Wis. 298), 640, 733.
- Carter v. McFarland (75 Iowa 196), 179.
- Cartersville v. Lanham (67 Ga. 753), 34, 275.
- Carthage v. Buckner (4 Ill. App. 317), 691.
- Carthage v. Carthage Light Co. (97 Mo. App. 20), 837, 887.
- Carthage v. First Nat. Bank (71 Mo. 508), 613.
- Carthage v. Frederick (122 N. Y. 268), 17, 670, 691, 715.

- Carthage v. Rhodes (101 Mo. 175), 640, 733.
- Carey v. Washington (5 Cranch C. C. 13), 672.
- Cary v. North Plainfield (49 N. J. L. 110), 643.
- Carvin v. St. Louis (151 Mo. 334), 64.
- Casby v. Thompson (42 Mo. 133), 434.
- Cascaden v. Waterloo (106 Iowa 673), 7, 11, 50, 51, 116, 315, 337.
- Case v. Cayuga County (88 Hun. 59), 896.
- Case v. Hall (21 III. 632), 276, 504.
- Case v. Johnson (91 Ind. 477), 827, 830.
- Case v. Mobile (30 Ala. 538), 496, 582.
- Casinello, ex parte (62 Cal. 538), 706.
- Caskell v. Bayley (30 L. T. 516), 710.
- Caspary v. Portland (19 Oreg. 496), 674.
- Cass v. Bellows (31 N. H. 501), 217. Cass v. People (166 Ill. 126), 847.
- Cass Co. Conrs. v. Ross (46 Ind. 404), 145.
- Cassell v. Lexington H. & P. Turnpike Rd. Co. (10 Ky. Law Rep. 486), 332.
- Cass Farm Co. v. Detroit (181 U. S. 396), 821.
- Cass Farm Co. v. Detroit (124 Mich. 433), 821.
- Cassidy v. Bangor (61 Me. 434), 180, 839.
- Cassin v. Zavalla County (70 Tex. 419), 176.
- Cassville v. Jimerson (75 Mo. App. 426), 477, 509.
- Castleton v. Langdon (19 Vt. 210) 92.
- Caswell v. Bay City (99 Mich. 417), 256.
- Caswell v. Worth (5 El. & B. 848), 56.
- Cate v. Martin (70 N. H. 135), 241.Catholic Church v. Tobbein (82 Mo. 418), 546.
- Cavanaugh v. Boston (139 Mass. 426), 708.

- Cedar Rapids, In re (85 Iowa 39), 812.
- Cedar Rapids Water Co. v. Cedar Rapids (Iowa 1902, 91 N. W. Rep. 1081), 264.
- Cedar Rapids Water Co. v. Cedar Rapids (117 Iowa 250), 877, 905.
- Centerville v. Fidelity & Guaranty Co. (118 Fed. Rep. 332), 244.
- Centerville v. Miller (57 Iowa 56), 271, 771.
- Centerville v. Miller (51 Iowa 712), 486, 487, 674.
- Centerville v. Woods (57 Ind. 192), 718.
- Central v. Sears (2 Colo. 588), 4, 6, 7, 9, 237, 249.
- Central Bridge Corporation v. Lowell (15 Gray 106), 142, 145.
- Central Crosstown Ry. Co. v. Metropolitan Street Ry. Co. (16 App. Div. 229), 894.
- Central Georgia Ry. Co. v. Bond (111 Ga. 13), 32, 551, 595, 601.
- Central Irrigation Dist. v. De Lappe (79 Cal. 351), 54, 245.
- Central R. & B. Co. v. Brunswick & W. R. Co. (87 Ga. 386), 31.
- Central R. R. v. Smith (78 Ga. 694), 601.
- Central R. R. v. Thompson (76 Ga. 770), 601.
- Central Savings Bank v. Baltimore (71 Md. 515), 591.
- Chad v. Tilsed (5 J. B. Moore 185), 108.
- Chaddock v. Day (75 Mich. 527), 636, 656.
- Chafin v. Waukesha County (62 Wis. 463), 478, 486.
- Chaffee v. Granger (6 Mich. 51), 237, 238.
- Chahoon v. Com. (21 Gratt 822), 467.
- Challiss v. Parker (11 Kan. 384, 394), 834, 874.
- Chamberlain v. Dover (13 Me. 466), 149, 178, 210, 214.
- Chamberlain v. Evansville (77 Ind. 542), 289, 337.
- Chamberlain v. Hoboken (38 N. J. L. 110), 252.
- Chamberlain v. Kansas City (125 Mo. 430), 9.

- Chamberlain v. Litchfield (56 III. App. 652), 529, 594, 731.
- Chamberlain of London v. Crompton (7 D. & R. 597), 292.
- Chambers v. Barnsville (89 Ga. 739), 270, 567.
- Chambers v. Ohio Life Ins. & Trust Co. (1 Disney Ohio 327), 721.
- Chambers v. St. Joseph (33 Mo. App. 536), 368.
- Chambers v. St. Louis (29 Mo. 543), 89, 90, 120, 432, 546.
- Champaign v. Forrester (29 Ill. App. 117), 679.
- Champaign v. Harmon (98 Ill. 491), 89.
- Champer v. Greencastle (138 Ind. 339), 71, 289, 758.
- Chandler v. Lawrence (128 Mass. 213), 235, 368.
- Chapline v. Robertson (44 Ark. 202), 528.
- Chapman v. Albany & S. Ry. (10 Barb. 360), 883.
- Chariton v. Barber (54 Iowa 360), 271, 751, 754.
- Chariton v. Holliday (60 Iowa 391), 171, 183, 828, 852.
- Chariton v. Simmons (87 Iowa 226), 729.
- Charity Hospital v. De Bar (11 La. Ann. 385), 658.
- Charity Hospital v. Stickney (2 La. Ann. 550), 615, 658.
- Charles v. Hackman (133 Mo. 634), 564.
- Charles v. Marion (98 Fed. Rep. 166), 820.
- Charleston v. Ahrens (4 Strobh 241), 355.
- Charleston v. Ashley Phosphate Co. (34 S. C. 541), 475, 505, 580, 583, 591.
- Charleston v. Benjamin (2 Strobh L. 508), 759.
- Charleston v. Blake (12 Rich. Law 66), 458.
- Charleston v. Chur (2 Bailey 164), 552, 583, 593.
- Charleston v. Corleis (2 Bailey 186), 549.
- Charleston v. Elford (1 McMullan 234), 40, 231, 686.

- Charleston v. England (3 Hill Law 56), 542.
- Charleston v. Feckman (3 Rich. L. 385), 549.
- Charleston v. Goldsmith (12 Rich. Law 470), 653, 773.
- Charleston v. Heisembritte (2 Mc-Mullen 233), 646.
- Charleston v. King (4 McCord L. 487), 32.
- Charleston v. Oliver (16 S. C. 47), 611.
- Charleston v. Palmer (1 McCord 342), 542.
- Charleston v. Pepper (1 Rich. Law 364), 33, 35, 471, 478, 615, 623.
- Charleston v. Pinckmey (3 Brev. 217), 808.
- Charleston v. Reed (27 W. Va. 681), 72, 449, 551, 735, 736.
- Charleston v. Rodgers (2 McCord. L.), 495, 768.
- Charleston v. Schmidt (11 Rich. 343), 482, 549.
- Charleston v. Schroeder (4 Rich. Law 296), 544.
- Charleston v. Seeba (4 Strob. 319), 485.
- Charleston v. State ex rel Adger (2 Speers 719), 35, 73.
- Charleston v. Wentworth Street Baptist Church (4 Strob. Law. 306), 80, 319, 696.
- Charlestown v. Stone (15 Gray 40), 810.
- Charlotte C. & A. R. R. v. Gibbes (142 U. S. 386), 910.
- Chase v. City Treasurer (122 Cal. 540), 128.
- Chase v. Oshkosh (81 Wis. 313), 717, 720.
- Chase v. Springfield (119 Mass. 556), 846.
- Chattanooga v. Norman (92 Tenn. 73), 44, 731.
- Cheatham v. Shearon (1 Swan 213), 740.
- Cheek v. Aurora (92 Ind. 107), 718.
 Chenango Bank v. Brown (26 N. Y. 467), 319.
- Cheney In re (90 Cal. 617), 283, 360, 771.
- Cheny v. Shelbyville (19 Ind. 84), 562, 647,

- Cherokee v. Fox (34 Kan. 16), 493, 657.
- Cherokee Nation v. Georgia (5 Pet. 1), 261.
- Cherry v. Keyport (52 N. J. L. 544), 803.
- Chesney v. McClintock (61 Kan. 94), 461.
- Chester v. Black (132 Pa. St. 568), 823.
- Chester v. Bullock (187 Pa. St. 544), 224.
- Chester v. Chester & D. R. R. Co. (3 Del. Co. Rep. 389), 813.
- Chester v. Eyre (181 Pa. St. 642), 264, 860.
- Chester v. W. U. Tel. Co. (154 Pa. St. 464), 406, 407.
- Chicago v. Bartee (100 III. 57), 766. Chicago v. Blair (149 III. 310), 826.
- Chicago v. Brownell (146 Ill. 64), 44.
- Chicago v. Brownell (41 III. App. 70), 756, 786.
- Chicago v. Chicago Union Traction Co. (199 Ill. 259), 750.
- Chicago v. Chicago Western & Ind. R. R. Co. (105 Ill. 73), 916.
- Chicago v. Collins (175 III. 445), 435, 437, 612, 644.
- Chicago v. Crosby (111 III. 538), 716, 810.
- Chicago v. Evans (24 III. 52), 260, 262, 882.
- Chicago v. Fraser (60 Ill. App. 404), 186, 807.
- Chicago v. Ferris Wheel Co. (58 III. App. 625), 735.
- Chicago v. Habar (62 Ill. 283), 848. Chicago v. Kenney (35 Ill. App. 57), 277, 476, 482, 483, 486, 487, 493, 501, 509.
- Chicago v. Law (144 Ill. 569), 797.
- Chicago v. McCoy (136 III. 344), 5, 252.
- Chicago v. McKechney (91 Ill. App. 442), 11, 117.
- Chicago v. Netcher (183 Ill. 104), 354, 774.
- Chicago v. Nichols (177 Ill. 97), 812.
- Chicago v. O'Brennan (65 Ill. 160), 457.

- Chicago v. O'Brien (111 Ill. 532), 63, 715.
- Chicago v. Phoenix Ins. Co. (126 Ill. 276), 660.
- Chicago v. Rumpff (45 Ill. 90), 21, 265, 302, 304, 310, 447, 697, 699.
- Chicago v. Rumsey (87 III. 348), 799.
- Chicago v. Sheldon (9 Wall 50), 378.
- Chicago v. Silverman (156 Ill. 601), 849.
- Chicago v. Singer (202 III. 75), 837, 854, 859.
- Chicago v. Stratton (162 III, 494), 44, 134, 313, 627, 703.
- Chicago v. Trotter (136 III. 430), 136, 294, 628, 728.
- Chicago & Western Ind. R. R. Co. v. Dunban (95 Ill. 571), 879.
- Chicago & A. Ry. Co. v. Carlinville (103 Ill. App. 251), 443.
- Chicago B. & Q. R. R. Co. v. Quincy (139 Ill. 355), 818.
- Chicago B. & Q. R. R. Co. v. Quincy (136 Ill. 563), 93, 817, 851.
- Chicago B. & Q. R. R. Co. v. Hagerty (67 Ill, 113), 686, 744.
- Chicago B. & Q. R. R. Co. v. Iowa (94 U. S. 155), 54, 909.
- Chicago & E. I. R. R. Co. v. Beaver (96 Ill. App. 558), 31.
- Chicago & G. T. Ry. Co. v. Well-man (143 U. S. 339), 910.
- Chicago, M. & St. P. Ry. Co. v. Minnesota (134 U. S. 418), 910.
- Chicago, M. & St. P. Ry. Co. v. Minn. Cent. Ry. Co. (14 Fed. 525), 318.
- C. & N. Pac. R. R. v. Chicago (174 Ill. 439), 5, 50, 315, 319, 337, 834.
- Chicago & N. Pac. R. R. Co. v. Chicago (172 Ill. 66), 835.
- Chicago & N. W. R. R. Co. v. Cicero (154 Ill. 656), 812.
- Chicago & N. W. R. R. Co. v. People ex rel Elgin (91 Ill. 251), 875.
- C., R. I. & P. R. R. Co. v. Council Bluffs (109 Iowa 425), 5.
- Chicago, R. I. & P. R. R. Co. v. Joliet (79 Ill. 25), 548.
- C. & R. I. R. R. Co. v. Whipple (22 III. 105), 558.

- Chicago, R. I. & P. R. R. Co. v. Young (96 Mo. 39), 572.
- Chicago & St. Paul R. R. Co. v. Ackley (94 U. S. 179), 54.
- Chicago, S. F. & C. Ry. Co. v. Mc-Grew (104 Mo. 288), 93.
- Chicago, W. D. Ry. Co. v. Klauber (9 Ill. App. 613), 586, 587, 602.
- Chicago & W. I. R. R. Co. v. Dunbar (100 Ill, 110), 894.
- Chicago, etc., Co. v. Chicago (88 III. 221), 36.
- Chicago, etc. R. R. Co. v. Chicago (124 Ill. 439), 11.
- Chicago, etc., R. R. Co. v. Chicago (176 Ill. 253), 426.
- Chicago, etc., R. R. Co. v. Chicago (166 U. S. 226), 819.
- Chicago, etc., R. R. Co. v. Council Bluffs (109 Iowa 425), 237.
- Chicago, etc., R. R. Co. v. Hines (82 III. App. 488), 232.
- Chicago, etc., R. R. Co. v. Kennedy (2 Kan. App. 693), 61.
- Chicago, etc., R. R. Co. v. People (79 Ill. App. 529), 32, 34.
- Chicago, etc., R. R. Co. v. State (47 Neb. 549), 671.
- Chicago Board of Trade v. People ex rel (91 Ill. 80), 879.
- Chicago City Ry. Co. v. People ex rel. (73 Ill. 541), 549 877, 879, 902, 914.
- Chicago Dock Co. v. Garrity (115 Ill. 155), 81, 168, 186, 202, 329, 340, 346, 886, 887.
- Chicago Municipal Gas Light Co. v. Lake (130 Ill. 42), 879.
- Chicago Packing & P. Co. v. Chicago (88 Ill. 221). 615, 616, 624, 673, 909.
- Chicago Terminal R. R. Co. v. Chicago (184 Ill. 154), 849.
- Chicago Union Traction Co. v. Chicago (199 Ill. 484), 579, 909, 911, 912.
- Chicago Union Traction Co. v. Chicago (202 III. 576), 836.
- Chicago Telephone Co. v. Northwestern Telephone Co. (199 Ill. 324), 203, 234, 429, 896, 901.

- Chicago Tel. Co. v. N. W. Tel. Co. (100 Ill. App. 57), 190.
- Chicago T. T. Co. v. Chicago (178 Ill. 429, 224).
- Chicago, W. & V. Coal Co. v. Glass (34 Ill. App. 364), 741.
- Child v. Bemus (17 R. I. 230), 626, 638.
- Child v. Hudson Bay Co. (2 P. Wm. 207), 79, 83.
- Childress v. Nashville (3 Sneed 347), 485, 752, 754.
- Chillicothe v. Brown (38 Mo. App. 609), 133, 299, 311, 627, 774.
- Chillicothe v. Logan Natural Gas, etc., Co. (11 Ohio Dec. 24), 50.
- Chillicothe v. Logan Natural Gas, etc., Co. (8 Ohio N. P. 88), 255.
- Chillicothe v. People (11 Hun. 390), 793.
- Chillicothe v. Raynard (80 Mo. 185), 65.
- Childs v. Nelson (69 Wis. 125), 717. Childs v. Shower (18 Iowa 261), 333.
- Chilson v. Wilson (38 Mich. 267), 209, 834,
- Chilvers v. People (11 Mich. 43), 415, 621, 634, 659.
- Chin Yan, ex parte (60 Cal. 78), 277, 290, 313, 557.
- Chipman v. Bowman (14 Cal. 157),
- Christensen, In re (43 Fed. Rep.
- 243), 626, 649. Christensen, ex parte (85 Cal. 208),
- 252, 253, 451, 757. Christensen v. Fremont (45 Neb. 160), 798.
- Christian v. St. Louis (127 Mo. 109), 891.
- Christie v. Malden (23 W. Va. 667),
- Christman v. Phillips (58 Hun. 282), 120.
- Chouquette v. Southern Elec. Ry. Co. (152 Mo. 257), 749.
- Chy Lung v. Freeman (92 U. S. 275), 411.
- Chytraus v. Chicago (160 Ill. 18), 848, 849, 859.
- Church v. People (179 III. 205), 812. Churchill v. Marsh (2 Abb. Pr. 219), 332.

- Cicero Lumber Co. v. Cicero (176 Ill. 9), 436, 815.
- Cincinnati v. Anderson (52 Ohio St. 600), 845.
- Cincinnati v. Bickett (26 Ohio St. 49), 16, 168, 190, 252.
- Cincinnati v. Bryson (15 Ohio 625), 615, 616, 634.
- Cincinnati v. Buckingham (10 Ohio 257), 616, 656, 761, 762.
- Cincinnati v. Corry (7 Ohio Dèc. 415), 843.
- Cincinnati v. Craft (8 Ohio Dec. 672), 544.
- Cincinnati v. Gwynne (10 Ohio 192), 25, 117, 477.
- Cincinnati v. Johnson (17 Ohio Cir. Ct. 291), 189.
- Cincinnati v. McMicken (6 Ohio Cir. Ct. Rep. 188), 95.
- Cincinnati v. Mathers (6 Ohio Dec. 755), 839.
- Cincinnati v. Miller (29 Ohio L. J. 364). 710.
- Cincinnati v. Penny (21 Ohio St. 499, 875).
- Cincinnati v. Rice (150 Ohio 225, 759).
- Cincinnati, H. & D. Ry. Co. v. Bowling Green (57 Ohio St. 336), 750.
- Cincinnati Incline Pl. Ry. Co. v. Cincinnati (52 Ohio St. 609), 650. Cincinnati Ry. Co. v. Tel. Assn.
- (48 Ohio St. 390), 305. Cincinnati St. Ry. Co. v. Cincinnati (8 Ohio N. P. 80), 651, 653.
- Cincinnati St. Ry. Co. v. Smith (29 Ohio St. 291), 263.
- Cincinnati Water Co. v. Cincinnati (4 Ohio 443), 584.
- Citizens' Electric Light & Power Co. v. Sands (95 Mich. 551), 896.
- Citizens' Gas Co. v. Elwood (114 Ind. 332), 3, 304, 313, 897.
- Citizens' Gas Light Co. v. Wakefield (161 Mass. 432), 837.
- Citizens' Sav. Bank v. Owensboro (173 U. S. 636), 374.
- Citizens' Street Ry. v. Jones (34 Fed. Rep. 579), 894,

- Citizens' St. Ry Co. v. Memphis (53 Fed. 715), 316.
- Citizens' Water Co. v. Bridgeport Hydraulic Co. (55 Conn. 1), 308, 379.
- City Council v. Ashley P. Co. (33 S. C. 25), 462.
- City Council v. Dunn (1 McCord 333), 533, 534, 552, 726.
- City Council v. King (4 McCord 487), 471.
- City Council v. Truchelut (1 Nott & McCord 227), 547.
- City Imp. Co. v. Broderick (125 Cal. 139), 861.
- City Pub. Co. v. Jersey City (54 N. J. L. 437), 252.
- City Ry. Co. v. Citizens' St. Ry. Co. (166 U. S. 557), 902.
- City Sewerage U. Co. v. Davis (8 Phil. 625), 194.
- City & Suburban Ry. Co. v. Savannah (77 Ga. 731), 34, 312, 751.
- Claffin v. Hopkinton (4 Gray 502), 103.
- Clamp, ex parte (9 Ohio Dec.), 672, 575.
- Clapp v. Spokane (53 Fed. Rep.). 515, 817.
- Clapton v. Taylor (49 Mo. App. 117), 861.
- Clare v. State (5 Iowa 509), 504.
- Clarence v. Patrick (54 Mo. App. 462), 493, 596.
- Clark, In re (9 Wend. 212), 522. Clark's Case (5 Co. 64), 277.
- Clark and Tp. of Howard Re (10 Up. Can. Com. Pleas 576), 272.
- Clark v. Bynum (3 McCord L. 298).
- Clark v. Davenport (14 Iowa 494), 75, 186.
- Clark v. Denton (B. & A. 92), 108. Clark v. Elizabeth (61 N. J. L. 565),

168.

- Clark v. Holdridge (58 Barb. 61),
- Clark v. Janesville (10 Wis. 136), 249.
- Clarke v. Jennings (Cal. 1893, 32 Pac. Rep. 1049), 236, 846.
- Clark v. LeCrew (9 B. & C. 52), 108.

- Clark v. Le Gren (9 B. & C. 52), 292.
- Clark v. Lewis (35 Ill. 417), 275.
- Clark v. Lyon (68 N. Y. 609), 804. Clark v. Mobile (67 Ala. 217), 660.
- Clark v. New Brunswick (43 N. J. L. 175), 484.
- Clark v. People (12 Am. Dec. 178), 465.
- Clark v. Providence (16 R. I. 337), 94.
- Clark v. South Bend (85 Ind. 276), 99, 734, 741.
- Clark v. Titusville (184 U. S. 329), 632.
- Clark v. Tucker (2 Vent. 183), 273. Clark v. Washington (12 Wheat. 40), 128.
- Clark County v. Lawrence (63 Ill. 32). 105.
- Clarke v. Rochester (28 N. Y. 605),
- Clarke v. Rochester (14 How. Pr. 193), 140.
- Clarksburg Electric Light Co. v. Clarksburg (47 W. Va. 739), 72, 896, 901.
- Claser v. Cincinnati (31 Wkly. Law Bul.), 243, 637.
- Clason v. Milwaukee (30 Wis. 316), 297, 552.
- Clay, ex parte (98 Mo. 578), 574.
- Clay v. Mexico (92 Mo. App. 611), 6, 842.
- Clayton v. Chicago (44 Ill. 280), 610.
- Clayton v. Henderson (20 Ky. Law Rep. 87), 680.
- Clementine v. State (14 Mo. 112), 752.
- Clements v. Casper (4 Wyo. 494), 634.
- Cleveland v. Clements Bros. Const. Co. (67 Ohio St. 197), 778, 864.
- Cleveland v. Lenze (27 Ohio St. 383), 736.
- Cleveland v. Main (7 Ohio Dec. 124), 687.
- Cleveland City Ry. Co. v. Cleveland (94 Fed. Rep. 385), 378, 436,
- Cleveland C. C. & St. L. R. R. Co. v. Dunn (61 Ill. App. 227), 546.

- Cleveland, etc., R. R. Co. v. Harrington (131 Ind. 426), 289, 744.
- Clevenger v. Rushville (90 Ind. 258), 580, 791.
- Clifford v. Dam (81 N. Y. 52), 715. Cline v. Seattle (13 Wash. 444), 168.
- Clinton v. Cedar Rapids Ry. Co. (24 Iowa 455), 890.
- Clinton v. Henry County (115 Mo. 557), 824.
- Clinton v. Howard (42 Conn. 294), 717.
- Clinton v. Norwich (39 Conn. 376), 717.
- Clinton v. Phillips (58 III. 108), 359. Clinton v. Portland (26 Oreg. 410), 830, 839.
- Clinton v. Walliker (98 Iowa 655), 867.
- Clintonville v. Keeting (4 Denio 341), 645.
- Cloherty, In re (2 Wash. 137), 69, 462.
- Cloquet Lumber Co. In re (61 Minn. 233), 610.
- Coal Float v. Jeffersonville (112 Ind. 15), 82, 290.
- Coast Co. v. Spring Lake Borough (56 N. J. Eq. 615), 348, 806.
- Coast Line Ry. Co. v. Savannah (30 Fed. Rep. 646), 322, 378.
- Coates v. New York (7 Cow. 585), 352, 353, 475, 494, 697.
- Coble v. Boston (109 Mass. 438), 708.
- Cochran v. McCleary (22 Iowa 75), 155, 156, 158.
- Cochran v. Park Ridge (138 III. 295), 801, 852.
- Cochran v. U. S. (157 U. S. 286), 491.
- Cochrane v. Darcy (5 S. C. 125), 372.
- Cochrane v. Frostburg (81 Md. 54), 76, 731.
- Coe v. Errol (62 N. H. 303), 411. Coe v. Schultz (47 Barb. 64), 687,
- 699. Coffin v. Nantucket (5 Cush. 269), 145.
- Coffin v. Portland (43 Fed. Rep. 411), 187.
- Coghill v. State (37 Ind. 111), 327.

- Cohen v. Goldsboro (77 N. C. 2), 437.
- Cohen v. New York (113 N. Y. 532), 677, 716, 717.
- Cohen v. Wright (22 Cal. 293), 383. Cohens v. Virginia (6 Wheat. 264), 415.
- Coker v. Birge (10 Ga. 336), 703.
- Coker v. Birge (9 Ga. 425), 704.
- Coldwater v. Tucker (36 Mich. 474), 673, 801.
- Cole v. Hall (103 Ill. 30), 640.
- Cole v. Newburyport (129 Mass. 594), 678.
- Cole v. Skrainka (105 Mo. 303), 870. Cole v. Skrainka (37 Mo. App. 427), 110.
- Coles v. Williamsburg (10 Wend. 659), 166, 173, 659, 828.
- Coles County v. Allison (23 III. 437), 546.
- Coll v. Board (83 Mich. 367), 119.
- Collier v. Territory (2 Okla. 444), 525.
- Collins v. Chicago (175 III. 445), 645.
- Collins v. Hall (92 Ga. 411), 555, 771.
- Collins v. Hatch (18 Ohio 523), 23, 26, 76, 79, 731.
- Collins v. Holyoke (146 Mass. 298), 196, 808.
- Collins v. Kinnare (89 Ill. App. 236), 570.
- Collins v. Louisville (2 B. Mon. 134), 768.
- Collins v. Savannah (77 Ga. 745), 676.
- Collins v. State (88 Ala. 212), 525. Collins v. Waltham (151 Mass.
- Collins v. Waltham (151 Mass. 196), 799.
- Collins v. Welch (58 Iowa 72), 115. Collinsville v. Cole (78 111. 114), 643.
- Colon v. Lisk (153 N. Y. 188), 669.
 Collopy v. Cloherty (95 Ky. 330), 86.
- Colorado Springs v. Smith (19 Colo. 554), 714.
- Columbia v. Beasly (1 Humph. 232), 510, 630, 757.
- Columbia v. Harrison (2 Mill's Const. Rep. 213), 475, 534.

405.

81.

- Columbia v. Johnson (72 Mo. App. 232), 506.
- Columbia Bottom Levee Co. v. Meier (39 Mo. 53), 164, 166.
- Columbia Co. v. King (13 Fla. 451), 382.
- Columbus v. Arnold (30 Ga. 517), 481, 530, 555.
- Columbus v. Columbus St. R. R. Co. (45 Ohio St. 98), 899.
- Columbus v. Goetchius (7 Ga. 139), 472.
- Columbus v. Hartford Ins. Co. (25 Neb. 83), 661.
- Columbus v. Jaques (30 Ga. 506), 716, 762.
- Columbus v. Ogletree (96 Ga. 177), 601.
- Columbus Gaslight & Coke Co. v. Columbus (50 Ohio St. 65), 817.
- Combs v. Lippincott (35 N. J. L. 481), 737.
- Commercial Bank v. Chambers (8 S. & M. 9), 383.
- Comer v. Folsom (13 Minn. 219), 105.
- Comrs. v. King (13 Fla. 451), 145. Comrs. v. Silvers (22 Ind. 491), 12.
- Comrs. of Highways v. Willard (41 Mich. 627), 803.
- Comrs. of Louisburg v. Harris (7 Jones Law 281), 283.
- Comrs. of Lowndes County v. Hearne (59 Ala. 371), 213.
- Commissioners of Northern Liberties v. Northern Liberties Gas. Co. (12 Pa. St. 318), 296, 300.
- Com. v. Abbott (160 Mass. 282), 839, 853.
- Com. v. Abrahams (156 Mass. 57), 360, 770.
- Com. v. Alden (143 Mass. 113), 704.
- Com. v. Alger (7 Cush. 53), 664.
- Com. v. Allen (128 Mass. 308), 8, 9.Com. v. Angle (14 Pa. County Ct, Rep. 538), 158.
- Com. v. Barrett (108 Mass. 302), 491, 492.
- Com. v. Bean (Thacher Cr. Cas. 85), 488.
- Com. v. Bean (14 Gray 52), 506, 508, 731.
- Com. v. Bearce (132 Mass. 542), 664.

- Com. v. Beatty (1 Watts, 382), 390.
 Com. v. Bennett (108 Mass. 27), 648.
- Com. v. Borden (61 Pa. St. 272), 480.
- Com. v. Brooks (109 Mass. 355), 47, 360, 763, 766.
- Com. v. Burke (114 Mass. 261), 540. Com. v. Calhane (154 Mass. 115),
- Com. v. Carter (132 Mass. 12), 768.
- Com. v. Carey (12 Cush. 246), 483. Com. v. Chase (6 Cush. 248), 733.
- Com. v. Chittenden (2 Pa. Dist.
- 804), 585. Com. v. Churchill (2 Met. 118), 332.
- Com. v. Comrs. (6 Pick. 501), 383.
- Com. v. Cooley (10 Pick. 37), 327, 332.
- Com. v. Crogan (155 Pa. St. 448), 22.
- Com. v. Crowell (156 Mass. 215), 404.
- Com. v. Curtis (9 Allen 266), 505, 536, 554, 732.
- Com. v. Cutter (156 Mass. 52), 29, 297, 491, 492, 505, 554, 706.
- Com. v. Cutter (Thatcher Cr. Cas. 137), 506.
- Com. v. Dailey (12 Cush. 80), 527.
- Com. v. Dava (2 Met. 329), 768.
- Com. v. Davis (11 Pick. 432), 488.
- Com. v. Davis (140 Mass. 485), 43, 47, 50, 200, 237, 245, 250, 360, 485, 770.
- Com. v. Davis (162 Mass. 510), 360.
- Com. v. Dean (110 Mass. 357), 648. Com. v. Dean (21 Pick. 334), 501.
- Com. v. Dejardin (126 Mass. 46),
- Com. v. Dennison (24 How. 66), 522.
- Com. v. Dow (10 Met. 382), 442, 451, 455, 474, 738.
- Com. v. Dowling (114 Mass. 259), 540.
- Com. v. Drew (3 Cush. 279), 540.
- Com. v. Eastern Ry. Co. (103 Mass. 254), 317.
- Com. v. Elliott (121 Mass. 367), 299.
- Com. v. Ellis (158 Mass. 555), 299, 714.
- Com. v. Ellis (11 Mass. 462), 570.

- Com. v. Emmons (98 Mass. 6), 539.Com. v. Emsley (5 Pa. Co. Ct. Rep. 476), 553.
- Com. v. Essex Co. (13 Gray 239), 317, 322.
- Com. v. Evans (132 Mass. 11), 767.
 Com. v. Fahey (5 Cush. 408), 222, 488, 695.
- Com. v. Farrell (8 Gray 463), 530. Com. v. Farren (9 Allen 489), 767.
- Com. v. Fenton (139 Mass. 195), 506, 552, 713.
- Com. v. Fitler (136 Pa. St. 129), 242, 243, 434.
- Com. v. Forrest (170 Pa. St. 40), 43, 727, 732.
- Com. v. Gingrich (21 Pa. Super Ct. 286), 103.
- Com. v. Gage (114 Mass. 328), 714.
- Com. v. Gannett (1 Allen 7), 540, Com. v. Gay (5 Pick, 44), 493.
- Com. v. Getchell (16 Pick. 452), 331.
- Com. v. Gillam (8 Serg. & R. 50), 341, 769.
- Com. v. Goodnow (117 Mass. 114), 24, 30, 715, 787, 793.
- Com. v. Goodrich (13 Allen 545), 312, 695.
- Com. v. Hamilton Mfg. Co. (120 Mass. 383), 779.
- Com. v. Hargest (7 Pa. Co. Ct. 333), 174.
- Com. v. Harmel (166 Pa. St. 89), 397, 404.
- Com. v. Hart (11 Cush. 130), 498.
- Com. v. Hastings (16 Pa. Co. Ct. Rep. 425), 143.
- Com. v. Hawkes (123 Mass. 525), 472.
- Com. v. Haynes (107 Mass. 194), 489.
- Com. v. Hill (12 Pa. Co. Ct. Rep. 559), 558.
- Com. v. Hillenbrand (96 Ky. 407), 196.
- Com. v. Howard (149 Pa. 302), 145.
- Com. v. Hubley (172 Mass. 58), 773. Com. v. Hunt (4 Met. 111), 524.
- Com. v. Hutz (Brightly 75), 704.
- Com. v. Ingraham (3 Bush. 106),
- Com. v. Ipswich (2 Pick. 70), 149, 164.

- Com. v. Kempsmith (13 Pa. County Ct. Rep. 667), 157.
- Com. v. Kepner (10 Phila. 510), 158.
- Com. v. Kepner (30 Leg. Int. 312), 241.
- Com. v. Kidder (107 Mass. 188), 697, 704.
- Com. v. Kimball (105 Mass. 465), 540.
- Com. v. Kimball (7 Met. 304), 543.
- Com. v. Kinsley (133, Mass. 578), 638.
- Com. v. LaBar (7 North C. C. R. 85), 226.
- Com. v. Lagorio (141 Mass. 81), 237, 508, 552, 567, 713.
- Com. v. Lancaster (5 Watts. 152), 171, 183.
- Com. v. Leonard (140 Mass. 473), 772.
- Com. v. Louisville (5 B. Mon. 293), 338.
- Com. v. Lynch (6 Pa. Co. Ct. Rep. 536), 512.
- Com. v. McCafferty (45 Mass. 384), 47, 249, 301, 730.
- Com. v. McClung (3 Clark), 413, 733.
- Com. v. McHale (97 Pa. St. 83), 522.
- Com. v. Mann (4 Gray 213), 540.
- Com. v. Markham (7 Bush. 486), 640.
- Com. v. Marshall (11 Pick. 350), 332.
- Com. v. Marshall (69 Pa. St. 328), . 246, 265.
- Com. v. Matthews (122 Mass. 60), 251.
- Com. v. Maxwell (2 Pick. 138), 497.
 Com. v. Miller (139 Pa. St. 77), 684, 697.
- Com. v. Mitchell (82 Pa. St. 343), 862.
- Com. v. Milton (12 B. Mon. 212), 655, 671.
- Com. v. Moir (199 Pa. St. 534, 367).
- Com. v. Morrisey (157 Mass. 471), 43, 758.
- Com. v. Mott (21 Pick. 492), 331.
- Com. v. Mulhall (162 Mass. 496), 299,

- Com. v. Newhall (164 Mass. 338), 404.
- Com. v. Nichols (10 Met. 259), 541.Com. v. Nightingale (Thatcher Crim. Cas, 251), 491.
- Com. v. N. & L. R. Corp (2 Gray 54), 887.
- Com. v. Odenweier (156 Mass. 234), 495.
- Com. v. Omensetter (9 Phila, 489), 143.
- Com. v. Page (155 Mass. 227), 642. Com. v. Painter (10 Pa. St. 214),
- 20m. v. Painter (10 Pa. St. 214) 49.
- Com. v. Parks (155 Mass. 531), 742.
 Com. v. Passmore (1 Serg. & R. 217), 717.
- Com. v. Patch (97 Mass. 221), 44, 298, 699, 704.
- Com. v. Perry (155 Mass. 117), 778.
- Com. v. Perry (139 Mass, 198), 704. Com. v. Phillips (16 Pick, 211), 502.
- Com. v. Pindar (11 Met. 539), 467.
- Com. v. Pittsburg (183 Pa. St. 202), 103.
- Com. v. Pittsburgh (14 Pa. St. 177), 9, 195.
- Com. v. Plaisted (148 Mass. 375), 135, 143, 297, 362, 615, 628, 629, 671.
- Com. v. Putnam (4 Gray 16), 541.
- Com. v. Randolph (146 Pa. St. 83), 522.
- Com. v. Raymond (97 Mich. 567), 539.
- Com. v. Reed (1 Gray 472), 471.
- Com, v. Reed (34 Pa. St. 275), 707.
- Com. v. Reese (16 Ky. Law Rep. 493), 367.
- Com. v. Reid (175 Mass. 325), 506, 508, 763.
- Com. v. Rice (9 Metc. 253), 505.
- Com. v. Ringold (182 Mass. 308), 653.
- Com. v. Roark (8 Cush. 210), 467.
- Com. v. Roberts (155 Mass. 281). 707.
- Com. v. Robertson (5 Cush. 438), 298, 428, 448, 690.
- Com. v. Roxbury (9 Gray 451), 113. Com. v. Rowe (141 Mass. 79), 506,
- Com. v. Roy (140 Mass. 432), 25, 30, 726.

- Com. v. Rumford Chemical Works (16 Gray 231), 697.
- Com. v. Rush (14 Pa. St. 186), 719. Com. v. Ryan (5 Mass, 90), 471.
- Com. v. Silfer (25 Pa. St. 23), 366.
- Com. v. Snyder (182 Pa. St. 630), 403.
- Com. v. Sotkley (12 Phila. 316), 626.
- Com. v. Steffee (7 Bush. 161), 301, 733.
- Com. v. Stevens (153 Mass. 421), 541.
- Com. v. Stodder (2 Cush. 562), 71, 83, 297, 300, 302, 615, 634, 726.
- Com. v. Tewksbury (11 Met. 55), 735.
- Com. v. Thompson (12 Met. 231), 689.
- Com. v. Thompson (110 Pa. St. 297), 466.
- Com. v. Thurlow (24 Pick. 374), 542.
- Com. v. Torrey (13 Pa. Co. Ct. 362), 585.
- Com. v. Tucker (2 Pick. 44), 799.
- Com. v. Turner (1 Cush. 493), 2 231, 784.
- Com. v. Tryon (99 Mass. 442), 540.
 Com. v. Van Sickle (Brightly 69),
 704.
- Com. v. Vermont and Mass. R. Corp. (4 Gray 22), 887.
- Com. v. Vrooman (164 Pa. St. 306), 669.
- Com. v. Wachendorf (141 Mass. 270), 541.
- Com. v. Waite (11 Allen 264), 539, 767.
- Com. ex rel v. Warwick (185 Pa. St. 623), 723.
- Com. v. Watson (97 Mass. 562), 458.
- Com. v. Webb (6 Rand Va. 726), 707.
- Com. v. Weiss (139 Pa. St. 247), 767.
- Com. v. Weller (14 Bush 218), 49.
 Com. v. Wentworth (118 Mass. 441), 539.
- Com. v. Wentworth (Brightly 318), 718.
- Com. v. Wetherbee (153 Mass. 159), 767.

- Com. v. Whitney (108 Mass. 5), 525.Com. v. Wilkins (121 Mass. 356), 284, 286.
- Com. v. Wilkinson (16 Pick. 175), 720.
- Com. v. Williams (11 Pa. St. 61), 49.
- Com. v. Worcester (3 Pick. 462), 32, 50, 296, 471, 486, 493, 496, 529, 532, 536, 552, 726, 744.
- Com. v. Young (135 Mass. 526), 704.
- Com. v. Young Men's Christian Association (169 Pa. St. 24), 93.
- Compagnie Francaise, etc. v. Louisiana State Board of Health (186 U. Ş. 380), 421, 422.
- Compton v. Van Volkenburg (34 N. J. L. 134), 12.
- Compton v. Waco Bridge Co. (62 Tex. 715), 95, 719.
- Conboy v. Iowa City (2 Iowa 90), 161, 245, 248, 562, 583.
- Concord v. Boscawen (17 N. H. 465), 75.
- Concordia v. Hagaman (1 Kan. App. 35), 172.
- Concordia Cemetery Assn. v. Minnesota & N. W. R. R. Co. (121 Ill. 199), 695.
- Conde v. Schnectady (164 N. Y. 258), 821.
- Conery v. New Orleans Waterworks Co. (39 La. Ann. 770), 428.
- Conger v. Comrs. (Idaho 1896), (48 Pac. Rep. 1064), 145.
- Congregational Society of Bethany v. Sperry (10 Conn. 200), 148, 150.
- Conley v. Sup'rs Calhoun Co. (2 W. Va. 416), 327, 330.
- Conn. Mutual Life Ins. Co. v. Albert (39 Mo. 181), 445.
- Conn. Mutual Life Ins. Co. v. Smith (117 Mo. 261), 89.
- Connolly v. Beverly (151 Mass. 437), 107.
- Connolly v. Knickerbocker Ice Co. (114 N. Y. 104), 605.
- Connelly v. State (60 Ala. 89), 527.Connor v. C. R. I. & P. R. R. (59 Mo. 285), 870,

- Connor v. Mayor, etc., of N. Y. (1 Selden 285), 366.
- Connor v. Paris (87 Tex. 32), 223, 840.
- Connors v. Gorey (32 Wis. 518), 463, 464, 469.
- Connersville v. Merrill (14 Ind. App. 303), 588, 856.
- Consolidated Traction Co. v. Elizabeth (58 N. J. L. 619), 297.
- Consumers' Gas, etc. Co. v. Congress Spring Co. (61 Hun. 133), 427.
- Contiental Construction Co. v. Altoona (92 Fed. Rep. 822), 128.
- Conway v. Rochester (157 N. Y. 33), 898.
- Conway v. Taylor (66 U. S. 603), 306, 414.
- Conwell v. Emrie (2 Ind. 35), 667. Cook v. Johnson (58 Mich. 437), 54.
- Cook v. Memphis (94 Tenn. 692), 654.
- Cook v. Pennsylvania (97 U. S. 566), 397, 400.
- Cook v. Portland (20 Oregon 580), 823.
- Cook v. Slocum (27 Minn. 509), 839.
- Cook County v. McCrea (93 Ill. 236), 71, 76.
- Cook & Rathborne Co. v. Sanitary Dist. (177 Ill. 599), 328.
- Cooley v. Port Wardens (12 How. 299), 39.
- Coolidge v. Brookline (114 Mass. 592), 75, 106.
- Coombs, ex parte (38 Tex. Crim. Rep. 648), 462, 466.
- Coombs v. Mac Donald (43 Neb. 632), 6, 705.
- Cooney v. Southern Elec. Ry. Co. (80 Mo. App. 226), 749.
- Coonley v. Albany (132 N. Y. 145), 475.
- Coonley v. Albany (57 Hun. 327), 676.
- Cooper, ex parte (3 Tex. App. 489), 640, 733.
- Cooper v. Alden (Har. 72), 93. Cooper v. Detroit (42 Mich. 584), 762.

- Cooper v. District of Columbia (11 Dis. of Col. 250), 451, 635.
- Cooper v. People (41 Mich. 403), 486, 487.
- Coopers v. San Jose (55 Cal. 599), 95.
- Coosa River Steamboat Co. v. Barclay (30 Ala. 120), 383.
- Copcutt v. Yonkers (82 Hun. 178), 851.
- Copeland v. St. Joseph (126 Mo. 417), 333.
- Copenhaver, In re (54 Fed. Rep. 660), 385.
- Corbett v. Duncan (63 Miss. 84), 570.
- Corby v. C. R. I. & P. Ry. Co. (156 Mo. 457), 888.
- Cordell v. State (22 Ind. 1), 335.
- Cordes v. Miller (39 Mich. 581), 737.
- Corn v. Cameron (19 Mo. App. 573), 643.
- Cornell v. New Bedford (138 Mass. 588), 845.
- Cornell v. Guilford (1 Denio 510),
- Cornell v. People (107 Ill. 372), 128.
- Cornish v. Pease (19 Me. 184), 151. Correll v. B. C. R. & M. Ry. Co. (38
- Iowa 120), 601. Corrigan v. Gage (68 Mo. 541), 118,
- 291, 425, 814, 858. Corry v. Campbell (25 Ohio St. 134), 840.
- Corry v. Gaynor (22 Ohio St. 584), 830.
- Corry v. Corry Chair Co. (18 Pa. Super. Ct. 271), 205, 225.
- Corsicana v. Kerr (75 Tex. 207), 454.
- Corson v. Maryland (120 U. S. 502), 401.
- Cortis v. Kent Waterworks (7 Barn & C. 314), 164.
- Corvallis v. Carlile (10 Oreg. 139), 72, 75, 83, 759, 784.
- Cosgrove v. Augusta (103 Ga. 835), 354, 671.
- Costello v. State (108 Ala. 45), 718.
- Cotter v. Doty (5 Ohio 393), 274, 346, 741.

- Cotting v. K. C. Stock Yards (183 U. S. 79), 910.
- Cotton v. Davis (1 Strange 53), 164.
- Cottonwood Falls v. Smith (36 Kan, 401), 770, 771.
- Couch v. Steel (3 El & B. 402), 56.
- Coulterville v. Gillen (72 Ill. 599), 568.
- County Court v. Griswold (58 Mo. 175), 450.
- Courter v. Newark B'rd of Health (54 N. J. L. 325), 143.
- Covington v. Bishop (10 Ky. Law Rep. 939), 811.
- Covington v. Boyle (6 Bush. 204),
- Covington v. Casey (3 Bush. 698), 845.
- Covington v. Dressman (6 Bush. 210), 828.
- Covington v. East St. Louis (78 Ill. 548), 31, 36, 66, 311.
- Covington v. Ludlow (1 Metc. 295), 202, 209, 214, 590.
- Covington v. Nelson (35 Ind. 532), 830.
- Covington v. Woods (98 Ky. 344), 644.
- Covington v. Woods (3 Ky. Law Rep. 85), 235.
- Covington Gas Light Co. v. Covington (84 Ky. 94), 610.
- Covington & Lexington Turnpike Road Co. v. Sanford (164 U. S. 578), 910.
- Covington St. Ry. Co. v. Covington (72 Ky. 127). 882, 894.
- Cowell v. Colorado Springs Co. (3 Colo. 82), 547.
- Cowein v. Hames (11 John. 76), 471.
- Cowen v. West Troy (43 Barb. 48), 25, 811.
- Cowen v. Wilderwood (60 N. J. L. 365), 254.
- Cowgill v. Long (15 Ill. 202), 266, 267.
- Cowley v. Rushville (60 Ind. 327), 315, 316.
- Cowley v. Spokane (99 Fed. Rep. 840), 820.

- Cox v. Marlatt (36 N. J. L. 389), 389.
- Cox v. Moss (53 Mo. 432), 528.
- Cox v. St. Louis (11 Mo. 431), 583, 591.
- Coy v. Detroit Y. & A. A. Ry. (125 Mich. 616), 909, 910.
- Craddock v. State (18 Tex. Crim. App. 567), 784, 791.
- Craig v. Burnett (32 Ala. 728), 559, 648.
- Craig v. First Presbyterian Church (88 Pa. St. 42), 165, 695, 697.
- Cram v. Bangor House (12 Me. 354), 164.
- Cram v. Chicago (138 III. 506), 813.
- Cramer v. Burlington (42 Iowa 315), 472.
- Cramer v. Charleston (176 III. 507), 850, 857.
- Crampton v. Zabriskie (101 U. S. 603), 431.
- Crandell v. Nevada (6 Wall. 35), 402, 408, 410.
- Crane v. Siloam Springs (67 Ark. 30), 248.
- Creasnaw v. Roxbury (7 Gray 374), 114.
- Cranston v. Augusta (61 Ga. 572),
- 571, 670. Craw v. Tolono (96 III. 255), 621.
- Crawford v. Hurd R. Co. (57 Minn. 187), 467.
- Crawford v. Topeka (51 Kan. 756), 295, 726.
- Crawfordsville v. Braden (130 Ind. 149), 6, 11, 101, 670, 682, 775, 798. Crebs v. Lebanon (98 Fed. Rep.
- 549), 6, 198, 244, 246. Creighton v. Manson (27 Cal. 613),
- 237, 241, 846. Creighton v. Toledo (18 Ohio St.
- 447), 386. Crepp v. Durden (Cowp. 640), 287.
- Crescent City L. S. & S. H. Co. v. Jefferson Police Jury (32 La. Ann. 1192), 260.
- Creston Waterworks Co. v. Creston (101 Iowa 687), 907.
- Cribbin, In re and City of Toronto (21 Ontario Rep. 325), 298.
- Crockett v. Boston (5 Cush. 182), 864.

- Crocker v. Collins (37 S. C. 327), 93.
- Crocker v. Knickerbocker Ice Co. (92 N. Y. 652), 726.
- Crofut v. Brooklyn Ferry Co. (36 Barb. 201), 469.
- Crofut v. Danbury (65 Conn. 294), 114, 264, 738.
- Crome v. Steeper (46 Up. Can Rep. 87), 29.
- Crommett v. Pearson (18 Me. 344), 197, 209.
- Crone v. Mallinckrodt (9 Mo. App. 316), 588, 851.
- Cronin v. People (82 N. Y. 318), 224, 478, 490, 700.
- Crook v. People (106 Ill. 237), 346.
 Croome, In re and City of Brantford (6 Ontario Rep. 188), 222, 290, 443.
- Crosby v. Montgomery (108 Ala. 498), 907.
- Crosby v. Warren (1 Rush. Law 385), 34, 276, 688, 689, 733.
- Cross v. Morristown (18 N. J. Eq. 305), 7, 803, 841.
- Cross v. Morristown (33 N. J. L. 57), 83.
- Cross v. St. L. K. & N. W. Ry. (77 Mo. 318), 891.
- Crowell v. Hopkinton (45 N. H. 9), 104, 106.
- Crowley v. B. C. R. & N. Ry Co. (65 Iowa 658), 40.
- Crowley v. Rucker (107 La. 213), 245.
- Crowder v. Tinkler (19 Ves. Jr. 617), 741.
- Croy v. Obion County (104 Tenn. 525), 397.
- Cruickshank v. Chicago (181 III. 415), 850.
- Crutcher v. Kentucky (141 U. S. 47), 395, 419.
- Crutchfield v. Warrensburg (30 Mo. App. 456), 5, 6, 132, 237.
- Cudon v. Eastwick (Salk. 192), 54, 192, 304.
- Cullen, In re (119 N. Y. 628), 827. Cullen, In re (53 Hun. 534), 868.
- Cullinan v. New Orleans (28 La. Ann. 102), 633.
- Cullman v. Arndt (125 Ala. 581), 403.

Culver v. Third National Bank of Chicago (64 Ill. 528), 328.

Cumberland Co. v. Poor Directors (7 Pa. Super. Ct. 614), 103.

Cuming v. Grand Rapids (46 Mich, 150), 837.

Cumming v. Savannah (R. M. Chart. 26), 402.

Cummings v. St. Louis (90 Mo. 259), 91, 92, 94, 888.

Cunningham v. Berry (17 Oreg. 622), 501, 574.

Cunningham v. Griffin (107 Ga. 690), 789.

Cunningham v. Peoria (157 III. 499), 813, 855, 870.

Curnen v. Mayor, etc. (79 N. Y. 511), 194.

Curry v. Elvins Co. (32 N. J. L. 362), 225.

Curry v. Mount Sterling (15 Ill. 320), 812.

Curry v. State (Tex. Crim. App. 1893, 24 S. W. Rep. 516), 578.

Curtis v. Gowan (34 III. App. 516), 191, 531.

Cushing v. Boston (128 Mass. 330), 715.

Cushing v. Buffalo Board of Health (13 N. Y. St. Rep. 783), 143, 705.

Cutcomp v. Utt (60 Iowa 156), 172, 180, 189.

Cutler v. Board of Supervisors (56 Miss. 115), 267.

Cutler v. Russellville (40 Ark. 105), 187, 205.

Cutliff v. Albany (60 Ga. 597), 630. Czarniecki v. Ballman (Pa., 10 Cent. Rep. 96), 698.

D.

Dabbs v. State (39 Ark. 353), 753. Daffinger v. Pittsburgh, etc. T. Co. (31 Pittsb. Legal J. 37), 187.

Daggett v. Colgan (92 Cal. 53), 609.

Daggett v. State (4 Conn. 60), 737. Dahlstrom v. St. L. I. M. & S. Ry. Co. (108 Mo. 525), 601, 745, 748.

Dailey v. New Haven (60 Conn. 314), 73, 236, 261.

Daily v. Swope (47 Miss. 367), 823. Dallas v. Atkins (Tex. Civ. App. 1895, 32 S. N. Rep. 780), 837.

Dallas v. Ellison (10 Tex. Civ. App. 28), 837.

Dalton, In re (61 Kan. 257), 779. Dalrymple v. Milwaukee (53 Wis. 178), 607.

Daives v. Hightston (45 N. J. L. L. 127), 249.

Daly v. Georgia Southern & F. I. Co. (80 Ga. 793), 718, 895.

Damon v. Granby (2 Pick. 345), 149, 164, 194, 195, 197.

Dana, In re (7 Ben. 1), 519, 526. Dancer v. Mannington (50 W. V. 322), 137.

Dane v. Mobile (36 Ala. 304), 537.

Danforth v. Hinsdale (177 Ill. 579), 857.

Daniel v. Richmond (78 Ky. 542), 631.

Daniel v. State (55 Ga. 222), 569. Daniels v. Clegg (28 Mich. 32), 726. Daniels v. New Orleans (26 La. Ann. 1), 830.

Danner v. State (89 Md. 220), 512, 523.

Danville v. Danville Water Co. (180 III. 235), 906, 909.

Danville v. Danville Water Co. (178 III. 299), 905.

Danville v. McAdams (153 III. 216), 851, 871.

Danville v. Peters (8 Luz. L. Reg. 272), 766.

Danville v. Shelton (76 Va. 325), 72, 219, 233, 633.

Danville v. Weaver (17 Pa. Co. Ct. R. 17, 4 Pa. Dist. R. 768), 632. Danville H. & W. R. Co. v. Com. (73 Pa. St. 29), 882.

Danville Water Co. v. Danville (180 U. S. 619), 72, 322, 324, 381, 445, 905.

Daquin v. Coiron (3 La. 387), 381.

Darcantel v. People's Slaughter House & R. Co. (44 La. Ann. 632), 237, 699.

Darden v. State (74 Ga. 842), 467,

Darling v. St. Paul (19 Minn. 389), 136, 625.

757.

- Darlington v. Com. (41 Pa. St. 68), 211, 245, 600, 846.
- Darlington v. Ward (48 S. C. 570), 290, 704.
- Darrach v. Kenney (12 Pa. County Ct. Rep. 391), 156.
- Darst v. Griffin (31 Neb. 668), 800. Darst v. People (51 Ill. 286), 275,
- Dart v. Bagley (110 Mo: 42), 245, 336, 445.
- Dartmouth v. Commissioners (153 Mass. 12), 165.
- Dartmouth College v. Woodward (4 Wheat 518), 53, 73, 317, 321, 369, 372.
- Dausch v. Crane (109 Mo. 330), 369. Davenport v. Bird (34 Iowa 524), 487.
- Davenport v. Kelley (7 Iowa 102), 310, 763.
- Davenport v. Kleinschmidt (6 Mont. 502), 71, 304, 308, 431.
- Davenport v. Richmond (81 Va. 636), 352, 741.
- Davenport, etc. Co. v. Davenport (13 Iowa 229), 352.
- Davidson v. Chicago (178 Ill. 582), 859.
- Davidson v. New Orleans (96 U. S. 97), 354, 444.
- Davidson v. Wight (16 Dist. of Columbia App. 371), 820.
- Daviess v. Fairbairn (3 How. 636), 339.
- Davies v. Mann (10 M. & W. 545), 604.
- Davies v. Morgan (1 Cromp. & J. 587), 292.
- Davies v. Los Angeles (86 Cal. 37), 69, 342.
- Davies v. Saginaw Co. (89 Mich. 295), 881.
- Davies v. Saginaw (87 Mich. 439), 183, 839.
- Davis, ex parte (115 Cal. 445), 583. Davis v. Anita (73 Iowa 325), 302, 769.
- Davis v. Brace (82 III. 542), 610.
- Davis v. Caldwell (28 La. Ann. 860), 144.
- Davis v. Davis (40 W. Va. 464), 169, 698.

- Davis v. Fasig (128 Ind. 271), 438. Davis v. Jackson (61 Mich. 530), 198, 209, 799.
- Davis v. Litchfield (155 Ill. 384), 319, 840, 857.
- Davis v. Litchfield (145 III. 313), 812.
- Davis v. Los Angeles (86 Cal. 37), 806.
- Davis v. Lynchburg (84 Va. 861), 829.
- Davis v. Massachusetts (167 U. S. 43), 360.
- Davis v Mayor, etc. (14 N. Y. 506), 261.
- Davis v. Montgomery (51 Ala. 139), 677.
- Davis v. New York (14 N. Y. 506), 716, 880, 887, 901.
- Davis v. N. Y. (1 Duer 451), 259.
- Davis v. Read (65 N. Y. 566), 134.
- Davis v. Rome (89 Ga. 724), 567. Davis v. Smith (130 Mass. 113), 873.
- Davis v. State (7 Md. 151), 10, 11. Davis v. State (2 Tex. App. 425), 753.
- Davis & Co. v. Macon (64 Ga. 128), 631.
- Davison v. Otis (24 Mich. 23), 571. Davock v. Moore (105 Mich. 120). 694.
- Dawes v. N. R. Ins. Co. (7 Owen 462), 166.
- Day v. Citizens' Ry. Co. (81 Mo. App. 471), 601, 748.
- Day v. Clinton (6 Ill. App. 476), 334, 534.
- Day v. Green (4 Cush. 433), 371,
- 627, 714, 719. Dayton v. Quigley (29 N. J. Eq.
- 77), 293. Deady v. Townsend (57 Cal. 298), 851.
- Deam v. Paterson (47 N. J. L. 15), 829.
- Dean v. Borchsenius (30 Wis. 236), 864.
- Dean v. Charlton (23 Wis. 590), 864.
- Dean v. Chicago General Ry. Co. (64 Ill. App. 165); 909.
- Dean v. Davis (51 Cal. 406), 54. Dean v. Madison (9 Wis. 402), 831.

- Dean v. State (63 Ala. 153), 570, 572.
- Deane, ex parte (2 Cranch. C. C. 125), 280, 672.
- Deane v. Todd (22 Mo. 90), 119.
- Dearden v. Townsend (L. R. 1. Q. B. 10), 442.
- De Ben v. Gerard (4 La. Ann. 30), 313.
- Decatur v. Vermillion (77 Ill. 315), 10.
- Decatur v. Wilson (96 Ga. 251), 838.
- Decatur G. L. Co. v. Decatur (24 Ill. App. 544), 305.
- Decatur Gas Light and Coke Co. v. Decatur (120 Ill. 67), 427.
- Decker v. Gammon (44 Me. 322), 602.
- Decker v. McSorley (111 Wis. 91), 583, 602.
- Decorah v. Bullis (25 Iowa 12), 153.
- Decorah v. Dunstan Bros. (38 Iowa 96), 315, 327, 626.
- Decorah v. Gillis (10 Iowa 234), 545.
- Deehan v. Johnson (141 Mass. 23), 637.
- Deems v. Baltimore (80 Md. 164), 435, 666, 668, 766.
- De Ginther v. New Jersey Home, etc. (58 N. J. L. 354), 736.
- Deischel v. Maine (81 Wis. 553), 145.
- Deitz v. Central (1 Colo. 323), 285, 463, 471, 492, 530, 534, 549, 554, 555, 567, 565, 568.
- Delamater v. Chicago (158 Ill. 575), 847, 849, 856, 857.
- Delaney, ex parte (43 Cal. 478), 298.
- Delaney v. Kansas City Police Court (167 Mo. 667), 337, 476, 508, 509, 512, 517, 519, 523, 528, 563, 577.
- DeLano v. Doyle (120 Mich. 258), 326.
- Delany v. Washington (2 Cranch. C. C. 459), 485.
- Delaware & A. Tel. Co. v. Camden County (67 N. J. L. 91), 225.

- Delaware & Atl. Tel. & Tel. Co. v. Pensauken Tp. (67 N. J. L. 531), 230, 232.
- Delaware Co. Comrs. v. Sackrider (35 N. Y. 154), 145.
- Delaware & H. Canal Co., In re (60 Hun. 204), 831, 833, 869.
- Delcambre v. Clere (34 La. Ann. 1050), 612.
- Delione v. Long Branch (55 N. J. L. 108), 737.
- De Loge v. New York Central, etc. R. R. Co. (157 N. Y. 688), 247.
- DeLoge v. N. Y. Central & H. R. Ry. Co. (92 Hun. 149), 595.
- Delphi v. Evans (36 Ind. 90), 12, 124, 186, 203.
- Demarest v. New Barbadoes (40 N. J. L. 604), 108.
- Demarest v. Wickham (63 N. Y. 320), 154, 155.
- Dement v. Rokker (126 Ill. 174), 861.
- Dempsey v. Burlington (66 Iowa 687), 227.
- Denison & Pac. Sub. Ry. Co. v. James (20 Tex. Civ. App. 358), 834.
- Dennehy v. Chicago (120 III. 627), 615, 647.
- Denning v. Roome (6 Wend. 651), 207.
- Denning v. Yount (62 Kan. 217), 334.
- Denning v. Yount (9 Kan. App. 708), 442.
- Dennison v. Kansas City (95 Mo. 416), 424, 430, 435, 830.
- Dent v. State (42 Ala. 514), 531.
- Dent v. West Virginia (129 U. S. 114), 405.
- Denton v. Jackson (2 Johns. Ch. 320), 89, 673.
- Densmore v. Erie City (7 Pa. Dist. Rep. 355), 645.
- Denver v. Beede (25 Colo. 172), 437.
- Denver v. Knowles (17 Colo. 204), 823.
- Denver v. Mullen (7 Colo. 345). 686, 689.

- Denver Board of Public Works v. Hayden (13 Colo. App. 36), 873.
- Denver City R. R. Co. v. Denver (21 Colo. 350), 269.
- Denver & R. G. Ry. Co. v. Olsen (4 Colo. 239), 442.
- Denver & S. Co. v. Denver City R. Co. (2 Colo. 673), 880, 881, 886.
- DePuy v. Wabash (133 Ind. 336), 832.
- Derby v. Modesto (104 Cal. 515), 234, 248.
- Derby & Co. v. Modesto (104 Cal. 513), 251.
- Desche v. Gies (56 Md. 135), 528. Des Moines v. Casady (21 Iowa 570), 594.
- Des Moines v. C. R. I. & P. R. Co. (41 Iowa 569), 318.
- Des Moines v. Des Moines Waterworks Co. (95 Iowa 348), 907.
- Des Moines v. Gilchrist (67 Iowa 210), 735, 736.
- Des Moines v. Hillis (55 Iowa 643), 224, 314.
- Des Moines v. Keller (116 Iowa 648), 228, 312, 353, 728.
- Des Moines City Ry. Co. v. Des Moines (90 Iowa 770), 817.
- Des Moines Gas Co. v. Des Moines (44 Iowa 505), 19, 117, 261, 262, 343, 379, 670, 875, 880.
- Des Moines St. R. R. Co. v. Des Moines B. G. St. Ry Co. (73 Iowa 513), 305.
- Desmond v. Jefferson (19 Fed. Rep. 483), 100, 111.
- Des Plaines v. Poyer (123 III. 348), 687, 689.
- Despatch Line v. Bellamy Mfg. Co. (12 N. H. 205), 165.
- De Soto v. Brown (44 Mo. App. 148), 787, 793.
- De Soto v. Merciel (53 Mo. App. 57), 565.
- De Soto, ex rel v. Showman (1903 Mo. App. 73 S. W. Rep. 257), 835, 837.
- Deters v. Renick (37 Mo. 597), 329. Detroit v. Beckman (34 Mich. 125),
- Detroit v. Beecher (75 Mich. 454), 813.

- Detroit v. Blackeby (21 Mich. 84) 675.
- Detroit v. Detroit City Ry. (56 Fed. Rep. 867), 72, 378, 912.
- Detroit v. Ft. Wayne & Belle Isle Ry. Co. (95 Mich. 456), 17, 270, 313, 449, 897, 912.
- Detroit v. Hosmer Wayne Circuit Judge (79 Mich. 384), 260, 798.
- Detroit v. Parker (181 U. S. 399), 821.
- Detroit v. Putnam (45 Mich. 263), 873.
- Detroit v. Moran (46 Mich. 213), 239, 240.
- Detroit Citizens' St. Ry. Co. v. Detroit Ry. Co. (171 U. S. 48), 881.
- Detroit Čitizens' Street Ry. Co. v. Detroit (64 Fed. Rep. 628), 882, 912.
- Detroit, etc. Ry. Co. v. Detroit (110 Mich. 384), 72, 305.
- Detroit St. Ry. Co. v. Mills (85 Mich. 634), 915.
- DeVignier v. New Orleans (16 Fed. Rep. 11), 375.
- Devlin v. Gallagher (6 Daly 494), 57.
- Devoy v. New York (36 N. Y. 449), 333.
- Dew v. Judges, etc. (3 Hen. & M. 1), 67.
- Dewey v. Des Moines (101 Iowa 416), 822,
- DeWitt v. Duncan (46 Cal. 342), 802.
- DeWitt v. San Francisco (2 Cal. 289), 88.
- Dey v. Lee (4 Jones L. 238), 193, 194.
- Dey v. Jersey City (19 N. J. Eq. 412), 6, 145, 241.
- Dexter & L. Plank Ry. Co. v. Allen (16 Barb. 15), 327, 339.
- Diamond State Iron Co. v. Giles (7 Houst. 453), 737.
- Dickson v. Mo. Pac. Ry. Co. (104 Mo. 491), 585, 749, 750.
- Dickinson v. Poughkeepsie (75 N. Y. 65), 861.

- Dieckmann v. Sheboygan County (89 Wis. 571), 846.
- Dill v. Roberts (30 Wis. 178), 268, 868.
- Dillard v. Webb (55 Ala. 468), 131, 681.
- Dillingham v. Snow (5 Mass. 547), 75.
- Dimock v. Suffield (30 Conn. 129), 717.
- Dingley v. Boston (100 Mass. 544),
- Dingwall v. Detroit (82 Mich. 568), 165.
- Dinwiddie v. Rushville (37 Ind. 66), 153.
- Distilling Co. v. Chicago (112 Ill. 19), 629, 648.
- District of Columbia v. Waggaman (4 Mackey 328), 290.
- District of Columbia v. Washington, etc. R. R. (4 Mackey 214), 898.
- District Township v. Dubuque (7 Iowa 262), 82, 125.
- Dively v. Cedar Falls (21 Iowa 565), 472.
- Dively v. Cedar Falls (27 Iowa 227), 801.
- Diveny v. Elmira (51 N. Y. 506), 472.
- Dixon v. People (168 III. 179), 3. Doane v. Omaha (58 Neb. 815), 448.
- Dobbin v. San Antonio (2 Tex. Unrep. Cases 708), 559.
- Dobson v. Blackmore (9 Ad. & El. 991), 63.
- Dodge v. B. C. R. & M. R. R. Co. (34 Iowa 276), 603.
- Dodge v. Council Bluffs (57 Iowa 560), 440.
- Dodge v. Gridley (10 Ohio 173), 23, 34.
- Dodge v. People (113 Ill. 491), 546. Dodwell v. Oxford (2 Vent 33), 451.
- Doe v. Naylor (2 Black. 32), 331. Dolese v. McDougall (78 III. App. 629), 856.
- Dollar Sav. Bank v. Ridge (62 Mo. App. 324), 845.
- Donaghy v. Macy (167 Mass. 178), 367.

- Donahoe v. Kansas City (136 Mo. 657), 675, 799.
- Donahue v. Graham (61 Cal. 276), 341, 342.
- Donly v. Pittsburg (147 Pa. St. 348), 867.
- Donnaher v. State (8 Smedes & M. 649), 747,
- Donnelly, In re (30 Kan. 424), 556. Donohue v. St. Louis, I. M. & S.
- Ry. Co. (91 Mo. 357), 749. Donough v. Dewey (82 Mich. 309), 176, 178.
- Donough v. Robbens (60 Mo. App. 156), 702.
- Donovan v. Huntington (24 Ind. 321), 562.
- Donovan v. Vicksburg (29 Miss. 247), 275, 354.
- Doran v. Camden (64 N. J. L. 666), 451.
- Dorathy v. Chicago (53 Ill. 79), 326, 827.
- Dorgan v. Boston (12 Allen 223), 800.
- Dorey v. Boston (146 Mass. 336), 196, 807.
- Dorland v. Bergson (78 Cal. 637), 834,
- Dorman v. Lewiston (81 Me. 411), 808, 839.
- Doty v. Lyman (166 Mass. 318), 242, 846.
- Dow v. Beidelman (125 U. S. 680), 910.
- Downham v. Alexandria (10 Wall 173), 403.
- Downing v. Miltonvale (36 Kan. 740), 177, 201, 552, 591, 594.
- Downing v. Rugar (21 Wend. 178), 175.
- Downs v. High Point (115 N. C. 182), 680.
- Doyle v. Bradford (90 III. 416), 568, 582.
- Doyle v. Continental Ins. Co. (94 U. S. 535), 257.
- Dougherty v. Austin (94 Cal. 601), 135.
- Douglass, ex parte (1 Utah 108), 575, 788, 792.
- Douglass, In re (46 N. Y. 42), 219. Douglas v. Baker County (23 Fla. 419), 175.

- Douglass v. Com. (108 Pa. St. 559), 862.
- Douglass v. Com. (2 Rawle 262), 457, 735, 737.
- Douglass v. Kansas City (147 Mo. 428), 478.
- Douglas v. Placerville (18 Cal. 643), 70, 76.
- Drake v. Berry (42 N. J. L. 60), 572.
- Drake v. Hudson River Co. (7 Barb. 539), 13.
- Drake v. Lowell (13 Metc. 292), 295, 721.
- Drake v. Phillips (40 III. 388), 609. Drake v. Railroad Co. (7 Barb. 508), 6.
- Drain v. Railroad (86 Mo. 574), 586.
- Drew County v. Bennett (43 Ark. 364), 647.
- Dreyfus v. Lonergan (73 Mo. App. 336), 257.
- Driscoll v. New Haven (Conn. 1902, 52 Atl. Rep. 618), 94.
- Drisko v. Columbia (75 Me. 73), 151.
- Drott v. Riverside (4 Ohio Cir Ct. 312), 211.
- Dry Dock E. B. & B. R. Co. v.New York (55 Barb. 298), 816.Duane v. Chicago (198 Ill. 471),
- 853. Duanesburgh v. Jenkins (57 N. Y.
- 177), 266.

 Dubach v. H. & St. J. R. R. Co.
- (89 Mo. 483), 747, 884, 888, 890. Dubois v. Augusta' (Dudley Rep. 30), 79.
- Dubois v. Kingston (102 N. Y. 219), 719.
- Dubuque v. Maloney (9 Iowa 450), 714.
- Dubuque v. Rebman (1 Iowa 444), 562.
- Dubuque v. Stout (32 Iowa 47), 38. Dubuque v. Wooton (28 Iowa 571), 248, 252.
- Ducat v. Chicago (48 Ill. 172), 621. Duckwall v. New Albany (25 Ind. 283), 616.
- Dudley v. Frankfort (12 B. Mon. 610), 719.

- Dudley v. Grayson (6 T. B. Monroe 259), 208.
- Dugan v. Farier (47 N. J. L. 383), 158.
- Duggan v. Peoria D. & E. Ry. Co. (42 Ill. App. 536), 24.
- Duggen v. McGruder (Walker 112), 570.
- Dullam v. Willson (53 Mich. 392), 83.
- Duluth v. Bloom (55 Minn. 97), 653, 773.
- Duluth v. Krupp (46 Minn. 435), 177, 201, 226, 450, 636, 766.
- Duluth v. Mallett (43 Minn. 204), 540, 554, 714, 747.
- Dumars v. Denver (Colo. App. 1901, 65 Pac. Rep. 580), 249, 251, 252.
- Dumesnil v. Dupont (18 B. Mon. 800), 740.
- Dunbar v. Augusta (90 Ga. 390), 668.
- Duncan v. Lawrence, County Comrs. (101 Ind. 403), 195.
- Duncan v. Lynchburg (Va. 1900, 34 S. E. Rep. 964), 71, 582, 673.
- Duncan v. Missouri (152 U. S. 377), 354.
- Dunham v. New Britain (55 Conn. 378), 437, 707.
- Dunham v. Rackliff (71 Me. 345), 726.
- Dunham v. Rochester (5 Cow. 462), 296, 302, 589, 615, 657, 698, 766. Dunker v. Stiefel (57 Mo. App.
- 379), 813. Dunn, In re (9 Mo. App. 255), 25,
- 196. Dunn v. Austin (77 Tex. 139), 696.
- Dunn v. Burleigh (62 Me. 24), 517. Dunn v. Com. (20 Ky. Law Rep. 1649), 361, 753.
- Dunstan v. Imperial Gas Light, etc. Co. (3 Barn & Adol. 125), 219.
- Du Page County v. Martin (39 III. App. 298), 213.
- DuQuoin First National Bank v. Keith (84 Ill. App. 103), 320.
- Durach, In re (62 Pa. St. 491), 646, 864,
- Durand v. Ansonia (57 Conn. 70), 851.

Durango v. Reinsberg (16 Colo. 327), 491, 564.

Durant, In re (60 Vt. 176), 489.Durant v. Jersey City (25 N. J. L. 309), 131, 201.

Durkin, In re (10 Hun. 269), 253.

Durr v. Howard (6 Ark. 461), 466, 523.

Duryee v. New York (96 N. Y. 477), 452.

Dutton v. Aurora (114 Ill. 138), 328, 330, 798.

Dye v. Noel (85 Ill. 290), 570.

Dyer v. Brogan (70 Cal. 136), 212. Dyer v. Hudson (65 Cal. 374), 833.

Dyer v. Miller (58 Cal. 585), 830.

E.

Earnhart v. Lebanon (5 Ohio Cir. Ct. 578), 334, 475.

Easley v. Mo. Pac. Ry. Co. (113 Mo. 236), 750.

East Jordan Lumber Co. v. East Jordan (100 Mich. 201), 838.

East Louisiana R. R. v. New Orleans (46 La. Ann. 526), 377.

Eastman v. Chicago (79 Ill. 178), 653, 773.

Eastman v. Meredith (36 N. H. 284), 675.

Easton v. Covey (74 Md. 262), 735, 738.

Easton City v. Easton Beef Co. (5 Pa. Co. Ct. R. 68), 631.

Easton & A. R. Co. v. Greenwich Tp. (25 N. J. Eq. 565), 719.

Easton, S. E. & W. E. P. R. Co. v. Easton, (133 Pa. St. 505), 720,

East River Bridge Co., In re (75 Hun. 119), 673.

East St. Louis v. Albrecht (150 Ill. 506), 316, 319, 840, 841.

East St. Louis v. Amy (120 U. S. 600), 341.

East St. Louis v. Bux (43 III. App. 276), 538.

East St. Louis v. Kase (9 III. App. 409), 22.

East St. Louis v. East St. Louis G. L. & C. Co. (98 III. 415), 305.

East St. Louis v. Thomas (11 Ill. App. 283), 132.

East St. Louis v. Trustees of Schools (102 III. 489), 645.

East St. Louis v. U. S. ex rel Zebley (110 U. S. 321), 119.

East St. Louis v. Wehrung (50 Ill. 28), 116, 135, 627.

East St. Louis v. Wehrung (46 Ill. 392), 619, 621, 633.

East Syracuse, In re (20 Abb. N. C. 131), 801.

East Tennessee Tel. Co. v. Anderson Co. Tel. Co. (22 Ky. L. Rep. 418), 233.

East Tennessee University v. Knoxville (6 Baxt. 166), 21, 77, 97, 608.

Eaton v. Kegan (114 Mass. 433), 768.

Eberle v. St. Louis Public Schools (11 Mo. 247), 472.

Eberlin v. Mobile (30 Ala. 548), 496.

Echols, ex parte (39 Ala. 698), 160. Eddleston v. Barnes (1 Ex. Div. Law Rep. 67), 548.

Eddy v. Board of Health (10 Phila. 94), 694.

Eddy v. Wilson (43 Vt. 362), 209. Eden v. People (161 Ill. 296), 864.

Edenton v. Capeheart (71 N. C. 156, 623), 34, 359.

Edenton v. Wool (65 N. C. 379), 468.

Edey v. Shreveport (26 La. Ann. 636), 96.

Edgar v. State (45 Ark. 356), 540. Edgerly v. Concord (62 N. H. 8), 674, 677.

Edgerly v. Emerson (23 N. H. 555), 168.

•Edgerton v. Goldsboro Water Co. (126 N. C. 93), 869.

Edgerton v. Green Cove Springs (19 Fla. 140), 823.

Edina v. Brown (19 Mo. App. 672), 465.

Edwards v. Ferguson (73 Mo. 686), 474.

Edwards v. Kearzey (96 U. S. 595), 372, 381, 383, 387, 389.

Edwards v. Vandemack (13 Ill 633), 562.

Edwards v. Watertown (61 How. Pr. 463), 137.

- Edwards v. Watertown (24 Hun. 426), 196.
- Eels v. American T. & T. Co. (143 N. Y. 133), 876.
- Egan v. Chicago (5 Ill. App. 70), 12.
- Egan v. Court (3 Har. & McH. 169), 641.
- Egbert v. Lake Shore & M. S. Ry. Co. (6 Ind. App. 350), 834.
- Egleston v. Charleston (1 Mill's Const. Rep. 45), 463.
- Eichenlaub v. St. Joseph (113 Mo. 395), 11, 236, 595, 596, 599, 625, 738.
- Eidemiller v. Tacoma (14 Wash. 376), 330, 385.
- Eldora v. Burlingame (62 Iowa 32), 201, 205, 451, 453, 499, 594.
- El Dorado v. Beardsley (53 Kan. 363), 229, 556.
- Electric Imp. Co. v. San Francisco (45 Fed. Rep. 593), 722.
- Electric Light, etc. Co. v. San Bernardino (100 Cal. 348), 861.
- Elerman v. McMains (30 La. Ann. 190), 416.
- Elizabeth v. Durning (58 N. J. L. 554), 612.
- Elizabethtown v. Lefler (28 Ill. 90), 218, 248, 532, 552, 593.
- Elkhart v. Calvert (126 Ind. 6), 496.
- Elkhart v. Wickwire (121 Ind. 331), 813, 827.
- Elkins v. State (13 Ga. 435), 498. Elk Point v. Vaughn (1 Dak. 113), 345, 451, 529, 545, 786, 792.
- Ellinwood v. Reedsburg (91 Wis. 131), 100, 798.
- Elliott v. Louisville (101 Ky. 262), 177, 224.
- Elliott v. Pittsburgh (6 Pa. Dist. Rep. 455), 302, 862.
- Ellis, ex parte (54 Cal. 204), 277, 557.
- Ellis v. Cleburne (Tex. Civ. App. 1896, 35 S. W. Rep. 495), 264.
- Ellis v. Comrs. of San Francisco (38 Cal. 629), 92.
- Ellis v. K. C. St. J. & C. B. R. R. Co. (63 Mo. 131), 705.
- Ellis v. Paige (1 Pick. 43), 336.

- Ellison v. Washington Comrs. (5 Jones Eq. 57), 696.
- Elma v. Carney (9 Wash. 466), 838.
- Elmendorf v. Jersey City (41 N. J. L. 135), 113.
- Elmendorf v. New York (25 Wend. 693), 13, 186, 250.
- Elmwood v. Marcy (92 U. S. 289), 267.
- Elwood v. Bullock (6 Q. B. L. R. 383), 292, 451.
- Elwood v. Rochester (43 Hun. 102), 832, 839.
- Ely v. Campbell (59 How. Pr. 333), 716, 718.
- Elyria Gas, etc. Co. v. Elyria (57 Ohio St. 374), 189.
- Emerich v. Indianapolis (118 Ind. 279), 624.
- Emerson v. Babcock (66 Iowa 257), 718.
- Emert v. Missouri (156 U. S. 296), 396, 397.
- Emmerton v. Mathews (7 N. & N. 586), 763.
- Emery v. San Francisco Gas Co. (28 Cal. 345), 823, 843, 851.
- Emporia v. Gilchrist (37 Kan. 532), 810.
- Emporia v. Norton (13 Kan. 569), 265, 867.
- Emporia v. Norton (16 Kan. 236), 250.
- Emporia v. Shaw (6 Kan. App. 808), 31, 51, 224.
- Emporia v. Volmer (12 Kan. 622),
- 486, 490, 497, 525, 530, 563, 617. Emporia v. Wagoner (6 Kan. App. 659), 728.
- Enfield Toll Bridge v. H. & N. H. R. R. Co. (17 Conn. 40), 306.
- Engle v. Sohn (41 Ohio St. 691), 657.
- English v. Danville (150 III. 92), 390, 812, 837.
- English v. State (7 Tex. App. 171),
- Enterprise v. State ex rel (29 Fla. 128), 802.
- Episcopal C. Soc. v. Episcopal Ch. (1 Pick. 372), 347.
- Episcopal School, In re (75 N. Y. 324), 122.

Erie v. Brady (150 Pa. St. 462), 837.

Erie v. Bier (10 Pa. Supr. Ct. 381), 862.

Erie v. Griswold (184 Pa. St. 435), 329.

Erie Academy v. Erie (31 Pa. St. 315), 337.

Erie & N. E. R. R. v. Casey (26 Pa. St. 287), 351.

Erie R. R. Co. v. Pennsylvania (21 Wall, 492), 373, 374.

Escanaba v. Chicago (107 U. S. 678), 415.

Esling, Appeal of (89 Pa. St. 205), 226.

Estes v. Owen (90 Mo. 113), 118, 424, 810, 812.

Estey v. Starr (56 Vt. 690), 194. Eswin v. St. Louis, I. M. & S. Ry. Co. (96 Mo. 290), 749.

Eubanks v. Ashley (36 Ill. 177), 246, 475, 482, 592.

Eufaula v. McNab (67 Ala. 588), 71, 74, 76.

Eureka v. Jackson (8 Kan. App. 49), 451.

Eureka City v. Wilson (15 Utah 67), 450, 738, 739.

Eureka Springs v. O'Neal (56 Ark. 350), 287, 451, 452.

350), 287, 451, 452. Eustace v. Jahns (38 Cal. 3), 63.

Evans v. Hughes County (3 S. Dak. 580), 877.

Evans v. U. S. (153 U. S. 584), 491. Evanston v. Gunn (99 U. S. 660), 346.

Evansville v. Martin (41 Ind. 145), 294, 357.

Evansville v. Miller (146 Ind. 613), 687, 689.

Evansville v. State (118 Ind. 426), 10. 687.

Evansville, I. & C. S. L. R. R. Co. v. Evansville (15 Ind. 395), 117, 137.

Evening Journal Assn. v. Board of Assessors (47 N. J. L. 36), 654.

Everett v. Council Bluffs (46 Iowa 66), 687.

Everett v. Deal (148 Ind. 90), 213. Everett v. Grapes (3 L. T. 669), 704. Everett v. Marquette (53 Mich. 450), 713.

Evison v. Chicago, etc. R. R. Co. (45 Minn. 370), 297.

Ewart v. Western Springs (180 III. 318), 855.

Ewbanks v. Ashley (36 Ill. 177), 492, 509, 532, 533, 536.

Ewing v. Filley (43 Pa. St. 384), 516.

Ewing v. Hoblitzelle (85 Mo. 64), 68, 69, 225, 226, 342.

Excelsior Brick Co. v. Haverstraw (62 Hun. 620), 831, 832.

Excelsior Paving Co. v. Leach (Cal. 1893, 34 Pac. Rep. 116), 866.

Eyerman v. Payne (28 Mo. App. 72), 131, 587.

Eyerman v. Blaksley (78 Mo. 145), 270.

F.

Faber v. St. Paul, M. &. M. Ry. Co. (29 Minn. 465), 585.

Face v. Ionia (90 Mich. 104), 875.

Facey v. Fuller (13 Mich. 527), 155.Fagg, ex parte (38 Tex. Crim. Rep. 573), 575, 784, 791.

Fairbank v. U. S. (181 U. S. 283), 394, 656.

Fairchild v. St. Paul (46 Minn. 540), 13, 250.

Fairfield v. People (94 III. 244), 610.

Fairmont v. Meyer (83 Minn. 456), 225, 230, 496, 501, 758.

Falmouth v. Watson (5 Bush 660), 42, 673.

Fanning v. Osborne (102 N. Y. 441), 890.

Fanning v. Schammel (68 Cal. 428), 868.

Fant v. People (45 III. 259), 535. Faribault v. Wilson (34 Minn. 254), 487, 494, 496, 594, 640, 733.

Farmer v. St. Paul (65 Minn. 176), 672.

Farmers' Loan & Trust Co. v. Ansonia (61 Conn. 76), 899.

Farmers' Loan & Trust Co. v Carroll (51 Barb. 33), 115.

Farmington v. Rutherford (94 Mo. App. 328), 660.

Farnsworth v. Pawtucket (13 R. I. 82), 3, 270.

Farnsworth Co. v. Rand (65 Me. 19), 211.

Farr v. Brackett et al (30 Vt. 344), 327.

Farrar v. Fessenden (39 N. H. 268), 206.

Farrar v. St. Louis (80 Mo. 379), 118, 424, 810, 812, 824, 848, 851.

Farrel v. Derby (58 Conn. 234), 74, 107.

Farrell v. Cook (16 Neb. 483), 686. Farrell v. King (41 Conn. 448), 216.

Farrell v. New York (22 N. Y. St. R. 469), 721.

Farrell v. Rammelkamp (64 Mo. App. 425), 6, 827, 842.

Farrell v. West Chicago Park Comrs. (182 Ill. 250), 821.

Farrell v. West Chicago (181 U. S. 404), 832.

Farwell v. Chicago (71 Ill. 269), 615, 617.

Farwell v. Rockland (62 Me. 296), 366.

Fass v. Seehawer (60 Wis. 525), 119, 811.

Fath v. Tower Grove & L. Ry. Co. (105 Mo. 537), 586, 601, 742, 745, 748.

Faulkner v. Aurora (85 Ind. 130), 676.

Faville v. Eastern Counties Ry Co. (2 Exch. 344), 113.

Fay, petitioner (15 Pick. 243), 879.Fay v. Springfield (94 Fed. Rep. 409), 820.

Fay v. Wood (65 Mich. 390), 611. Fayette v. Shafroth (25 Mo. 445), 465.

Fayette County v. Chitwood (8 Ind. 504), 198, 209.

Fayetteville v. Carter (52 Ark. 301), 119, 617, 634.

Fazakerley v. Wiltshire (1 Stra. 469), 450.

Fecheimer Bros. & Co. v. Louisville (84 Ky. 306), 402.

Fehler v. Gosnell (99 Ky. 380), 234, 450, 844, 865.

Felclin, ex parte (96 Cal. 360), 647. Fell v. State (42 Md. 71), 66, 274. Fennell v. Bay City (36 Mich. 186), 787.

Feorth v. Anderson (87 Mo. 354), 565.

Fergus Falls Water Co. v. Fergus Falls (65 Fed. Rep. 586), 798.

Ferguson v. Crittenden Co. (6 Ark. 479), 165.

Ferguson v. Selma (43 Ala. 398), 683.

Ferguson v. Snohomish (8 Wash. 668), 547.

Ferrenbach v. Turner (86 Mo. 416), 672, 708, 892.

Fertilizing Co. v. Hyde Park (97 U. S. 659), 320, 323, 419, 665.

Ficklen v. Shelby Co. Taxing Dist. (145 U. S. 1), 399.

Fidelity Trust & G. Co. v. Fowler Water Co. (113 Fed. Rep. 560), 88.

Fiedler v. St. Louis, I. M. & S. Ry. Co. (107 Mo. 635), 748.

Field v. Barber Asphalt Pav. Co. (117 Fed. Rep. 925), 858.

Field v. Des Moines (39 Iowa 575), 71.

Field v. Field (9 Wend. 394), 165. Field v. Western Springs (181 Ill. 186), 424, 425, 438.

Fields v. Cooby (102 Mich. 449), 873.

Fields v. Stokley (99 Pa. St. 306), 668.

Fietsam v. Hay (122 III. 293), 879. Fifield v. Phoenix (Ariz. 1894, 24 L. R. A. 430), 676.

Findley v. Pittsburg (Pa. 1887, 11 Atl. Rep. 678), 810.

Finegan v. Allen (46 III. App. 553), 438.

Fink v. Milwaukee (17 Wis. 26), 496, 497, 531.

Fire Department of New York v. Braender (3 N. Y. St. 580), 545.

Fire Department v. Harrison (2 Hilt 455), 517.

Fire Department v. Helfenstein (16 Wis. 136), 616.

First Municipality v. Blineau (3 La. Ann. 688), 698.

First Municipality v. Cutting (4 La. Ann. 336), 6, 30, 444, 448.

First Municipality of New Orleans v. Pease (2 La. Ann. 538), 416.

First Nat. Bank v. Randall (1 White & W. Civ. Cas. Ct. App. 971), 212.

First Nat. Bk. v. Sarlls (129 Ind. 201), 439, 734, 737.

First National Bank v. Tyson (133 Ala. 459), 719.

First Parish v. Stearns (21 Pick. 148), 149, 164, 166.

First Presbyterian Ch. v. Ft. Wayne (36 Ind. 338), 115.

Fish v. Branin (23 N. J. L. 484), 340.

Fishburn v. Chicago (171 Ill. 338), 863.

Fisher v. Boston (104 Mass. 87), 675.

Fisher v. Graham (1 Cincinnati Rep. 113), 238.

Fisher v. Harrisburg (2 Grant's Cases 291), 121, 270, 281, 298, 622, 690, 769.

Fisher v. McGirr (1 Gray 1), 275, 452.

Fisher v. Thirkell (21 Mich. 1),

714. Fisher v. Tp. of Vaughan (10 Up.

Can. Q. B. 492), 222.

Fiske, ex parte (72 Cal. 125), 251, 735, 738.

Fiske v. Hazard (7 R. I. 438), 104, 105, 106.

Fiske v. People (188 III. 206), 863. Fitchburg Ry Co. v. Grand Junction Ry Co. (4 Allen 198), 317.

Fitzgerald v. Grand Trunk R. R. (63 Vt. 169), 372.

Fitzgerald v. New Brunswick 47 N. J. L. 479), 340.

Fitzgerald v. Pawtucket Av. Ry. (R. I. 1902, 52 Atl. Rep. 887), 154, 178.

Fitzhugh v. Duluth (58 Minn. 427), 834.

Flack v. Fry (32 W. Va. 364), 466. Flanagan v. Plainfield (44 N. J. L. 118), 572.

Fleetwood v. Read (21 Wash. 547), 659.

Fletcher v. Fuller (120 U. S. 534), 151.

Fletcher v. Lowell (15 Gray 103), 9.

Fletcher v. Peck (6 Cranch. 87), 322, 376.

Fletcher v. Somerset R. R. Co. (74 Me. 434), 471.

Fletcher v. State (7 Ohio Dec. 316), 512.

Flewellyn v. Proetzel (80 Tex. 191), 387.

Flint v. Pierce (99 Mass. 68), 13.

Flint v. Russell (5 Dillon C. C. 151), 692.

Flood v. Atlantic City (63 N. J. L. 530), 234.

Flood v. State (19 Tex. Crim. App. 584), 26, 784, 791.

Flora v. Lee (5 III. App. 629), 543, 567.

Flora v. Sachs (64 Ind. 155), 277. Florence, ex parte, in re Jones (75 Ala. 419), 449.

Florida C. & P. R. Co. v. Ocala St. & S. R. Co. (39 Fla. 306), 882.

Floyd v. Eatonton (14 Ga. 354), 477, 514, 523.

Flynn v. Canton Co. (40 Md. 312), 61, 62, 587, 603, 715.

Foley v. Haverhill (144 Mass. 352), 182.

Folmar v. Curtis (86 Ala. 354), 34, 275, 551, 732.

Folsom Bros. v. New Orleans (16 Fed. Rep. 11), 376.

Folts Street, In re (46 N. Y. Suppl. 43), 813.

Fonda v. Louisville (20 Ky. Law Rep. 1652), 593.

Foot, ex parte (70 Ark. 12), 576, 685, 686.

Foot v. Stiles (57 N. Y. 399), 174. Foote v. New York Fire Dept. (5 Hill, 99), 741.

Forbis v. Bradbury (58 Mo. App. 506), 830.

Ford v. Clough (8 Me. 334), 115, 148.

Ford v. Harbor Comrs. (81 Cal. 19), 8.

Ford v. North Des Moines (80 Iowa 626), 546, 861.

- Ford v. Thralkill (84 Ga. 169), 735.
- Forcheimer v. Mobile (84 Ala. 126), 436, 437.
- Forry v. Ridge (56 Mo. App. 615), 110, 176, 177.
- Ft. Scott v. Eads Brokerage Co. (117 Fed. Rep. 51), 75, 115.
- Ft. Scott v. Pelton (39 Kan. 764),
- Ft. Smith v. Ayers (43 Ark. 82), 615.
- Fort Smith v. Dodson (46 Ark. 296), 276.
- Ft. Smith v. Scruggs (70 Ark. 549), 449, 629, 644.
- Ft. Wayne v. Rosenthal (75 Ind. 156), 694.
- Ft. Wayne L. S. & M. S. Ry. (132 Ind. 558), 91, 172.
- Ft. Worth v. Crawford (74 Tex. 404), 680.
- Ft. Worth v. Crawford (64 Tex. 202), 680.
- Ft. Worth Street Ry. Co. v. Rosedale St. Ry. Co. (68 Tex. 169), 916.
- Forstall v. Consolidated Association (34 La. Ann. 770), 385.
- Forsyth v. Atlanta (45 Ga. 152), 676.
- Forsythe v. Baltimore & Ohio Tel. Co. (12 Mo. App. 494), 885.
- Foss v. Chicago (56 III. 354), 808, 863, 848, 855.
- Fossett v. Bearce (29 Me. 523), 150, 214.
- Foster v. Blount (18 Ala. 687), 81. Foster v. Board of Police Comrs. (102 Cal. 483), 313, 314.
- Foster v. Brown (55 Iowa 686), 783.
- Foster v. Davenport (22 How. 244), 410.
- Foster v. Fowler (60 Pa. St. 27), 53.
- Foster v. Kansas (112 U. S. 201), 419, 665.
- Foster v. Moore (4 Law Rep. Ir. Crown Cases Reserved 670), 29.
- Foster, Supervisor of Jamaica v. Rhoads (19 Johns 191), 33.
- Foster v. St. Louis (4 Mo. App. 191), 692.

- Foster v. Worcester (164 Mass. 419), 797.
- Fournier v. West Bay City (94 Mich. 463), 168.
- Fourth Street (19 Pa. Co. Ct. Rep. 488), 233.
- Fow v. Roberts (108 Pa. St. 489), 457.
- Fowle v. Alexandria (3 Pet. 393), 653, 676.
- Fowler, In re (53 N. Y. 60), 833. Fowler v. St. Joseph (37 Mo. 228), 447.
- Fox v. Ohio (5 How. 410), 795.
- Fox y. Winona (23 Minn. 10), 721. Fralich v. Barlow (25 Ind. App. 383), 168.
- Frame v. Felix (167 Pa. St. 47), 440, 861.
- Frank, ex parte (52 Cal. 606), 296, 302, 312, 615, 634.
- Frank v. Atlanta (72 Ga. 428), 692.
- Franke v. Paducah Water Supply Co. (88 Ky. 467), 627.
- Frankford & Phila. Ry Co. v. Philadelphia (58 Pa. St. 119), 652, 742.
- Frankfort v. Aughe (114 Ind. 77), 490, 510, 589, 590, 791.
- Frankfort v. Brawner (100 Ky. 166), 366, 367, 368.
- Frankfort v. Coleman (19 Ind. App. 368), 874.
- Frankfort v. Murray (99 Ky. 422), 852.
- Frankfort v. Winterport (54 Me, 250), 75, 106.
- Franklin v. Hancock (204 Pa. St. 101), 822.
- Franklin v. Maberry (6 Humph. 368), 810.
- Franklin v. Westfall (27 Kan. 614), 338, 646.
- Frantz v. Jacob (88 Ky. 525), 610. Frazee, In re (63 Mich. 396), 282,
- 294, 297, 628, 687, 728. Frazer v. Chicago (186 III. 480), 680, 694.
- Frazier v. Draper (51 Mo. App. 163), 731.
- Frazier v. Warfield (13 Md. 279), 107.

- Frederick Street, In re (11 Pa. Co. Ct. Rep. 114), 831.
- Freeholders v. Barber (7 N. J. L. 64), 634.
- Freeland, ex parte (38 Tex. Crim. App. 321), 785, 791, 793, 795.
- Freeland v. Hastings (10 Allen 570), 75, 104, 105.
- Freeland v. People (16 Ill. 380), 786, 793.
- Freeman v. Boston (5 Metc. 56), 114.
- Freeport v. Marks (59 Pa. St. 253), 258.
- Freeport Water Co. v. Freeport (180 U. S. 587), 72, 322, 324, 381, 445, 905.
- French v. Barber A. P. Co. (181 U. S. 324), 821.
- French v. Quincy (3 Allen 9), 92. French v. Woodward (58 Mo. 66), 315.
- Fretwell v. Troy (18 Kan. 271), 611, 635.
- Friday v. Floyd (63 III. 50), 34, 276.
- Friesner v. Charlotte (91 Mich. 504), 120.
- Frommer v. Richmond (31 Gratt. 646), 623, 656.
- Frorer v. People (141 Ill. 171), 778.
- Frosh v. Galveston (73 Tex. 401), 837.
- Frest v. Belment (6 Allen 152), 106.
- Fruin-Brambrick Const. Co. v. Geist (37 Mo. App. 509), 198, 206, 830, 859.
- Frye v. C. B. & Q. R. R. Co. (73 III. 399), 446.
- Fulgum v. Nashville (76 Tenn. 635), 631.
- Fuller, In re (79 Ill. 99), 352.
- Fuller v. Atlanta (66 Ga. 80), 799.
- Fuller v. Heath (89 III. 296), 218.
- Fuller v. Redding (13 App. Div. 61), 726.
- Fullerton v. Spring (3 Wis. 667), 335.
- Fulton v. Cummings (132 Ind. 453), 118.
- Fulton v. Dist. of Columbia (2 App. Cas. 431), 774.

- Fulton v. Lincoln (9 Neb. 358), 842.
- Fulweiler v. St. Louis (61 Mo. 479), 472.
- Furhman v. Huntsville (54 Ala. 263), 509, 567, 578, 591.

G.

- Gabel v. Houston (29 Tex. 335), 21, 69, 443, 760.
- Gafney v. San Francisco (72 Cal. 146), 835.
- Gage v. Chicago (143 Ill. 157), 847.Gaiocchio v. State (9 Tex. App. 387), 541.
- Gaither v. Green (40 La. Ann. 362), 209.
- Galbreath v. Newton (30 Mo. App. 380), 132, 810.
- Galbraith v. Olivet (3 Pitts. 78), 685.
- Gale v. Kalamazoo (23 Mich. 344), 309, 761.
- Gale v. Mead (4 Hill 109), 331.
- Gale v. South Berwick (51 Me. 174), 114.
- Galesburg v. Hawkinson (75 Ill. 152), 140.
- Gall v. Cincinnati (18 Ohio St. 563), 762.
- Gallagher v. Goldfrank (63 Tex. 473), 528.
- Gallagher v. Smith (55 Mo. App. 116), 810, 813, 855, 871.
- Gallaher v. Head (72 Iowa 173), 803.
- Gallatin v. Tarwater (143 Mo. 40), 43, 364, 365, 491, 500, 758.
- Gallerno v. Rochester (46 Up. Can. Q. B. 279), 252.
- Gallitzen Borough v. Gains (15 Pa. Ct. 337), 559.
- Galloway v. Corbitt (52 Mich. 460), 562.
- Galt v. Chicago (174 Ill. 605), 315, 319, 337.
- Galveston v. Galveston City Ry. Co. (46 Tex. 435), 901.
- Galveston v. Heard (54 Tex. 420). 811.
- Galveston v. Menard (23 Tex. 349), 799.
- Galveston v. Posnainsky (62 Tex. 118), 675.

Galveston, H. & S. A. Ry. v. Harris (Tex. Civ. App. 1896), 36 S. W. Rep. 776, 232.

Gamble v. Pettijohn (116 Mo. 375), 891.

Gannon v. Laclede Gas Light Co. (145 Mo. 502), 64, 725.

Ganson v. Buffalo (2 Abb. Dec. 236), 831.

Garden City v. Abbott (34 Kan. 283), 23, 35, 623, 641.

Gardnier v. Johnson (16 R. L. 94), 835, 842.

Gardner v. New Bern (98 N. C. 228), 170.

Gardner v. People (20 Ill. 430), 343, 783, 789.

Gardner v. Railway Co. (99 Mich. 182), 587.

Garey v. Galveston (42 Tex. 627), 337.

Gargan v. Louisville, N. A. & C. Ry Co. (89 Ky. 212), 831.

Garland v. Denver (11 Colo. 534), 466, 583, 591.

Garland v. Towne (55 N. H. 55), 64.

Garnett v. Jacksonville, etc. R. Co. (20 Fla. 889), 886.

Garnier v. St. Louis (37 Mo. 554), 9.

Garrett v. James (65 Md. 260), 230, 737.

Garrett v. St. Louis (25 Mo. 505), 818, 819, 825.

Garrett v. State (49 N. J. L. 94), 698.

Garrison v. Atlanta (68 Ga. 64),

Garrison v. Chicago (7 Bissell 480), 119.

Garside v. Cohoes (34 N. Y. St. 234), 156.

Gartside v. East St. Louis (43 Ill. 47), 261, 576, 643.

Garvey, In re (77 N. Y. 523), 831. Garvin v. Wells (8 Iowa 286), 582, 591.

Garza, ex parte (28 Tex. Crim. App. 381), 26, 72, 76, 345, 615.

Gas Co. v. San Francisco (6 Cal. 190), 6.

Gas & Water Co. v. Downington (175 Pa, St. 341), 799. Gass v. Greenville (4 Sneed 62), 33, 443, 454, 768.

Gast v. Buckley (23 Ky. Law Rep. 992), 655.

Gastenau v. Com. (108 Ky. 473), 364.

Gately v. Leviston (63 Cal. 365), 830.

Gates v. Aurora (44 Ill. 121), 481, 530.

Gates v. Kansas City B. & T. Ry

Co. (111 Mo. 28), 747, 891. Gatlin v. Tarboro (78 N. C. 119),

629, 633. Gault v. Wallis (53 Ga. 675), 436.

Gaus & Sons Mfg. Co. v. St. L. K. & N. Ry Co. (113 Mo. 308), 891.

Gay v. Mutual Union Telegraph Co. (12 Mo. App. 485), 885.

Gearhart v. Dixon (1 Pa. St. 224), 198, 208, 213.

Geeley v. Hammann (12 Colo. 94), 564.

Geiger v. Filor (8 Fla. 325), 887.

Geiger v. Perkiomen & Reading Turnpike Road (167 Pa. St., 582), 645, 727.

Geneva v. Cole (61 III. 397), 546, 145.

Genoa v. Van Alstine (108 III, 555), 549.

Gentle v. Atlas Savings & L. A. (105 Ga. 406), 467.

George v. Wyandotte Electric Light Co. (105 Mich. 1), 837.

Georgetown v. United States (2 Hayw. & H. 302), 801.

Georgia Packing Co. v. Macon (60 Fed. 774), 403.

Georgia Ry. & Banking Co. v. Smith (128 U. S. 174), 910.

Geraty v. Reid (78 N. Y. 64), 470.Gerdes v. Iron & Foundry Co. (124 Mo. 347), 875, 876.

German American Fire Ins. Co. v. Minden (51 Neb. 870), 452, 639, 660, 661.

German Ins. Co. v. Manning (95 Fed. Rep. 597), 204.

German P. & P. Co. v. Illinois S.Z. Co. (55 Ill. 127), 253.

Gerry v. Stoneham (1 Allen 319), 103,

- Gest v. Cincinnati (26 Ohio St. 275), 823.
- Gettysburg v. Zeigler (2 Pa. Co. Ct. Rep. 326), 461, 618.
- Ghee v. Northern Union Gas Co. (158 N. Y. 510), 884.
- Gibbons v. Ogden (9 Wheat. 1), 392, 393, 422, 423.
- Gibbs v. Somers Point (49 N. J. L. 515), 546.
- Gibson Re. & U. C. of H. & B. (20 Up. Can. Q. B. Rep 11), 222, 442.
- Gibson v. Bailey (9 N. H. 168), 214, 216.
- Gibson v. Coraopolis (22 Pittsb. L. J. N. S. 64), 32, 642.
- Gibson v. Donk (7 Mo. App. 37), 697.
- Gibson v. Kayser (16 Mo. App. 404), 827.
- Gibson v. Owens (115 Mo. 258), 818, 851, 866.
- Gibson v. Wyandotte (20 Kan. 156), 472.
- Giddings v. Cox (31 Vt. 607), 336. Gilbert v. New Haven (40 Conn. 102), 209.
- Gilberts v. Rabe (49 Ill. App. 418), 204, 213, 215, 217, 547, 598.
- Gilboy v. Detroit (115 Mich. 121), 675.
- Gilchrist v. Schmidling (12 Kan. 263), 276.
- Gildersleeve v. Board of Education (17 Abb. Pr. 201), 147, 174.
- Giles v. San Bornton (31 N. H. 304), 148, 150.
- Gilham v. Wells, (64 Ga. 192), 549. Gilkey v. Town of How. (105 Wis. 41), 348, 547.
- Gillespie v. People (188 Ill. 176), 864.
- Gillett v. Logan County (67 III. 256), 136, 195.
- Gilman v. Cutts (23 N. H. 376), 390.
- Gilman v. Milwaukee (61 Wis. 588), 72, 219, 233, 236, 845.
- Gilman v. Waterville (59 Me. 491), 75.
- Gilmore v. Hentig (33 Kan. 156), 837.
- Gilmore v. Holt (4 Pick. 258), 34, 37, 551.

- Gilmore v. Utica (131 N. Y. 26), 177, 195, 866, 901.
- Gilson, in re (34 Kan. 641), 10. Giltner, v. Carrollton (7 B. Mon. 680), 93.
- Given v. Des Moines (70 Iowa 637), 835.
- Givens v. Daviess County (107 Mo. 603), 9.
- Givens v. Van Studiford (86 Mo. 149), 751, 752.
- Glaessner v. Anheuser Busch B. Assn. (100 Mo. 508), 747, 887, 888.
- Glasby v. Morris (18 N. J. Eq. 72), 453, 890, 893.
- Glasgow v. Bazan (96 Mo. App. 412), 787, 790, 792.
- Glasgow v. Lindell's Heirs (50 Mo. 60), 329.
- Glasgow v. Rowse (43 Mo. 479), 606, 630.
- Glasgow v. St. Louis (107 Mo. 198), 883.
- Glasgow v. St. Louis (87 Mo. 678), 92, 94, 129, 742, 883, 887.
- Glasgow v. St. Louis (15 Mo. App. 112), 888.
- Glass v. Ashbury (49 Cal. 571), 116.
- Glass v. White (5 Sneed 475), 610. Gleasin v. Waukesha Co. (103 Wis. 225), 821.
- Gleason v. Barnett (22 Ky. Law Rep. 1660), 6.
- Gleason v. Barnett (20 Ky Law Rep. 1694), 857.
- Gleason v. Barnett (20 Ky. L. Rep. 1865), 234.
- Gleason v. Peerless Mfg. Co. (37 N. Y. Sup. 267), 237, 239, 256.
- Glenn v. Baltimore (5 Gill. & J. 425), 737.
- Glentz v. State (38 Wis. 549), 335. Glenwood v. Roberts (59 Mo. App. 167), 534.
- Gloucester Ferry Co. v. Pennsylvania (114 U. S. 196), 911,
- Gloversville v. Howell (70 N. Y. 287), 17.
- Godcharles v. Wigeman (113 Pa. St. 431), 110, 667.
- Goddard, In re (16 Pick. 504), 44, 296, 343, 346, 486, 532, 715, 720,

- Goddard, In re (94 N. Y. 544), 127. Goddard v. Boston (20 Pick. 407), 327.
- Goddard v. Jacksonville (15 Ill. 588), 688, 689, 646.
- Goddard v. Merchants Exchange (78 Mo. 609), 304.
- Goddard v. State (12 Conn. 448), 489, 523.
- Goebel v. Grosse Pointe Water Works (126 Mich. 307), 907.
- Goedgen v. Supervisors (2 Biss. C. C. 328), 176.
- Goetler v. State (45 Ark. 454), 756. Goff v. Nolan (62 How. Pr. 323), 174.
- Golden City v. Hall (68 Mo. App. 627), 477, 509.
- Goldsmith v. Huntsville (120 Ala. 182), 328, 641.
- Goldsmith v. New Orleans (31 La. Ann. 646), 647.
- Goldstraw v. Duckworth (5 Q. B. Div. 275), 721.
- Goldthwaite v. Montgomery (50 Ala. 486), 486, 496, 566, 611, 640.
- Goodale v. Fennell (27 Ohio St. 426), 346, 369, 384, 387.
- Goodel v. Baker (8 Cowen 286), 179.
- Goodenow v. Buttrick (7 Mass. 140), 344.
- Goodloe v. Fox (96 Ky. 627), 185. Goodno v. Oshkosh (31 Wis. 127), 332.
- Goodrich v. Brown (30 Iowa 291), 465, 467, 582, 591.
- Goodwillie v. Detroit (103 Mich. 283), 832, 837.
- Goodwin v. Chicago, Rock Island & Pac. Ry. Co. (75 Mo. 73), 585, 745.
- Goodwin v. State (142 Ind. 117), 367.
- Goodyear Rubber Co. v. Eureka (135 Cal. 613), 204.
- Gordon v. Cornes (47 N. Y. 608), 226.
- Gordon v. Peltzer (56 Mo. App. 599), 715, 876.
- Gordon v. People (44 Mich. 485), 329.
- Gorman v. Boise Co. Comrs. (1 Idaho 553), 202.

- Goshen v. Crary (58 Ind. 268), 61. Goshen v. Croxton (34 Ind. 239), 490, 492, 565.
- Goshen v. Kern (63 Ind. 468), 496, 672.
- Gosling v. Veley (19 L. J. (N. S.), Q. B. 111), 2.
- Gosling v. Veley (7 Q. B. 406), 164.
- Gosling v. Veley (4 H. of L. Cas. 679), 167.
- Gosling v. Veley (12 Q. B. 328), 292.
- Gosnell v. Louisville (14 Ky. Law. Rep. 719), 866.
- Gosselink v. Campbell (4 Iowa 296), 34, 36, 274, 276, 551.
- Gostin v. Brooks (89 Ga. 244), 163. Goszler v. Georgetown (6 Wheat. 593), 320.
- Gould v. Atlanta (55 Ga. 678), 435, 630.
- Gould v. Rochester (105 N. Y. 46), 707.
- Goundie v. Northampton Water Co. (7 Pa. St. 233), 90.
- Grace, Ex parte (9 Tex. App. 381), 575.
- Grace v. Newton (135 Mass. 490), 682, 707.
- Graffty v. Rushville (107 Ind. 502), 402, 766.
- Graham v. Carondelet (33 Mo. 262), 240.
- Graham v. State (1 Ark. 79), 486.Grand Ave. Ry. Co. v. Citizens'Ry. Co. (148 Mo. 665), 18.
- Grand Ave. Ry. Co. v. People's Ry. Co. (132 Mo. 34), 888.
- Grand Island Gas Co. v. West (28 Neb. 852), 440.
- Grand Rapids v. Bateman (93 Mich. 135), 529, 539, 753.
- Grand Rapids v. Board of Public Works (87 Mich. 113), 813.
- Grand Rapids v. Braudy (105 Mich. 670), 636, 654, 773, 774, 775.
- Grand Rapids v. Grand Rapids & I. R. Co. (66 Mich. 42), 814.
- Grand Rapids v. Hughes (15 Mich. 54), 79, 271, 719.
- Grand Rapids v. Norman (110 Mich. 544), 326.

v.

- Grand Rapids v. Weiden (97 Mich. 82), 699.
- Grand Rapids Bridge Co. Prange (35 Mich. 400), 877.
- Grand Rapids etc. Co. v. Grand Rapids, etc. Co. (33 Fed Rep. 659), 901.
- Grand Rapids & I. R. Co. v. Heisel (38 Mich. 62), 887.
- Grand Rapids N. & L. S. R. R. Co. v. Gray (38 Mich. 461), 465, 469, 550.
- Granger v. Syracuse (38 How. Pr. 308), 832.
- Granger's Life Ins. Co. v. Kamper (73 Ala. 325), 67.
- Grant v. Erie (69 Pa. St. 420) 126.
- Grant v. Moone (128 Mo. 43), 890. Grant v. Reese (82 N. C. 72), 528.
- Grant County Comrs. v. Bradford (72 Ind. 455), 114.
- Gratiot v. Mo. Pac. Railroad (116 Mo. 450), 585, 601, 745, 748.
- Graubner v. Jacksonville (50 Ill. 87), 534, 552.
- Graves v. Shattuck (35 N. H. 257), 716.
- Gray v. Cicero (177 Ill. 459), 856, 860.
- Gray v. Bourgeois (107 La. 671), 244.
- Gray v. Burr (128 Cal. 109), 829.
- Gray v. Delaware (2 Harrington 76), 466.
- Gray v. State (2 Harrington 76), 461, 463.
- Grayson v. Gas Co. (4 Lanc. Law Rev. 41), 553.
- Great Central R. Co. v. Gulf, etc., R. Co. (63 Tex. 529), 913.
- Great Western Ry. Co., in re. (23 Up. Can. C. P. 28), 319.
- Gregory, Ex parte (1 Tex. Ct. App. 753), 575.
- Gregory, Ex parte (20 Tex. App. 210), 76, 223, 231, 445, 617, 634, 642.
- Gregory v. Bridgeport (41 Conn. 76), 136.
- Gregory v. Lincoln (13 Neb. 352), 527, 528.
- Gregor v. Lovington (48 Ill. App. 211), 771.

- Gregory v. New York (40 N. Y. 273), 77, 688.
- Gregory v. Jersey City (34 N. J. L. 390), 173.
- Gregsten v. Chicago (145 Ill. 451), 876.
- Greeley v. Hamman (17 Colo. 30), 171, 183, 201.
- Greeley v. Hamman (12 Colo. 94), 476, 515, 523.
- Greeley v. Jacksonville (17 Fla. 174), 319, 328.
- Greely v. Passaic (42 N. J. L. 87), 501, 543, 562.
- Greeley v. Quimby (22 N. H. 335), 206.
- Green, Ex parte (94 Cal. 387), 277, 278.
- Green v. Briggs (1 Curtis 311), 527.
- Green v. Cape May (41 N. J. L. 45), 6, 11, 98.
- Green v. D. H. Canal Co. (38 Hun. 51), 41.
- Green v. Durham (1 Burr. 131), 158, 304.
- Green v. Eastern Ry. Co. (52 Minn. 79), 750.
- Green v. Indianapolis (25 Ind. 490),
- 224, 490, 496, 509, 593, 596, 598. Green v. Indianapolis (22 Ind. 192), 490, 582.
- Green v. Jersey City (42 N. J. L. 505), 830.
- Green v. Lake (60 Miss. 451), 685. Green v. Lake (54 Miss. 540), 697.
- Green v. Reading (9 Watts 382), 882.
- Green v. Savannah (6 Ga. 1), 356, 688, 689, 698.
- Green v. Weller (32 Miss. 650), 169.
- Green Bay v. Brauns (50 Wis. 204), 6, 12, 185, 187, 194, 202.
- Greenburg v. Young (53 Pa. St. 280), 810.
- Green City v. Holsinger (76 Mo. App. 567), 43, 364, 501, 758.
- Greenfield v. Camden (74 Me. 56), 207.
- Greenfield v. Mook (12 Ill. App. 281), 285, 479, 564.
- Greenough v. Wakefield (127 Mass. 275), 103,

- Greensboro v. Ehrenreich (80 Ala. 579), 24, 296, 298, 425, 695, 773. Greensboro v. Mullins (13 Ala.
- 341), 330.
- Greensboro v. Shields (82 N. C. 532), 490.
- Greensboro v. Shields (78 N. C. 417), 496.
- Greensburg v. Corwin (58 Ind. 518), 476, 492, 505, 509.
- Greenville v. Eichelberger (44 S. C. 351), 579.
- Greenville v. Kemmis (58 S. C. 427), 283, 569, 787, 792.
- Greenville Waterworks Co. v. Greenville (Miss 1900, 7 So. Rep. 409), 798.
- Greenwood v. Freight Co. (105 U. S. 13), 317, 321, 322, 380.
- Greenwood v. State (6 Baxter 567), 783, 788, 792, 795.
- Greer, In re (58 Kan. 268), 461.
- Grenada v. Wood (Miss 1903, 33 So. Rep. 173), 355.
- Grenada Co. v. Brodden (112 U. S. 261), 267.
- Grenville v. St. Louis Ry. Co. (51 Mo. App. 629), 744.
- Greystock, In re, and Township of Otonabee (12 Up. Can. Q. B. 458), 28.
- Gridley v. Bloomington (88 III. 554), 63, 715.
- Gridley v. Bloomington, (68 Ill. 47), 457.
- Griffin v. Appleby (69 Ala, 409), 469.
- Griffin v. Gloversville (73 N. Y. St. 684), 17.
- Griffen v. Lewiston (Idaho 1898 55 Pac. Rep. 545), 874.
- Griffin v. Messenger (114 Iowa 99), 157, 166, 171, 189.
- Griffin v. New York (9 N. Y. 456), 713.
- Griffith v. McCullum (46 Barb. 561), 716.
- Griggs v. Macon (103 Ga. 602), 733.
- Grills v. Jonesboro (8 Baxt. 247), 761.
- Grim v. Weissenberg School District (57 Pa. St. 433), 105.

- Grimes v. Hamilton County (37 Iowa 290), 113.
- Grimmell v. Des Moines (57 Iowa 144), 5, 187, 841.
- Grimmett v. Askew (48 Ark. 151), 178.
- Griswold v. Bay City (35 Mich. 452), 95.
- Griswold v. Hepburn (63 Ky. 20), 383.
- Groesch v. State (42 Ind. 547), 648, 627.
- Grossman v. Oakland (30 Oreg. 478), 428, 574, 687, 696.
- Grove v. Ft. Wayne (45 Ind. 429), 718.
- Grover v. Huckins (26 Mich. 476), 83, 276, 732.
- Grube v. Mo. Pac. R. R. Co. (98 Mo. 330), 601, 744, 749.
- Grumley v. Webb (44 Mo. 444), 448.
- Guerrero, Ex parte (69 Cal. 88), 241, 252, 253, 647, 648.
- Guilford v. Clark (2 Vent. 247), 451,
- Guillotte v. New Orleans (12 La. Ann. 432), 275, 466, 769.
- Guillotte's Heirs v. New Orleans (12 La. Ann. 479), 435,
- Gulf City St. Ry. v. Galveston (69 Tex. 660), 898.
- Gulf C. & S. F. Ry. Co. v. Calvert (11 Tex. Civ. App. 297), 748.
- Gulf C. & S. F. Ry. v. Ellis (165 U. S. 150), 354, 910.
- Gulf C. & S. F. Ry. v. Riordan (Tex. Civ. App. 1893, 22 S. W. Rep. 519), 808.
- Gulf Sea & S. F. R. R. Co. v. Calvert (11 Tex. Civ. App. 297), 596.
- Gulf & Ship Island R. R. Co. v. Hewes (183 U. S. 66), 374.
- Gulick v. New (14 Ind. 93), 465. Gundling v. Chicago (176 Ill. 340), 611, 615, 626, 659, 712.
- Gunmakers' Co. v. Fell (Wiles 390), 450.
- Gunn v. Macon (84 Ga. 365), 623. Gunnarssohn v. Sterling (92 Ill.

569), 646.

Gunning Gravel & P. Co. v. New Orleans (45 La. Ann. 911), 813.

Gunning System v. Buffalo (62 App. Div. 497), 725.

Gurley v. New Orleans (41 La. Ann. 75), 133.

Gustafson v. Hamm (56 Minn. 334), 890.

Guthrie v. Territory ex rel Losey (1 Okla. 188), 349, 806.

Guthrie Nat. Bank v. Guthrie (173 U. S. 528), 348, 806.

Guy v. Baltimore (100 U. S. 434), 402, 911.

H.

Haag v. Vanderburgh Co., Comrs., (60 Ind. 54), 683.

Hackensack Water Co. v. Hoboken (51 N. J. L. 220), 798.

(51 N. J. L. 220), 798. Hackman v. Staunton (42 Ill. App.

409), 186, 187. Hackney v. State (8 Ind. 494), 698. Hadfield v. New York (2 Abb.

Prac. N. S. 95), 385. Hadley v. Chamberlain (11 Vt.

618), 214. Hadley v. Dague (130 Cal. 207),

821. Hadsell v. Hancock (3 Gray 526),

114, 152.Hadtner v. Williamsport (15 Wkly.N. Cas. 138), 629.

Hafford v. New Bedford (16 Gray 297), 675.

Hafner v. St. Louis (161 Mo. 34), 89.

Hagar v. Board of Supervisors (47 Cal. 222), 570.

Hagar v. Reclamation District (111 U. S. 701), 820.

Hagerstown v. Dechert (32 Md. 369), 341, 468.

Hagerstown v. Startzman (93 Md. 606), 600.

Hagerstown v. Witmer (86 Md. 293), 733, 734.

Hagood v. Hutton (33 Mo. 244), 673.

Haight v. Love (39 N. J. L. 14),

Haines v. Readfield (41 Me. 246), 149.

Hale v. Cushing (2 Me. 218), 211. Hale v. People (87 III. 72), 103. Hale v. Kenosha (29 Wis. 599), 818.

Hale v. Lawrence (21 N. J. L. 714), 667.

Hall, in re (10 Neb. 537), 319, 338. Hall's Case (1 Mod. 76), 719.

Hall v. Baker (74 Wis. 118), 115. Hall v. Holden (116 Mass. 172),

Hall v. Nixon (L. R. 10 Q. B. 152), 292.

Hall v. Racine (81 Wis. 72), 241, 841, 846.

Hall v. Street Com'rs of Boston (177 Mass. 434), 384.

Hall v. Wisconsin (103 U. S. 5), 369.

Halleck v. Boylston (417 Mass. 469), 209, 214.

Hallenbeck v. Getz (63 Conn. 385),

Haller v. Sheridan (27 Ind. 494), 733.

Halpin v. Campbell (71 Mo. 493), 824.

Halsey v. Rapid Transit Co. (54 N. J. L. 102), 11.

Halsey v. Rapid Transit R. R. Co. (47 N. J. Eq. 380), 145.

Hamilton y. Carthage (24 III. 22), 270, 545, 546.

Hamilton v. Fond du Lac (40 Wis. 47), 708.

Hamilton v. McNeil (13 Gratt. 389), 802.

Hamilton Co. v. Rape (101 Tenn. 222), 890.

Hamilton v. State (3 Tex. Crim. App. 643), 791, 792, 793, 795.

Hamilton-Brown Shoe Co. v. Saxey (131 Mo. 212), 436.

Hamilton Gas Light & Coke Co. v. Hamilton City (146 U. S. 258), 274, 371, 798.

Hamilton Gas Light & Coke Co. v. Hamilton (37 Fed. Rep. 832), 305.

Hamilton Tp. Board of Health v.Neidt (N. J. Ch. 1901, 19 Atl.Rep. 318), 688.

Hammond v. N. Y. C. & St. L. Ry. Co., (5 Ind. App. 526), 239, 246, 476.

- Hampstead v. Plaistow (49 N. H. 84), 206.
- Hancock's Appeal (115 Pa. St. 1), 737.
- Hand v. Elizabeth (30 N. J. L. 365), 846.
- Handley v. Stutz (139 U. S. 417), 199.
- Handlin v. State (16 N. J. L. 96), 500.
- Handy v. New Orleans (39 La. Ann. 107), 428.
- Hanger v. Des Moines (52 Iowa 193), 114.
- Hang Kie, in re (69 Cal. 149), 773.
- Hankins v. People (106 III. 628), 786, 794.
- Hanlon v. Mo. Pac. Ry. Co. (104 Mo. 381), 585, 749.
- Hanna v. Kankakee (34 Ill. App. 186), 590.
- Hannibal v. Guyott (18 Mo. 515), 274, 622.
- Hannibal v. Marion Co. (69 Mo. 571), 226.
- Hannibal v. Mo. & K. T. Co. (31 Mo. App. 23), 297, 298, 299, 312, 451, 690, 720, 725, 885.
- Hannibal v. Price (29 Mo. App. 280), 643.
- Hannibal v. Richards (82 Mo. 330), 691, 692, 708.
- Hannibal v. Richards (35 Mo. App. 15), 692.
- Hannibal v. Winchel (54 Mo. 172), 799.
- Hannibal Bridge Co. v. Schaubacher (57 Mo. 582), 708, 890.
- Hannibal & St. Joseph Ry. Co. v. Marion Co. (36 Mo. 294), 137.
- Hannibal & St. Joseph Ry. Co. v. State Board of Equalization (64 Mo. 294), 572.
- Hannon v. St. Louis County (62 Mo. 313), 876.
- Hansen v. Meyer (81 Ill. 321), 352.
- Hanson, In re (51 Me. 193), 803. Hanson v. Hunter (86 Iowa 722),

224, 895.

Hanson v. Vernon (27 Iowa 28), 53. Hanson v. William A. Hunter

- Electric Light Co. (86 Iowa 722), 227.
- Harbaugh v. Monmouth (74 Ill. 367), 449, 543, 544, 568.
- Harbeck v. New York (10 Bosw. 366), 332.
- Harbison v. Knoxville Iron Co. (103 Tenn. 421), 665.
- Harcourt v. Asbury Park (62 N. J. L. 158), 137.
- Hardenbrook v. Lingonier (95 Ind. 70), 277, 490, 492, 593.
- Hardin v. State (16 N. J. L. 96), 558.
- Hardin County v. Louisville, etc., R. R. Co. (92 Ky. 412), 145.
- Harding v. Bader (75 Mich. 316), 177.
- Harding v. Vanderwater (40 Cal. 77), 175.
- Hardy v. Waltham (3 Metc. 163), 75.
- Hark v. Gladwell (49 Wis. 172), 184,
- Harker v. New York (17 Wend. 199), 494, 583, 591.
- Harlem Gas Light Co. v. New York (33 N. Y. 309), 865.
- Harley v. Heyle (2 Cal. 477), 741. Harlow v. Tufts (4 Cush. 448), 81. Harman v. Chicago (147 U. S. 396), 414.
- Harman v. St. Louis (137 Mo. 494), 601, 676.
- Harmison v. Lewistown (153 III. 313), 686, 688, 691, 701.
- Harmon v. Chicago (110 III. 400), 66, 417, 582, 664, 670, 671, 709.
- Harmon v. Cummings (43 Pa. St. 322) 737.
- Harney v. Benson (113 Cal. 314), 812.
- Harney v. Heller (47 Cal. 15), 848.
 Harper, Appeal of (109 Pa. St. 9), 435, 827.
- Harper v. Elberton (23 Ga. 566), 610.
- Harpending v. Haight (39 Cal. 189), 243, 257.
- Harper v. Jonesboro (94 Ga. 801), 638, 739.
- Harper v. Milwaukee (30 Wis. 365), 680.

- Harrington v. Miles (11 Kan. 480), 640.
- Harrington v. Providence (20 R. I. 233), 691, 706.
- Harris, in re (47 Mo. 164), 574, 576.
- Harris re and City of Hamilton (44 Up. Can. Q. B. 641), 450.
- Harris v. Canaan School District (28 N. H. 58), 213.
- Harris v. Hamilton (44 Up. Can. Q. B. 641), 30.
- Harris v. Livingston (28 Ala. 577), 84.
- Harris v. Nesbit (24 Ala. 398), 546. Harris v. School District (28 N. H. 58), 206.
- Harris v. Schaffer (92 N. C. 30), 528.
- Harrisburg v. Citizens' Pass. Ry. Co. (4 Pa. Dist. R. 687), 652.
- Harrisburg v. East Harrisburg Pass. Ry. Co. (4 Pa. Dist. R. 683), 652.
- Harrisburg v. McPherran (200 Pa. 343), 821.
- Harrisburgh v. Sheck (104 Pa. St. 53), 339.
- Harrison v. Baltimore (1 Gill. 264), 682, 693.
- Harrison v. New Orleans (33 La. Ann. 222), 260, 262.
- Harrison v. N. O. Pac. Ry. Co. (34 La. Ann. 462), 883.
- Harrison v. People (97 Ill. App.
- 421), 446. Harrison v. State (9 Mo. 530), 309, 344, 346.
- Harrison v. Walker (1 Ga. 32), 331.
- Harrison Bros. v. Chicago. (163 Ill. 129), 851.
- Harrisonburg v. Roller (97 Va. 582), 138.
- Harrodsburg v. Renfro (22 Ky. Law Rep. 806), 634, 639.
- Hart v. Albany (9 Wend. 571), 272, 285, 513, 719.
- Hart v. Gaven (12 Cal. 476), 810. Hart v. State (21 Tex. App. 318), 641.
- Hart v. Union County (57 N. J. L. 90), 679.

- Hartford v. Hartford Electric Light Co. (65 Conn. 324), 807.
- Hartford v. Talcott (48 Conn. 526), 61, 715.
- Hartman v. Greenhow (102 U. S. 672), 375,
- Hartwell v. Littleton (13 Pick. 229), 214.
- Harvard College v. Boston (104 Mass. 470), 113.
- Harvey v. Aurora & Geneva Ry. Co. (186 Ill. 283), 248, 879, 894.
- Harvey v. Dean (62 Ill. App. 41), 570, 571, 646.
- Harward v. St. Clair D. Co. (51 Ill. 130), 128, 804.
- Haskell, Ex parte (112 Cal. 412), 224, 313, 442, 449.
- Haskill v. Bartlett (34 Cal. 281), 251.
- Hassard v. Municipality, No. 2 (7 La. Ann. 495), 582.
- Hastings v. Aiken (1 Gray 163), 332.
- Hastings v. Columbus (42 Ohio St. 585), 252.
- Hasty v. Huntington (105 Ind. 540), 738.
- Hatch v. Pendergast (15 Md. 251), 763.
- Hathaway v. Addison (48 Me. 440), 201, 208, 211.
- Hatzung v. Syracuse (92 Hun. 203), 265.
- Haughawout v. Hubbard (131 Cal. 675), 137, 855.
- Hause v. Newel (60 Minn. 481), 467.
- Havana v. Biggs (58 III, 519), 486. Haven v. Lowell (5 Metc. 35), 145.
- Haverty v. Bass (66 Me. 71), 694.
- Hawes v. Chicago (158 Ill. 653), 296, 425, 858.
- Hawk v. Marion County (48 Iowa 472), 114.
- Hawkins in re v. Municipal Council, etc., of Huron, et al (2 Up. Can. C. P. 72), 232.
- Hawkins v. Sanders (45 Mich. 491), 721.
- Hawkinsville v. Ethridge (96 Ga. 326), 574.
- Hawley v. Harrall (19 Conn. 142), 713, 718, 829.

- Hawthorne v. East Portland (13 Oreg. 271), 828.
- Hay v. Springfield (64 Ill. App. 671), 100.
- Hayden v. Noyes (5 Conn. 391), 150, 152, 357.
- Hayden v. State (69 Ga. 731), 569, 572.
- Hayes v. Appleton (24 Wis. 540), 291, 297.
- Hayes v. Mich. Cent. R. R. (111 U. S. 228), 16, 57, 880.
- Hayes v. Oshkosh (33 Wis. 314), 677.
- Haynes v. Cape May (52 N. J. L. 180), 269, 450.
- Haynes v. Cape May (50 N. J. L. 55), 290.
- Hays v. Pac. Mail Steamship Co. (17 How. 596), 409, 415.
- Hays v. Vincennes (82 Ind. 178), 851.
- Hayward v. Davidson (41 Ind. 212), 90.
- Hayward v. North Bridgewater (2 Cush. 419), 151.
- Hayward v. People (145 Ill. 55), 346.
- Hayward v. School District (2 Cush. 419), 148.
- Haywood v. N. Y. Cent. & H. Ry. Co. (59 Hun. 617), 590.
- Haywood v. Savannah (12 Ga. 404), 21, 23, 329, 330, 339, 344, 352.
- Hazard Powder Co. v. Volger (58 Fed. Rep. 152), 741.
- Hazelgreen v. McNabb (23 Ky. Law Rep. 811), 200.
- Heacock v. Hosmer (109 III. 245), 528.
- Heacock v. Lubukee (108 Ill. 641), 527.
- Health Department v. Knoll (70 N. Y. 530), 545.
- Health Dept. v. Purdon (99 N. Y. 237), 692.
- Heath v. Hall (Tex. Civ. App. 1894, 27 S. T. Rep. 160), 731.
- Hechinger v. Mayville (22 Ky. Law Rep. 486), 364.
- Hecht v. Coale (93 Md. 692), 156, 163.
- Heeg v. Licht (80 N. Y. 579), 740.

- Heeney v. Sprague (11 R. I. 456), 63, 64, 76, 587.
- Heer Dry Goods Co. v. Citizens' Ry. Co. (41 Mo. App. 63), 64.
- Heffron v. Detroit City R. Co. (92 Mich. 406), 751.
- Heidenwag v. Philadelphia (168 Pa. 72), 538.
- Heilbron, Ex parte (56 Cal. 609), 701.
- Heilbron v. Cuthbert (96 Ga. 312), 100, 250.
- Heinrich v. St. Louis (125 Mo. 424), 883, 892.
- Heins v. Lincoln (102 Iowa 69), 237.
- Heinssen v. State (14 Col. 228), 333.
- Heisembrittle v. Charleston (2 MacMullan 233), 757.
- Heiskell v. Baltimore (65 Md. 125), 163, 166.
- Heitzelman v. State (Tex. Crim. App. 1894, 26 S. W. Rep. 729), 774.
- Heland v. Lowell (3 Allen 407), 19, 31, 32.
- Hellen v. Noe (3 Ired. 493), 276, 732.
- Helena v. Dwyer (64 Ark. 424), 294.
- Heller v. Alvarado (1 Tex. Civ. App. 409), 600.
- Hellman v. Shoulters (114 Cal. 136), 247, 841.
- Helm v. Pridgen (1 White & W. Civ. Cas. Tex. Ct. App. sec. 644), 382.
- Heman v. Allen (156 Mo. 534), 248. Heman v. Gilliam (171 Mo. 258),
- 821. Heman v. McLaren (28 Mo. App.
- 654), 131. Heman v. Ring (85 Mo. App. 231),
- 290, 298, 822, 851. Heman v. Schulte (166 Mo. 409), 117.
- Heman Construction Co. v. Loevy (64 Mo. App. 430), 50, 159, 200, 848, 860, 871.
- Heminger v. Cleveland (2 Ohio Dec. 428), 454.
- Hemmer v. Hustace (51 Hun. 457), 126.

- Henderson v. Baltimore (8 Md. 352), 831.
- Henderson v. Central, etc. Ry. (21 Fed. Rep. 358), 380.
- Henderson v. Covington (14 Bush. 312), 107.
- Henderson v. Davis (106 N. C. 88), 546.
- Henderson v. Heyward (109 Ga. 373), 647.
- Henderson v. Marshall (22 Ky. Law Rep. 671), 642.
- Henderson v. New York (92 U. S. 259), 411.
- Henderson v. O'Haloran (24 Ky. Law Rep. 995), 680.
- Henderson Bridge Co. v. Henderson (173 U. S. 592), 607.
- Hendersonville v. McMinn (82 N. C. 532), 490, 496.
- Hendrick v. Crowley (31 Cal. 471), 846.
- Henke v. McCord (55 Iowa 378), 71, 273, 473.
- Henkel v. Detroit (49 Mich. 249), 762.
- Hennepin County v. Robinson (16 Minn. 381), 128, 625.
- Minn. 381), 128, 625. Hennessy v. Connolly (13 Hun. 173), 484.
- Hennessy v. St. Paul (37 Fed. Rep. 565), 686.
- Hennick, In re (5 Mackey 489), 400.
- Henry v. Pittsburgh & A. Bridge Co. (8 Watts & S. 85), 882.
- Henry County v. Slatter (52 Ind. 171), 90.
- Hensley Tp. v. People ex rel (84 III. 544), 608.
- Hensoldt v. Petersburg (63 Ill. 116, 157), 465, 499, 534.
- Hentig v. Gilmore (33 Kan. 234), 837.
- Hequembourg v. Dunkirk (49 Hun. 550), 100.
- & E. Ry. Co. (141 Ill. 491), 468.
- Herford v. Omaha (4 Neb. 336), 127.
- Herman v. Oconto (100 Wis. 391), 249.
- Herman v. Payne (27 Mo. App. 481), 588.

- Herrick v. Smith (1 Gray, 67 Mass.), 1, 575.
- Hershoff v. Beverly (45 N. J. L. 288), 645.
- Herzo v. San Francisco (33 Cal. 134), 189, 235, 300.
- Hesketh v. Braddock (3 Burr 1847), 471, 476.
- Heslep v. Sacramento (2 Cal. 580), 10.
- Hess v. Lancaster (4 Pa. Dist. Rep. 737), 715.
- Hessler v. Drainage Com. (53 Ill. 105), 128.
- Hewison v. New Haven (37 Conn. 475), 721.
- Hewison v. Tp. of Pembroke (6 Ont. Rep. 170), 55, 172.
- Hexamer v. Webb (101 N. Y. 377), 714.
- Heydenfelt v. Hitchcock (15 Cal. 514), 95.
- Heylman, Ex parte (92 Cal. 492), 632.
- Hibbard v. Chicago (173 Ill. 91), 337.
- Hibbard v. Suffolk County (163 Mass. 34), 237, 238.
- Hibernia L. E. Co. v. Com. (93 Pa. St. 264), 296.
- Hickey v. Chicago & W. I. R. Co. (6 Ill. App. 172), 894.
- Hickman v. O'Neal (10 Cal. 292), 463, 467, 470.
- Hickman v. U. D. Ry. Co. (47 Mo. App. 65), 744.
- Hickok v. Shelburne (41 Vt. 409), 179, 208.
- Higginbotham v. Com. (25 Gratt. 627), 349.
- Higgins, Ex parte (14 Mo. App. 601), 560.
- Higgins v. Curtis (39 Kan. 283), 193.
- Higgins v. Northwich Union Guardians of the Poor (22 L. T. 753), 710.
- Highland Turnpike Co. v. McKean (11 Johns 98), 206.
- Higley v. Bunce (10 Conn. 436), 248, 253.
- Hight v. Monroe County Comrs. (68 Ind. 575), 114.

- Hilbish v. Catherman (64 Pa. St. 154), 104, 607.
- Hildreth v. McIntyre (1 J. J. Marsh 206), 158.
- Hilgert v. Levin (72 Mo. App. 48), 775.
- Hill v. Boston (122 Mass. 344), 674, 675.
- Hill v. Charlotte (72 N. C. 55), 50, 676.
- Hill v. Dalton (72 Ga. 314), 501, 511, 514, 789.
- Hill v. Decatur (22 Ga. 203), 66.
- Hill v. East Hampton Selectmen (140 Mass. 381), 103.
- Hill v. Glasgow R. R. (41 Fed. Rep. 610), 381.
- Hill v. Godwin (56 N. H. 441), 206. Hill v. Kahoka (35 Fed. Rep. 32),
- 546.
- Hill v. New York (139 N. Y. 495), 680.
- Hill v. People (16 Mich. 351), 527. Hill v. People (20 N. Y. 363), 43.
- Hill v. St. Louis (159 Mo. 159), 83, 293, 812.
- Hill v. Thompson (16 Jones & Spencer 481), 356.
- Hill v. Wells (6 Pick. 104), 471.
- Hillhouse v. New Haven (62 Conn. 344), 810.
- Hilliard v. Asheville (118 N. C. 845), 823.
- Hillsboro v. Ivey (1 Tex. Civ. App. 653), 680,
- Himmelmann v. Hoadley (44 Cal. 213), 833.
- Hinchman v. Detroit (9 Mich. 103), 842.
- Hine v. Keokuk & D. R. R. (42 Iowa 636), *890.
- Hine v. New Haven (40 Conn. 478), 435, 438, 735, 737, 738.
- Hines v. Leavenworth (3 Kan. 186), 823.
- Hinsdale v. Shannon (182 III. 312), 224, 852, 857, 871.
- Hirshfield v. Dallas (29 Tex. App. 242), 637, 655.
- Hirst v. Ringen Real Estate Co. (169 Mo. 194), 60, 61, 64, 583, 585, 586, 602, 740.
- Hisey v. Charleston (62 Mo. App. 381), 7.

- Hisey v. Mexico (61 Mo. App. 248), 688, 721, 876.
- Hitchcock v. Galveston (96 U. S. 341), 138, 197, 808.
- Hitchcock v. St. Louis (49 Mo. 484), 69, 102, 434.
- Hixon v. Eagle River (91 Wis. 649), 610.
- Hoadley v. San Francisco (70 Cal. 320), 92.
- Hoadley v. San Francisco (50 Cal. 265), 92.
- Hoag v. Durfey (1 Aiken 286), 209, 214.
- Ho Ah Kow v. Nunan (5 Sawyer 552), 280.
- Hobart v. Detroit (17 Mich. 246), 864.
- Hobbs v. Hill (157 Mass. 556), 492, 506.
- Hoboken v. Chamberlain (37 N. J. L. 51), 813.
- Hoboken v. Gear (27 N. J. L. 265), 247, 250, 251, 366.
- Hoboken v. Harrison (30 N. J. L. 73), 86.
- Hoboken Land & Imp. Co. v. Hoboken (35 N. J. L. 205), 842.
- Hodges v. Buffalo (2 Denio 110),
- Hodges v. Nashville (2 Humph. 61), 616.
- Hodson v. New Orleans (21 La. Ann. 301), 630.
- Hoefling v. San Antonio (85 Tex. 228), 630.
- Hoey v. Gilroy (129 N. Y. 132), 715, 721.
- Hogan v. Citizens' Ry. Co. (150 Mo. 36), 750.
- Hogan v. Indianapolis (Ind. 1902, 65 N. E. Rep. 525), 612, 618, 645.
- Hoge v. Railroad Co. (99 U. S. 348), 380,
- Hoggatt v. Bigley (6 Humph. 236), 36.
- Hoffman v. Jersey City (34 N. J. L. 172), 537, 635, 768,
- Hoffner v. Oberlin (8 Ohio Dec. 710), 521.
- Hoke v. Perdue (62 Cal. 545), 54. Holden v. Alton (179 Ill. 318), 302, 431, 863.

- Holden v. Chicago (172 III, 263), 850.
- Holden v. Hardy (169 U. S. 366), 779.
- Holland v. Baltimore (11 Md. 186), 81, 437.
- Holland v. Bartch (120 Ind. 40),
- Holland v. Isler (77 N. C. 1), 640.
- Holland v. San Francisco (7 Cal. 361), 115.
- Holland v. State (23 Fla. 123), 195.
- Hollwedell, Ex parte (74 Mo. 395), 277, 477, 512, 506, 522, 576, 787, 794.
- Holly Springs Bank v. Pinson (58 Miss. 421) 220.
- Holmes v. Fihlenburg (54 Ill. 203), 464, 469.
- Holmquist, Ex parte (Cal. 1901, 27 Pac. Rep. 1099), 451.
- Holst v. Roe (39 Ohio St. 340), 640.
- Holt v. Somerville (127 Mass. 408), 170, 183, 189.
- Holwerson v. St. Louis and S. R. Co. (157 Mo. 216), 61.
- Holyoke Co. v. Lyman (15 Wall 500), 322, 323.
- Holzhauer v. Newport (94 Ky. 396), 823.
- Holzworth v. Newark (50 N. J. L. 85), 562.
- Home Ins. Co. v. Augusta (93 U. S. 116), 371, 660.
- Home Ins. Co. v. Augusta (50 Ga. 530), 629, 660.
- Home Ins. Co. v. Tierney (47 Ill. App. 600), 8.
- Homes v. Hyde Park (53 Ill. 79),
- Homestead Street Ry v. Pittsburg, etc., Street Ry (166 Pa. St. 162), 896.
- Homewood v. Wilmington (5 Houst. 123), 538.
- Hong Shen, ex parte (98 Cal. 681), 683.
- Hood v. Lynn (1 Allen 103), 103, 109.

- Hood v. Von Glahn (88 Ga. 405), 789.
- Hooksett v. Amoskeag Mfg. Co. (44 N. H. 105), 719.
- Hooper v. California (155 U. S. 648), 398.
- Hoops v. Ipava (55 Ill. App. 94), 686.
- Hope v. Deaderick (8 Humph. 1), 609.
- Hope v. Johnson (2 Yerg. 123), 383.
- Hopkins v. Swansea (4 M. &. W. 621), 2, 18, 345, 348.
- Horan v. Lane (53 N. J. L. 275), 22.
- Horn v. Baltimore (30 Md. 218), 192, 264.
- Horn v. Chicago & N. W. Ry. Co. (38 Wis. 463), 746.
- Horn v. People (26 Mich. 221), 56, 294, 775, 873, 881.
- Hornby v. Beverly (48 N. J. L. 110), 837.
- Horner v. Rowley (51 Iowa 620), 168, 172, 189.
- Horney v. Sloan (1 Ind. 266), 36. Horney v. Sloan (Smith 136), 32.
- Horney v. Sloan (Smith 136), 32, 34.
- Horton v. Critchfield (18 Ill. 133), 558.
- Hornung v. State (116 Ind. 458), 163.
- Horton v. Garrison (23 Barb. 176), 165.
- Horton v. Mobile, School (43 Ala. 598), 623.
- Horton v. Williams (99 Mich. 423), 814.
- Hottinger v. New Orleans (42 La. Ann. 629), 438.
- Hough, ex parte (69 Fed. Rep. 330), 400.
- Hough v. Bridgeport (57 Conn. 290), 845.
- Hough v. Cook County Land Co. (73 III. 23), 90.
- Houghton v. Burnham (22 Wis. 301), 828.
- Houghton v. Huron Copper M. Co. (57 Mich. 547), 88, 554.
- House v. Greensburg (93 Ind. 533), 830.

- House v. State (41 Miss. 737), 627, 648.
- Houston v. Houston City Ry Co. (83 Tex. 548), 913.
- H. & T. C. R. R. Co. v. Odum (53 Tex. 343), 201, 246.
- Houston v. Royston (7 How. 543), 463.
- Hovelman v. K. C. Horse R. R. (79 Mo. 632), 90, 120, 380, 432, 891, 915.
- Hovey v. Mayo (43 Me. 322), 116, 118.
- Howard v. Olyphant (181 Pa. St. 191), 259,
- Howard v. Robbins (1 Lans. 63), 716.
- Howard v. Savannah (Thos. U. P. Charlton 173), 352.
- Howe v. New Orleans (12 La. Ann. 481), 680.
- Howe v. Plainfield (37 N. J. L. 145), 513, 792.
- Howell v. Stewart (54 Mo. 400), 538
- Howeth v. Jersey City (30 N. J. L. 93), 238, 839.
- Howland v. Chicago (108 Ill. 496), 654.
- Howlett v. Turner (93 Mo. App. 20), 565.
- Hoyer v. Mascoutah (59 III. 137),
- Hoyt v. East Saginaw (19 Mich. 39), 222, 223, 839.
- Hubbard v. Deming (21 Conn. 356), 717.
- Hubbard v. Goodrich (37 Wis. 84), 720.
- Hubbard v. Medford (20 Oregon 315), 735.
- Hubbard v. Norton (28 Ohio 116), 12, 346.
- Hubbard v. Paterson (45 N. J. L. 310), 736.
- Hubbard v. Preston (90 Mich. 221), 734.
- Hubbard v. Tauton (140 Mass. 467), 104.
- Hubbard v. Winsor (15 Mich. 146), 178, 179.
- Hubbell v. Goodrich (37 Wis. 84), 720.

- Huckenstine's Appeal (70 Pa. St. 102), 685, 698.
- Huddleson v. Ruffin (6 Ohio St. 604), 277, 768.
- Hudson v. Emigration Co. (47 Tex. 56), 306.
- Hudson v. Thorne (7 Paige Ch. 261), 296, 310, 439, 734, 735.
- Hudson County v. State (24 N. J. L. 718), 147, 180.
- Hudson Electric Co. v. Hudson (163 Mass, 346), 837.
- Hudson River Tel. Co. v. Watervliet Turnpike, etc., Co. (135 N. Y. 393), 742.
- Hudson Tel Co. v. Jersey City (49 N. J. L. 303), 319.
- Huesing v. Rock Island (128 Ill. 465), 71, 79, 699.
- Huffsmith v. People (8 Colo. 175), 346.
- Hugg v. Camden (29 N. J. Eq. 6), 531.
- Huggans v. Riley (125 N. Y. 88), 900.
- Hughes v. People (8 Colo. 536), 794.
- Hughes v. Recorders Court (75 Mich. 574), 764, 766.
- Huidekoper v. Meadville (83 Pa. St. 156), 823.
- Hull v. Chicago (156 Ill. 381), 851, 859.
- Hull v. Chicago, etc. R. R. Co. (21 Neb. 371), 251.
- Hull v. Independent District (82 Iowa 686), 145.
- Hull v. West Chicago Park Com'rs (185 Ill. 150), 851.
- Humboldt v. McCoy (23 Kan. 249), 224.
- Hume v. New York (74 N. Y. 264), 721.
- Humes v. Ft. Smith (93 Fed. Rep. 857), 632, 659.
- Humphrey, ex parte (10 Wend. 612), 175.
- Humphrey v. Front Street M. E. Church (109 N. C. 132), 696.
- Humphreys v. Norfolk (25 Gratt. 97), 660.
- Hundley v. Lincoln Park Com'rs (67 Ill. 559), 823.

Hunneman v. Grafton (10 Met. 454), 194.

Hunneman v. Fire District (37 Vt. 40), 99, 149.

Hunsaker v. Borden (5 Cal. 288), 385.

Hunt v. Hunt (72 N. Y. 217), 545.Hunt v. Jacksonville (34 Fla. 504), 512, 515, 520, 570, 786.

Hunt v. Lambertville (45 N. J. L. 279), 4, 893.

Hunt v. Norwich (14 Vt. 300), 151.

Hunt v. School District (14 Vt. 300), 149.

Hunter v. Nockolds (1 McN. & Cord. 651), 445.

Huntington v. Attrill (146 U. S. 657), 375.

Huntington v. Cheesbro (57 Ind. 74), 490, 657.

Huntington v. Mahan (142 Ind. 695), 397, 401.

Huntington v. Pease (56 Ind. 305), 490, 496.

Huntsville v. Phelps (27 Ala. 55), 281.

Hurber v. Baugh (43 Iowa 514), 273.

Hurford v. Omaha (4 Neb. 336), 116, 125.

Hurl, ex parte (49 Cal. 557), 611, 629, 645, 647.

Hurley v. Texas (20 Wis. 634), 335.

Huron v. Carter (5 S. D. 4), 477, 509, 562.

Huron Waterworks Co. v. Huron (7 S. D. 9), 95.

Hurst v. Jones (10 Lea 8), 774.

Hurst v. Warner (102 Mich. 238), 693.

Huse v. Glover (119 U. S. 543), 414, 416.

Hutcheson v. Storrie (92 Tex. 685), 820.

Hutcheson v. Storrie (Tex. Civ. App. 1898, 48 S. W. Rep. 785), 183.

Hutchings v. Scott (9 N. J. L. 218), 467, 468.

Hutchinson v. Beckman (U. S. C. C. A.), 118 Fed. Rep. 339, 435, 437,

Hutchinson v. Mo. Pac. Ry. Co. (161 Mo. 246), 586, 748, 750.

Hutchinson v. Pratt (11 Vt. 402), 206, 211.

Hutchinson Tp. v. Filk (44 Minn. 536), 719.

Hutchison v. Mt. Vernon (40 III. App. 19), 248, 552, 593.

Huthsing v. Bousquet (2 McCrary 152), 114.

Hutton v. Camden (39 N. J. L. 122), 693.

Hutton v. Camden (29 N. J. L. 122), 687.

Hyatt v. McMahon (25 Barb. 457), 322.

Hyatt v. Myers (73 N. C. 237), 697.

Hyde Park v. Borden (94 III. 26), 853.

Hyde Park v. Carton (132 III, 100), 853.

Hyde Park v. Corwith (122 Ill. 441), 321.

Hyde Park v. Ingalls (87 Ill. 11), 609.

Hyde Park v. Spencer (118 III 446), 853.

Hyde Park v. Thatcher (13 Ill. App. 613), 856.

Hydes v. Joyes (67 Ky. 464), 808. Hynes v. Briggs (41 Fed. 468), 397. Hynes v. Chicago (175 Ill. 56),

852.

I.

Illinois v. Illinois Central R. Co. (33 Fed. Rep. 730), 346.

Illinois Central R. R. Co. v. Chicago (141 Ill. 586), 813.

Illinois Cent. R. R. Co. v. Chicago (144 Ill. 392), 848.

Illinois Central R. R. Co. v. Decatur (147 U. S. 190), 818.

Illinois Central R. R. Co. v. Decatur (154 Ill. 173), 825.

Illinois Central R. R. Co. v. Galena (40 Ill. 344), 456.

Illinois Central R. R. Co. v. Gilbert (157 Ill. 354), 597.

Illinois Central R. R. Co. v. Godfrey (71 Ill. 500), 602.

Illinois Cent. R. R. v. Illinois (146 U. S. 387), 93,

- Illinois Central R. R. Co. v. People (161 Ill. 244), 15, 45, 248, 451.
- Illinois Conference Female College v. Cooper (25 Ill. 148), 352.
- Illinois, etc. Co. v. St. Louis (2 Dillon C. C. 70), 38, 304.
- Illinois & M. Canal Co. v. Chicago (14 Ill. 334), 334.
- Illinois Mutual Fire Ins. Co. 'v. Peoria (29 Ill. 180), 621, 660.
- Illinois & St. L. R. & Canal Co. v. St. Louis (2 Dillion C. C. 70), 95.
- Illinois Trust & Sav. Bank v. Arkansas City (40 U. S. App. 257), 377
- Illinois Trust and Sav. Bank v. Arkansas City (76 Fed. 271), 308.
- Illinois Trust & Savings Bank v. Arkansas City Water Co. (67 Fed. Rep. 196), 798.
- Imler v. Springfield (55 Mo. 119), 675.
- Independence v. Cleveland (167
 Mo. 384), 72, 613.
- Independence v. Gates (110 Mo. 374), 825.
- Independence v. Moore (32 Mo. 392), 278, 787, 792.
- Independent School District v. Wirtner (85 Iowa 387), 145.
- Indianapolis v. Bieler (138 Ind. 30), 403, 405, 450, 630.
- Indianapolis v. Blythe (2 Ind. 75), 684, 786.
- Indianapolis v. Consumers' Gas & Trust Co. (140 Ind. 246), 183, 553.
- Indianapolis v. Consumers' Gas Trust Co. (140 Ind. 107), 352, 897.
- Indianapolis v. Fairchild (1 Ind. 315), 476, 794.
- Indianapolis v. Gas Co. (66 Ind. 396), 17 79, 308.
- Indianapolis v. Higgins (141 Ind. 1), 790.
- Indianapolis v. Huegele (115 Ind. 581), 448, 791.
- Indianapolis v. Imberry (17 Ind. 175), 12, 840, 841.

- Indianapolis v. Miller (27 Ind. 394), 6, 717, 841, 893.
- Indianapolis & L. Ry. Co. v. Zimmerman (158 Ind. 189), 904.
- Indianola v. Jones (29 Iowa 282), 186.
- Information v. Oliver (21 S. C. 318), 530, 533, 543, 611, 621, 630.
- Inhabitants v. New Orleans (14 La. Ann. 452), 118, 119.
- Inhabitants, etc. v. Fox (84 Mo. 59), 546.
- Inhabitants of Quincy v. Kennard (151 Mass. 563), 43.
- Inman v. Chicago (78 Ill. 405), 302. In re Butler Street (6 Kulp. 488),
- 801.
 In re Callowhill St. (32 Pa. St.
- 361), 803.
- In re Carlton St. (16 Hun. 497), 186, 202, 205, 209, 210.
- In re Central Park Comrs. (51 Barb. 277), 804, 829.
- In re Chestnut Street (118 Pa. St. 593), 815.
- In re Condemnation of Independence Ave. Boulevard (128 Mo. 272), 813, 836.
- In re Eight Hour Law (21 Colo. 29), 311.
- In re Front Street (24 Pa. Co. Ct. Rep. 88), 239.
- In re Fulton Street (29 How. Pr. 429), 827.
- In re House Bill No. 203 (21 Colo. 27), 777, 778.
- In re House Bill No. 165 (15 Colo. 593), 805.
- In re Jackson Street (83 Pa. St. 328), 803.
- In re Market Street (49 Cal. 546), 825, 827.
- In re Opening of Albany St. (6 Abb. Pr. 273), 331.
- In re Opening of First Street (66 Mich. 42), 129, 742.
- In re Opening Robin Street (1 La. Ann. 412), 179, 256.
- In re Osage Street (90 Pa. St. 114), 803.
- In re Public Road (54 N. J. L. 539), 803,

In re Road (14 Serg. & R. 447), 803.

In re Road Sterrett Tp. (123 Pa. St. 231), 803.

In re Twenty-eighth St. (102 Pa. St. 140), 803.

In re Vacation of Henry St. (123 Pa. St. 346), 803.

In re Vacation of Union St. (140 Pa. St. 525), 803.

Insurance Co. v. Sortwell (8 Allen 217), 165.

Interocean Pub. Co. v. Associated Press (184 Ill. 438), 54.

Inwood v. State (42 Ohio St. 186), 512, 515, 519.

Iowa City v. Newell (115 Iowa 55), 635, 653.

Iowa Homestead Co. v. Webster County (21 Iowa 221), 442.

Ireland v. Globe Milling, etc. Co. (19 R. I. 180), 79.

Iron Mountain R. R. v. Bingham (87 Tenn. 522), 890.

Iron M. R. Co. v. Memphis (96 Fed. Rep. 113), 19, 369, 886.

Irvin v. Devors (65 Mo. 625), 5, 236, 237, 588, 846.

Irvine v. Wood (51 N. Y. 224), 717.

Irving v. Ford (65 Mich. 241), 118.

Isbell v. N. Y. & N. H. R. R. (25 Conn. 556), 151, 207.

Iske v. Newton (54 Iowa 586), 428, 440.

Israel v. Jacksonville (2 Ill. 290), 475, 476, 485, 486.

J.

Jack v. Ontario S. & H. R. W. Co. (14 Up. Can. Rep. 328), 29.

Jackson v. Boyd (53 Iowa 536), 465, 499.

Jackson v. Gilchrist (15 John 89), 446.

Jackson v. Grand Ave. Ry. Co. (118 Mo. 199), 17, 31, 345, 743.

Jackson v. K. C., Ft. S. & M. Ry. Co. (157 Mo. 621), 586, 598, 601, 671, 744, 749.

Jackson v. Newman (59 Miss. 385), 642.

Jackson v. People (9 Mich. 111), 561, 572, 716.

Jackson v. People (9 Mich. 119), 573.

Jackson v. Rochester (43 Hun. 635), 680.

Jackson v. Shawl (29 Cal. 267), 775.

Jackson County H. R. R. Co. v. Interstate Rapid Transit Co. (24 Fed. Rep. 306), 121, 305.

Jacksonville v. Allen (25 Ill. App. 54), 22.

Jacksonville v. Block (36 III. 507), 568.

Jacksonville v. Headen (48 Ill. App. 60), 537.

Jacksonville v. Holland (19 Ill. 271), 500, 567.

Jacksonville v. Ledwith (26 Fla. 163), 242, 294, 452, 616, 762, 763, 764.

Jacksonville v. Jacksonville Ry. Co. (67 Ill. 540), 720.

Jacksonville Electric Light Co. v. Jacksonville (36 Fla. 229), 798.

Jacksonville Ry. Co. v. Jacksonville (114 III. 562), 840, 848, 854.

Jacksonville R. Co. v. Jacksonville (114 Ill. 560), 855.

Jacksonville, Tampa & K. W. Ry. Co. v. Boy (34 Fla. 389), 570.

Jacobs, In re (98 N. Y. 98), 313, 667, 669, 682, 687, 864.

Jacobs v. San Francisco (100 Cal. 121), 158, 238, 241.

Jacobs v. Smallwood (63 N. C. 112), 372.

Jahn, In re (55 Kan. 694), 519, 523, 526, 574, 757, 786.

James v. Darlington (71 Wis. 173), 831.

James v. Dubois (16 N. J. L. 285), 331, 333.

James v. Harrodsburg (86 Ky. 191), 713.

James v. Pine Bluff (49 Ark. 199), 715, 810.

James v. Portage (48 Wis. 677), 874.

James v. Putney (Cro. Car. 498), 490.

James v. Stull (9 Barb, 482), 389.

- Janesville v. Dewey (3 Wis. 245), 46, 247, 249.
- Janesville v. Milwaukee & M. R. R. Co. (7 Wis. 484), 466, 490, 496, 713.
- Jaquith v. Royce (42 Iowa 406), 465, 478.
- Jansen v. Atchison (16 Kan. 358), 63, 587.
- Janvrin v. Exeter (48 N. H. 83), 114.
- Jarvis v. Fleming (27 Ont. Rep. 309), 102.
- Jarvis v. New York (49 How. Pr. 354), 24.
- Jefferson v. Slagle (66 Pa. St. 202), 145.
- Jefferson City v. Courtmire (9 Mo. 692), 128.
- Jefferson County v. Lewis (20 Fla. 980), 472.
- Jeffreys v. Defiance (11 Ohio Dec. 144), 500.
- Jelliff v. Newark (48 N. J. L. 101), 827, 832.
- Jelly v. Pieper (44 Mo. App. 380), 60, 64.
- Jenkins v. Ballantyne (8 Utah 245), 734.
- Jenkins v. Charleston (96 U. S. 449), 375.
- Jenkins v. Cheyenne (1 Wyo. Ter. 287), 478, 487, 565.
- Jenkins v. Stetler (118 Ind. 275), 119.
- Jenkins v. Thomasville (35 Ga. 145), 782.
- Jenks v. Chicago (56 Ill. 397), 808. Jennings County v. Verbarg (63
- Ind. 107), 862. Jett v. Richmond (78 Ind. 316),
- 791.
- Jetter v. New York & H. R. R. Co. 2 Abb. Ct. App. Dec. 458), 56, 603.
- Jersey City v. Jersey City & B. R. Co. (20 N. J. Eq. 360), 305, 884.
- Jersey City v. State (30 N. J. L. 521), 192.
- Jersey City H. & P. St. Ry. v. Passaic (N. J. L. 1902, 52 Atl. Rep. 242), 224, 234.

- Jersey City Brewery Co. v. Jersey City (42 N. J. L. 575), 830.
- Jersey City Gas Co. v. Dwight (29 N. J. Eq. 242), 379, 880.
- Jessing v. Columbus (1 Ohio Cir. Ct. Rep. 90), 831.
- Jex v. New York (103 N. Y. 536), 831.
- John v. State (1 Ala. 95), 571.
- Johnson v. Americus (46 Ga. 80), 471, 472, 483.
- Johnson v. Asbury Park (58 N. J. L. 604), 621.
- Johnson v. Barclay (16 N. J. L. 1), 492, 499, 505, 512, 556, 559.
- Johnson v. Board of Com'rs of Wells County (107 Ind. 15), 867.
- Johnson v. Cincinnati (Ohio, 26 Wkly. Law Bul. 223), 360.
- Johnson v. Dodd (56 N. Y. 76), 145.
- Johnson v. Dow (53 Mo. App. 372), 275.
- Johnson v. Finley (54 Neb. 733), 47, 250, 596.
- Johnson v. Hahn (4 Neb. 139),
- Johnson v. Higgins (3 Metc. 566), 372.
- Johnson v. Hilton & D. L. Co. (103 Ga. 212), 469, 470, 574.
- Johnson v. Macon (114 Ga. 426), 642.
- Johnson v. People (202 III. 306), 859.
- Johnson v. Philadelphia (60 Pa. St. 445), 442, 652.
- Johnson v. School District (67 Mo. 319), 192.
- Johnson v. Simonton (43 Cal. 242), 17, 20, 672, 767.
- Johnson v. St. Paul D. R. R. (43 Minn. 222), 311.
- Johnson v. Smith (11 Humph. 396), 774.
- Johnson v. State (59 Miss. 543), 787.
- Johnson v. State (7 Mo. 183), 522.
 Johnson v. Winfield (48 Kan. 129), 502.
- Johnston v. District of Columbia (118 U. S. 19), 799.

- Johnston v. Macon (62 Ga. 645), 611, 633, 644.
- Johnston v. Oshkosh (21 Wis. 184), 811.
- Johnston v. Wilson (2 N. H. 202), 191.
- Jolly v. P. N. I. & C. Ry. Co. (25 Pittsb. Leg. J. 259), 174.
- Joliet v. Alexander (194 Ill. 457),
- Joliet v. Petty (96 Ill. App. 450), 337.
- Joliet v. Petty (97 Ill. App. 450), 330.
- Joliet v. Verley (35 Ill. 58), 127.
- Jonas v. Cincinnati (18 Ohio 318), 609.
- Jonas v. Gilbert (5 Sup. Ct. of Canada 356), 312.
- Jones v. Andover (9 Pick. 146), 150, 197.
- Jones v. Andover (10 Allen 18), 587, 605.
- Jones v. Belt (8 Houton 562), 603.
- Jones v. Boston (104 Mass. 461), 847.
- Jones v. Detroit Water Com'rs (34 Mich. 273), 824.
- Jones v. Duncan (127 N. C. 118), 731.
- Jones v. Estis (2 John 379), 545.
- Jones v. Fireman's Fund Ins. Co. (2 Daly 307), 19, 32, 63, 371.
- Jones v. Gilbert (5 S. C. 356), 631.
- Jones v. Grady (25 La. Ann. 586), 647.
- Jones v. Great Southern, etc., Hotel Co. (86 Fed. Rep. 370), 669.
- Jones v. Hilliard (69 Ala. 300), 627, 648.
- Jones v. Hutchinson (43 Ala. 721), 209.
- Jones v. Lake View (151 Ill. 663), 582.
- Jones v. Loving (55 Miss. 109), 258.
- Jones v. McAlpine (64 Ala. 511), 7, 203, 315.
- Jonesboro v. McKee (2 Yerg. 167), 471.

- Jones v. Millsaps (71 Miss. 10), 457.
- Jones v. Page (44 Ala. 657), 641.Jones v. Pendleton County (Ky. 1902, 19 S. W. Rep. 740), 120.
- Jones v. Port Arthur (16 Ont. Rep. 474), 102.
- Jones v. Richmond (18 Gratt. 517), 759.
- Jones v. Robbins (8 Gray 329), 522, 527.
- Jones v. Schuykill L. H. & P. Co. (202 Pa. St. 164), 237.
- Jones v. South Omaha (Neb. 1902, 94 N. W. Rep. 957), 830.
- Joplin v. Leckie (78 Mo. App. 8), 72, 76, 82, 614.
- Jordan v. School District (38 Me. 164), 149, 191.
- Jordon v. Nicolin (84 Minn. 367), 505, 535.
- Joslyn v. Dickerson (71 Ill. 25), 469.
- Joy v. St. Louis (138 U. S. 1), 16.
 Joyce v. East St. Louis (77 Ill. 156), 617.
- Joyce v. Barron (67 Ohio St. 264), 829.
- Joyce v. Woods (78 Ky. 386), 693.Joyes v. Shadurn (11 Ky. Law. Rep. 892), 833, 847.
- Judd v. Hartford (72 Conn. 350), 675.
- Judd v. W. St. L. & P. Ry. Co. (23 Mo. App. 56), 581, 585.
- Judson v. Plattsburg (3 Dill. C. C. 181), 546.
- Judson v. Reardon (16 Minn. 431), 359, 484.
- Julia Building Assn. v. Bell Tele. Co. (13 Mo. App. 477), 885.
- Julia Building Assn. v. Bell Tele. Co. (88 Mo. 258), 892, 893.
- Julienne v. Jackson (69 Miss. 34), 733.
- Junction City v. Webb. (44 Kan. 71), 336.
- Jussen v. Commissioners (95 Ind. 567), 177.

K.

Kaime v. Harty (4 Mo. App. 357), 319, 325, 334,

Kalamazoo v. Kalamazoo, etc., Co. (124 Mich. 74), 885.

Kamerick v. Castleman (21 Mo. App. 587), 245, 336.

Kamrath v. Albany (53 Hun. 206), 196.

Kanouse v. Lexington (12 III. App. 318), 278, 567.

Kankakee v. K. I. R. R. Co. (115 Ill. 88), 143.

Kankakee v. Potter (119 Ill. 324), 848, 853, 856.

Kahn v. Macon (95 Ga. 419), 537, 784.

Kansas v. Young (3 Kan. 445), 461.

Kansas City v. Am. Surety Co. (71 Mo. App. 315), 588.

Kansas City v. Bacon (147 Mo. 259), 136, 821, 824.

Kansas City v. Baird (163 Mo. 196), 694.

Kansas City v. Butt (38 Mo. App. 237), 657.

Kansas City v. Clark (68 Mo. 588), 334, 436, 477, 564, 565, 755, 794.

Kansas City v. Cook (38 Mo. App. 660), 133, 292, 299, 311, 627.

Kansas City v. Corrigan (86 Mo. 67), 318, 376.

Kansas City v. Corrigan (18 Mo. App. 206), 618, 651, 655.

Kansas City v. Dickey (76 Mo. App. 437), 541.

Kansas City v. Flanagan (69 Mo. 22), 115, 482, 485, 506, 531.

Kansas City v. Flanders (71 Mo. 281), 648.

Kansas City v. Garnier (57 Kan. 412), 774.

Kansas City v. Grubel (57 Kan. 436), 786.

Kansas City v. Grush (151 Mo. 128), 614, 657.

Kansas City v. Johnson (78 Mo. 661), 583, 584, 657.

Kansas City v. Hallett (59 Mo.

App. 160), 25, 756, 787. Kansas City v. Hanson (8 Kan. App. 290), 865.

Kansas City v. Lorber (64 Mo. App. 604), 69, 81, 614, 657.

Kansas City v. McAleer (31 Mo. App. 433), 299, 688, 690, 698, 773.

Kansas City v. McDonald (60 Kan. 481), 294.

Kansas City v. Marsh Oil Co. (140 Mo. 458), 21, 68, 341, 804.

Kansas City v. Muhlback (68 Mo. 638), 477, 564, 646.

Kansas City v. Neal (49 Mo. App. 72), 466, 477, 563, 688, 772, 787, 793.

Kansas City v. O'Connor (82 Mo. App. 655), 826.

Kansas City v. O'Connor (36 Mo. App. 594), 482.

Kansas City v. Richardson (90 Mo. App. 450), 313, 629, 644.

Kansas City ex rel v. Scarritt (127 Mo. 642), 68, 342, 805.

Kansas City v. Smart (128 Mo 272), 329, 341.

Kansas City v. Smith (93 Mo. App. 217), 642.

Kansas City v. Sutton (52 Mo. App. 398), 311, 313, 772.

Kansas City v. Swope (79 Mo. 446), 71.

Kansas City v. Vindquest (36 Mo. App. 584), 657.

Kansas City v. Vineyard (128 Mo. 75), 582.

Kansas City v. Ward (134 Mo. 172), 341.

Kansas City v. White (69 Mo. 26), 320, 334, 755.

Kansas City v. Whitman (70 Mo. App. 630), 497, 507.

Kansas City v. Young (85 Mo. App. 381), 776.

Kansas City v. Zahner (138 Mo. 453), 563.

Kansas City v. Zahner (73 Mo. App. 396), 491, 756, 787.

Kansas City Grading Co. v. Holden (32 Mo. App. 490), 824,

Kansas City Ry. Co. v. Mower (16 Kan. 573), 750.

K. C. St. J. & C. B. Ry. Co. v. St. J. T. Ry. Co. (97 Mo. 457), 888.

Kansas City Transfer Co. v. Hulling (22 Mo. App. 654), 865.

Karle v. K. C. St. Joseph & C. B. Ry. Co. (55 Mo. 476), 602.

Karwisch v. Atlanta (44 Ga. 204), 758.

- Kassell v. Savannah (109 Ga. 491), 784.
- Katzenberger v. Aberdeen (121 U. S. 172), 266.
- Katzenberger v. Larvo (6 Pickle 235), 748.
- Katzenberger v. Lawo (90 Tenn. 235), 26.
- Kavanaugh v. Mobile & G. R. Co. 78 Ga. 271), 895.
- Kaufman v. Stein (138 Ind. 49), 439, 734, 737.
- Kaye v. Hall (13 B. Mon. 455), 846.
- Kayser v. Bremen (16 Mo. 88), 546.
- Keane v. Cushing (15 Mo. App. 96), 46, 845, 860.
- Keane v. Klausman (21 Mo. App. 485), 583, 588, 861.
- Kearney v. Andrews (10 N. J. Eq. 70), 835, 851.
- Kearney v. Farrell (28 Conn. 317), 685.
- Kearney v. Woodruff (U. S. C. C. A., 115 Fed. Rep. 90), 244.
- Kearns v. Snowdew (104 Mass. 63), 605.
- Keating v. Skiles (72 Mo. 97), 209, 595, 860.
- Keck v. Gainsville (98 Ga. 423), 784.
- Keckely v. Road Com'rs (4 Mc-Cord 463), 251.
- Keek v. Cincinnati (4 Ohio Dec. 324), 566.
- Keel v. Board of Directors, etc., (59 Ark. 513), 829.
- Keeler v. Milledge (24 N. J. L. 142), 480, 484, 492, 496, 559, 566.
- Keeny v. Jersey City (47 N. J. L. 449), 131.
- Keese v. Denver (10 Colo. 112), 831.
- Keilkopf v. Denver (19 Colo. 325), 670.
- Keim v. Chicago (46 Ill. App. 445), 773.
- Keim v. Union Ry. & Transit Co. (90 Mo. 314), 745, 749.
- Keith v. Bingham (100 Mo, 300), 818, 823, 825,

- Keith v. Covington (22 Ky. L. Rep. 1414), 159.
- Keith v. Wilson (145 Ind. 149), 810.
- Keithsburg v. Frick (34 III. 405), 267.
- Kellar v. Savage (17 Me. 444), 199, 200.
- Keller v. Corpus Christi (50 Tex. 614), 667.
- Kelley v. Kennard (60 N. H. 1), 142.
- Kelley v. Milwaukee (18 Wis. 23), 118, 124, 125.
- Kelley v. New York (6 Misc. 516), 682, 707.
- Kelley v. Rhodes (7 Wyo. 237), 412.
- Kellny v. Mo. Pac. Ry. Co. (101 Mo. 67), 586, 745, 748.
- Kellogg v. Carrico (47 Mo. 157), 252.
- Kelly v. Chicago (62 Ill. 279), 862.
- Kelly v. Meeks (87 Mo. 396), 65, 351.
- Kelly v. Milwaukee (18 Wis. 83), 676.
- Kelly v. Pittsburg (104 U. S. 78), 140.
- Kelly v. St. Paul M. & M. Ry. Co. (29 Minn. 1), 585.
- Kelsey v. King (32 Barb. 410). 813, 828, 832.
- Kemp v. Monett (95 Mo. App. 452). 21, 22.
- Kemper v. Burlington (81 Iown 354), 720.
- Kempinger v. St. Louis & Iron M. Ry. Co. (3 Mo. App. 581), 744.
- Kemper v. Louisville (14 Bush. 87), 472.
- Keokuk v. District of Keokuk (53 Iowa 352), 61.
- Keokuk v. Dressell (47 Iowa 597), 279, 451, 557, 617.
- Keokuk v. Fort Wayne Electric Co. (90 Iowa 67), 895.
- Keokuk v. Keokuk N. L. Packet Co. (45 Iowa 196), 38.
- Keokuk v. Scroggs (39 Iowa 447), 79, 734, 735.
- Keokuk, etc. Co. v. Quincy (81 III. 422), 448,

- Keough v. St. Paul (66 Minn. 114), 834.
- Kendig v. Knight (60 Iowa 29), 47, 845.
- Kennard v. Burton (25 Me. 39), 726.
- Kennebec Water Dist. v. Waterville (97 Me. 185), 905.
- Kennedy v. Board of Health (2 Pa. St. 366), 688.
- Kennedy v. Miller (97 Cal. 429), 70.
- Kennedy v. Phelps (10 La. Ann. 227), 682, 691, 693, 698.
- Kennedy v. Philadelphia (2 Pa. St. 366), 682.
- Kennedy v. Newman (3 N. Y. Super. Ct. 187), 596.
- Kennedy v. Sowden (1 McMullan Law 323), 32, 276, 552, 688, 689.
- Kensington v. Glenat (1 Phila. 393), 499.
- Kent v. Dithridge & Smith Cut Glass (10 Ohio Cir. Ct. Rep. 629), 96.
- Kenyon v. Stewart (44 Pa. St. 179), 383.
- Kepner v. Com. (40 Pa. St. 124), 3, 5, 11, 13, 14, 237, 238, 241, 244.
- Kerlin Bros. Co. v. Toledo (20 Ohio Cir. Ct. 603), 189.
- Kernitz v. Long Island City (50 Hun. 428), 253.
- Kerr v. Corsicana (Tex. Civ. App. 1895, 35 S. W. Rep. 694), 839.
- Kerr v. Hitt (75 Ill. 51), 251.
- Kerr v. Seaver (11 Allen 151), 640.
- Kerr v. Trego (47 Pa. St. 29), 154.
- Kerrigan, in re (33 N. J. L. 344), 465.
- Kesler v. Smith (66 N. C. 154), 335.
- Ketchum v. Buffalo (21 Barb. 294), 88, 111.
- Ketchum v. Buffalo (14 N. Y. 356), 761.
- Kettering v. Jacksonville (50 Ill. 39), 449, 453, 534, 545, 546, 594,
- Keyes v. Westford (17 Pick. 273), 195.

- Keyport v. Cherry (51 N. J. L. 417), 803.
- Kiburg, ex parte (10 Mo. App. 442), 277, 461, 512, 520, 560, 756, 787, 792.
- Kidd v. Pearson (128 U. S. 1), 419, 665.
- Kiley v. Cranor (51 Mo. 541), 214.
- Kiley v. Forsee (57 Mo. 390), 223, 257.
- Kiley v. Kansas City (87 Mo. 103), 19, 63, 371, 675, 677, 692.
- Kiley v. Oppenheimer (55 Mo 374), 72, 214.
- Kilvington v. Superior (83 Wis. 222), 864.
- Kimball v. Brawner (47 Mo. 398), 111, 870.
- Kimball v. Connor (3 Kan. 414), 516.
- Kimball v. Lamprey (19 N. H. 215), 149, 178.
- Kimball v. Marshall (44 N. H. 465), 167, 175, 178, 179.
- Kimball v. People (20 III, 348), 535.
- Kimball v. Rosendale (42 Wis. 407), 869.
- Kimble v. Peoria (140 III. 157), 253, 847.
- Kimmel, in re (41 Fed. Rep. 775), 400.
- Kimmel v. State (104 Tenn. 184), 397.
- Kimmish v. Ball (129 U. S. 217), 422.
- Kimmundy v. Mahan (72 Ill. 462), 277, 627.
- Kincaid's Appeal (66 Pa. St. 411), 697.
- Kinder v. Gillespie (63 III. 88). 276, 731.
- Kinealy v. Gay (7 Mo. App. 203), 837.
- King v. Avering Atte Bower (5 Barn. & Ald. 691), 464.
- King v. Bower (1 Barn, and Cress. 492), 175.
- King v. Brooklyn (42 Barb. 627), 807.
- King v. Buller (8 East 389), 175.

- King v. Burdett (12 W. Va. 688), 528.
- King v. Chicago (111 Ill. 63), 241. King v. Chicago, etc., R. R. Co.
- (98 Ill. 376), 738.
- King v. Davenport (98 III. 305), 691, 735, 738.
- King v. Derby (Skinner 370), 125.
- King v. Dixon (10 Mod. 335), 540.
- King v. Greet (8 Barn. & Cress. 363), 164.
- King v. Hastings (5 Barn. & Ald. 692), 464.
- King v. Hunter (65 N. C. 603), 366,
- King v. Inhabitants of Essex (4 T. R. 591), 115.
- King v. Jacksonville (3 III. 305), 475, 487.
- King v. Jacksonville (2 Scam. 305), 645.
- King v. Miller (6 Durnf. & East 268), 164, 175.
- King v. Morris (18 N. J. Eq. 397), 684.
- King v. Portland (2 Oreg. 146), 823.
- King v. Reed (43 N. J. L. 186), 806.
- King v. Thompson (2 Durnf. & East 18), 558.
- King v. Williams (2 Maule & Sel. 141), 175.
- King-Hill Brick Mfg. Co. v. Hamilton (51 Mo. App. 120), 132, 809.
- Kingman, in re (153 Mass. 566), 806.
- Kingman v. Berry (40 Kan. 625), 506.
- Kingsbury v. Centre School Dist. (12 Met. 99), 179.
- Kinsbury v. Quincy School District (12 Met. 99), 152.
- Kings County Ins. Co. v. Stevens (101 N. Y. 411), 91.
- Kinney v. Koopman (116 Ala. 310), 740.
- Kinsel, in re (64 Kan. 1), 512.
- Kinsella v. Auburn (54 Hun. 634), 846.
- Kinsley v. Chicago (124 Ill. 359), 615, 616, 635, 671.
- Kip v. Paterson (26 N. J. L. 298), 490, 496, 616, 634.

- Kiphart v. Pittsburgh C. C. & St. L. Ry. Co. (7 Ind. App. 122), 829.
- Kirchgraber v. Lloyd (58 Mo. App. 59), 553, 685, 698.
- Kirby v. Boylston Market Association (14 Gray 249), 62, 587, 603, 715.
- Kirby v. Citizens' Ry. Co. (48 Md. 168), 817.
- Kirk v. Nowell (1 Term Rep. 118), 272.
- Kirk v. Nowill (1 Term Rep. 125), 475.
- Kirkham v. Russell (76 Va. 956), 8, 9, 28, 66, 72, 76, 81, 121, 142, 293.
- Kirkland v. Indianapolis (142 Ind. 123), 830.
- Kirkman v. Handy (30 Tenn. 406), 704.
- Kirkpatrick v. State (5 Kan. 673), 547.
- Kirkpatrick v. United Presbyterian Ch. (63 Iowa 372), 13.
- Kirkwood v. Autenreith (11 Mo. App. 515), 541, 564.
- Kirkwood v. Cairns (44 Mo. App. 88), 477, 692, 707, 715.
- Kirkwood v. Meramec Highlands Co. (94 Mo. App. 637), 72, 304, 309, 451.
- Kitchell v. Commissioners (123 Ind. 540), 120.
- Kitson v. Ann Arbor (26 Mich. 325), 635, 646.
- Kittinger v. Buffalo Traction Co. (160 N. Y. 377), 182, 240, 241, 257, 260, 880.
- Kittle v. Shervin (11 Neb. 65), 824.
- Klais v. Pulford (36 Wis. 587), 246.
- Kline v. Tacoma (12 Wash. 657), 842.
- Klinesmith v. Harrison (18 Ill. App. 467), 437.
- Klingler v. Bickel (117 Pa. St. 326), 735, 738.
- Klipper v. Coffey (44 Md. 117), 604. Klock v. People (2 Park Cr. Rep. 676), 522.

Klockenbrink v. St. Louis & M. Riv. Ry. Co. (81 Mo. App. 351), 749

Klotz v. Winona & St. P. Ry. Co. (68 Minn. 341), 585.

Knapp v. Kansas City (48 Mo. App. 485), 72, 76, 103, 115, 430.

Knapp, Stout & Co. v. St. Louis

(156 Mo. 343), 425, 428, 814, 883. Knapp, Stout & Co. v. St. Louis Transfer Co. (126 Mo. 26), 873,

Transfer Co. (126 Mo. 26), 873, 874, 884, 888, 889, 891, 892.

Knaust, in re (101 N. Y. 188), 841.
Knauss v. Brua (107 Pa. St. 85), 456.

Kneedler v. Norristown (100 Pa. St. 368), 273, 296, 734, 735.

Kneeland v. Milwaukee (18 Wis. 411), 828.

Kneib v. People (50 How. Pr. 140), 249.

Knell v. Buffalo (54 Hun. 80), 239.
Knight v. Eureka (123 Cal. 192), 128.

Knight v. K. C., St. J. & C. B. R. R. Co. (70 Mo. 231), 209, 212, 238, 241, 243, 599, 915.

Knight v. Thompsonville (74 Ill. App. 550), 186.

Knight v West Union (45 W. Va. 194), 327.

Kniper v. Louisville (7 Bush. 599), 612, 618, 635.

Knupfle v. Knickerbocker Ice Co. (84 N. Y. 488), 56, 61.

Knoblach v. C. M. & St. Paul Ry. Co. (31 Minn. 402), 745.

Knot v. Gay (1 Root 66), 483.

Knowles v. Muscatine (20 Iowa, 248), 803.

Knowles v. Seale (64 Cal. 377), 833.

Knowles v. Wayne City (31 III. App. 471), 564.

Knowlton v. Williams (174 Mass. 476), 609.

Knox, ex parte (Tex. Crim. App. 1897, 39 S. W. Rep. 670), 462, 468.

Knox City v. Thompson (19 Mo. App. 523), 72, 448, 614, 620.

Knox City v. Whitaker (87 Mo. App. 468), 32.

Knoxville v. Bird (12 Lea 121), 44, 257, 369, 715.

Knoxville v. C. B. & Q. R. R. (83 Iowa 636), 83, 271, 686.

Knoxville v. King (7 Lea 441), 34, 276, 552, 731.

Knoxville v. Knoxville Water Co. (107 Tenn. 647), 176, 252, 906.

Knoxville v. Knoxville Water Co. (189 U. S. 434), 907.

Kobbe v. New Brighton (20 Misc. 477), 699.

Koeppen v. Sedalia (89 Mo. App. 648), 134.

Kokomo v. Mahan (100 Ind. 272), 799.

Kolff v. St. Paul Fuel Exchange (48 Minn. 215), 304.

Kolkmeyer v. Jefferson City (75 Mo. App. 678), 192, 840.

Konrad v. Rogers (70 Wis. 492), 91.

Koppersmith v. State (51 Ala. 6), 538.

Korah v. Ottawa (32 Ill. 121), 270, 328.

Kosciusko v. Slomberg (68 Miss. 469), 302, 693.

Kraffe v. Springfield (86 Mo. App. 530), 834.

Kreis v. Mo. Pac. Ry. Co. (148 Mo. 321), 749.

Krickle v. Com. (1 B. Mon. 361), 447, 754.

Krieseler v. Le Valley (122 Mich. 576), 143.

Kroffe v. Springfield (86 Mo. App. 530), 6, 842.

Krumberg v. Cincinnati (29 Ohio St. 69), 825, 839.

Kruse v. Johnson (2 Q. B. 91), 292, 443.

Kuback, ex parte (85 Cal. 274), 780.

Kuester v. Chicago (187 III, 21), 871.

Kuhn v. Chicago (30 Ill. App. 203), 654, 774.

Kunkle v. Franklin (13 Minn. 127), 105.

Kundinger v. Saginaw (59 Mich. 355), 829.

Kyle v. Malin (8 Ind. 34), 77.

L.

Lacey, ex parte (108 Cal. 326), 24, 354, 703, 773.

Lacey v. Marshalltown (99 Iowa 367), 898.

Lacey v. Palmer (93 Va. 159), 665, 682.

Lackland v. N. Mo. Ry. Co. (31 Mo. 180), 708, 888, 890.

Ladd v. East Portland (18 Oreg. 87), 237.

Ladd v. Jones (61 Ill. App. 584), 798.

Lafayette v. Fowler (34 Ind. 140), 831.

Lafayette v. Timberlake (88 Ind. 330), 676.

Lafferranderie v. New Orleans (3 La. 246), 643.

Laffin & Rand Powder Co. v. Tearney (131 III. 322), 740.

Lafon v. Dufrocq (9 La. Ann. 350), 462, 563.

Laing v. Americus (86 Ga. 756), 716, 718.

Lake v. Aberdeen (57 Miss. 260), 124.

Lake v. Decatur (91 Ill. 596), 835, 848, 855.

Lake Co. Water & Light Co. v. Walsh (Ind. 1902, 65 N. E. Rep. 530), 95.

Lake Erie, etc., R. Co. v. Noblesville (16 App. 20), 593.

Lake Shore & M. S. Ry. Co. v. Chicago (144 Ill. 391), 848.

Lake Shore & M. S. Ry. Co. v. Chicago (56 Ill. 454), 808, 848,

Lake Shore & M. S. R. Co. v. Dunkirk (65 Hun. 494), 163.

Lake Shore, etc., R. Co. v. Probeck (33 Ill. App. 145), 744.

Lake Shore & M. S. Ry. Co. v. Smith (173 U. S. 684), 911.

Lake View v. LeBahn (120 Ill. 92), 717.

Lake View v. Letz (44 III. 81), 294, 697.

Lake View v. Rose Hill Cemetery Co. (70 Ill. 191), 668, 687, 696.

Lake View v. Tate (130 Ill. 247), 45, 310, 744.

Lamar v. Adams (90 Mo. App. 35), 611, 618.

Lamar v. Gunter (29 Ala. 324), 545.

Lamar v. Hewitt (60 Mo. App. 314), 502,

Lamar v. Weidman (57 Mo. App. 507), 291, 297, 298, 452, 762, 768.

Lamar W. & E. L. Co. v. Lamar (128 Mo. 188), 824.

Lamarque v. New Orleans (1 Mc-Gloin 28), 671, 763.

Lamb v. S. L. C. & W. Ry. Co. (33 Mo. App. 489), 742.

Lambertville v. Thornton (1 Ld. Raym. 91), 82.

Lamkin v. Sterling (1 Idaho 92), 385.

Lamm v. Chicago, St. P., M. & O. Ry. Co. (45 Minn. 71), 244, 838.

Lammert v. Lidwell (62 Mo. 188), 133.

Lammert v. Lidwell (62 Mo. 188), 49.

Lancaster v. Baer (5 Lanc. Bar. 606), 558.

Lancaster v. Edison Electric Illuminating Co. (8 Pa. Co. Ct. Rep. 178), 287, 407, 510.

Lancaster v. Fulton (Pa., 24 W. N. C. 401), 9.

Lancaster v. Hirsh (1 Lanc. Law Rev. 209), 488, 558.

Lancaster v. R. R. Co. (12 Lancaster Bar 99), 498, 531.

Land v. Coffman (50 Mo. 243), 90, 546.

Land Co. v. Jellico (103 Tenn. 320), 176.

Lander v. School District (33 Me. 239), 148.

Lander v. Smithfield (33 Me. 239), 151.

Landers v. Staten Island R. R. Co. (53 N. Y. 450), 465.

Landers v. Staten Island R. R. Co. (13 Abb. Pr. N. S. 338), 469.

Landis v. Landis (39 N. J. L. 274), 329.

Landis v. Vineland (54 N. J. L. 75), 21, 23, 285, 451.

Lang v. Brookston (79 Ind. 183), 508.

Landon v. New York (39 N. Y. Super. Ct. 467), 24.

Lane v. Atlantic Works (111 Mass. 136), 602, 603.

Lane v. Burdick (17 Wis. 92), 469. Laney v. Garbee (105 Mo. 355), 481.

Langdon v. Castleton (30 Vt. 285), 142.

Langdon v. New York Fire Dept. (17 Wend. 234), 736.

Langhorne v. Robinson (20 Gratt. 661), 35, 36.

Langon v. Barnardston (1 Lev. 16), 490.

Langdale v. Bonton (12 Ind. 467), 717.

Langston, in re (55 Neb. 310), 269. Languille v. State (4 Tex. App. 312), 640.

Lane v. Concord (70 N. H. 485), 292.

Lanfear v. New Orleans (4 La. 97), 274, 275.

Lanier v. Savannah (70 Ga. 760), 641.

Lansing v. C. M. & St. P. Ry. Co. (85 Iowa 215), 466.

Lansing v. Lansing City Elect. Ry. Co. (109 Mich. 123), 900.

Lansing v. Toolan (37 Mich, 152), 799.

Laporte City v. Goodfellow (47 Iowa 572), 583.

Laramie County v. Albany County (92 U. S. 307), 67.

Laredo v. International Bridge & T. Co. (66 Fed. Rep. 246), 306.

Largen v. State ex rel (76 Tex. 323), 546.

Larkin v. Burlington, etc., R. R. Co. (91 Iowa 654), 247, 594.

Larkin v. Burlington, C. R. & N. Ry. Co. (85 Iowa 492), 251, 315, 593.

Larkin v. Saginaw County (11 Mich. 88), 675.

Larned v. Briscoe (62 Mich. 393), 198, 209.

Larney v. Cleveland (34 Ohio St. 599), 500, 557.

Latham v. Wilmette (168 III. 153), 850, 857, 866, 871.

Latta v. Williams (87 N. C. 126), 614.

Laude v. Chicago & N. W. Ry. Co. (33 Wis. 640), 335.

Lauenstein v. Fond du Lac (28 Wis. 336), 132.

Launder v. Chicago (111 Ill. 291), 297, 359, 427, 551, 653, 654, 774.

Laundry License Case, in re (22 Fed. 701), 616, 634.

Laundry Ordinance Case (7 Saw-yer 526), 135.

Launtz v. People (113 Ill. 137), 8, 158, 163, 167.

Laurens v. Elmore (55 S. C. 477), 401.

Lavery v. Hannigan (20 Jones & S. 463), 713, 718.

Law v. People ex rel (87 III. 385), 103, 233, 252.

Lawrence, in re (69 Cal. 608), 645.
 Lawrence v. Chicago & N. W. R.
 R. Co. (94 U. S. 164), 54.

Lawrence v. Ingersoll (88 Tenn. 52), 8, 163, 166, 185.

Lawrence v. Traner (136 III. 474), 176.

Lawrence v. Webster (167 Mass. 513), 708.

Lawson v. Gibson (18 Neb. 137), 251.

Lawton v. Steele (119 N. Y. 226), 691, 692.

Lawton v. Stelle (152 U. S. 133), 668.

Lawyers' Tax Cases, in re (55 Tenn. 565), 641.

Layton v. New Orleans (12 La. Ann. 515), 67.

Leach v. Cargill (60 Mo. 316), 72, 811.

Leach v. State (36 Tex. Crim. Rep. 248), 462, 466, 561, 791, 795.

Lead v. Klatt (13 S. D. 140), 280, 477, 491, 499, 510.

Lead v. Klatt (11 S. D. 109), 477. Leadville v. Matthews (10 Colo. 125), 222.

Leake v. Philadelphia (150 Pa. St. 643), 898.

Leathers v. Aiken (9 Fed. Rep. 679), 415.

Leavenworth v. Booth (15 Kan. 627), 269, 620, 629, 660.

Leavenworth v. Douglass (3 Kan. App. 67), 240, 247.

Leavenworth v. Weaver (26 Kan. 392), 564.

Leavenworth County Com'rs v. Sellew (99 U. S. 624), 145.

Leavenworth & D. M. R. R. Co. v. Platte County (42 Mo. 171), 126.

Leavey v. Preble (64 'Me. 120), 693.

Leavitt v. Oxford, etc., Silver Min. Co. (3 Utah 265), 165.

Lebanon Light & Water Co. v. Lebanon (163 Mo. 254), 598, 600.

LeClaire v. Davenport (13 Iowa 210), 310, 763.

Lecoup v. Mobile (127 U. S. 640), 399.

Le Couteulx v. Buffalo (33 N. Y. 333), 85, 87, 88.

Lee v. Smyley (16 Ala. 773), 531. Lee v. Thomas (49 Mo. 112), 608.

Lee v. Wallis (1 Ken. 295), 450.

Leeds v. Richmond (102 Ind. 372), 118, 799.

Leep v. St. Louis, I. M. & S. R. Co. (58 Ark. 407), 779.

Lee Tong, in re (9 Sawyer 333), 756.

Lehigh Coal & Iron Co. v. Capehart (49 Minn, 539), 768.

Lehigh Coal & Navigation Co. v. Inter-County Street Railway (167 Pa. St. 126), 430.

Lehigh County v. Schock (113 Pa. St. 373), 522.

Lehigh Water Co. v. Easton (121 U. S. 388), 369.

Lehman v. McBride (15 Ohio St, 573), 225.

Leighton v. Walker (9 N. H. 59),

Leisy v. Hardin (135 U. S. 100), 403.

Leloup v. Port of Mobile (127 U. S. 640), 396, 410.

Lemington v. Blodgett (26 Vt. 210), 202.

Lemington v. Blodgett (37 Vt. 210), 211.

Lemmon v. Guthrie Center (113 Iowa 36), 738.

Lemoine v. St. Louis (120 Mo. 419), 9.

Lemoine v. St. Louis (72 Mo. 404), 15, 330.

Lemoine v. St. Louis (5 Mo. App. 583), 15.

Lemon v. Reidel (1 Lanc. Law Rev. 3), 487, 509.

Lennon v. N. Y. City (55 N. Y. 361), 869.

Lenox v. Grant (8 Mo. 254), 474. Lent v. Portland (Oregon 1903, 71 Pac. Rep. 645), 611.

Lent v. Tillson (72 Cal. 404), 805.
Lenz v. Sherrott (26 Mich. 139), 327, 731.

Leominister v. Conant (139 Mass. 384), 841, 846.

Leonard v. Canton (35 Miss. 189), 76, 614.

Leoni Tp. v. Taylor (20 Mich. 148), 675.

LesBois v. Bramell (4 How. 449), 92.

Lessley v. Phipps (49 Miss. 790), 383.

Lester v. Baltimore (29 Md. 415), 192.

Lester v. Jackson (69 Miss. 887), 89.

Lesterjelle v. Columbus (30 Ga. 936), 481, 530, 555.

LeTourneau v. Duluth (Minn. 1902, 88 N. W. Rep. 529), 244.

LeTourneau v. Duluth (85 Minn. 219), 430.

Levi v. Louisville (97 Ky. 394), 621.

Levis v. Newton (75 Fed. Rep. 884), 723, 913.

Levy, Matter of (4 Hun. 501), 249. Levy v. Chicago (113 III. 650), 111, 848, 870, 871.

Levy v. New York (1 Sandf. 465), 676.

Levy v. Salt Lake City (3 Utah 63), 72.

Levy v. Shreveport (27 La. Ann. 620), 437.

Levy v. State (6 Ind. 281), 482, 485, 492, 781, 794.

Lewis v. Cumberland (56 N. J. L. 416), 440.

Lewis v. Denver City Waterworks (19 Colo. 236), 260.

- Lewis v. Dodge (17 How. Pr. 229), 686.
- Lewis v. New York (35 How Pr. 162), 234.
- Lewis v. St. Louis (4 Mo. App. 563), 218.
- Lewis v. State (21 Ark. 209), 467. Lewiston v. Fairfield (47 Me. 481),
- 496, 582, 591.
- Lewiston v. Proctor (27 Ill. 414), 486.
- Lewiston v. Proctor (23 Ill. 533), 532.
- Lewisville Natural Gas Co. v. State (135 Ind. 49), 101.
- Lexington v. Curtin (69 Mo. 626), 508.
- Lexington v. Lafayette Co. Bk. (165 Mo. 671), 98.
- Lexington v. Headley (5 Bush. 508), 168, 201, 202, 592, 600, 846.
- Lexington v. Thompson (24 Ky. Law Rep. 384), 805.
- Lexington v. Wise (24 S. C. 163), 466, 509, 518, 530, 563.
- Lexington & Ohio R. R. v. Applegate (8 Dana 289), 883.
- L'Hote v. New Orleans (177 U. S. 587), 44, 358, 680, 753.
- L'Hote v. New Orleans (51 La. Ann. 93), 753.
- Liberman v. State (26 Neb. 464), 513, 759.
- License Cases (5 How. 504), 419, 422.
- Liddy v. St. Louis Ry. Co. (40 Mo. 506), 742, 744.
- Liebman v. San Francisco (24 Fed. Rep. 705), 830.
- Ligare v. Chicago (139 Ill. 46), 444, 799.
- Lightburne v. Taxing Dist. (4 Lea. 219), 400, 618.
- Lightfoot v. Krug (35 Pa. St. 348), 737.
- Lightner v. Peoria (150 III. 80), 813.
- Lilly v. Indianapolis (149 Ind. 648), 257.
- Lima Gas Co. v. Lima (4 Ohio Cir. Ct. Rep. 22), 903.

- Lincoln v. Grant (38 Neb. 369), 385.
- Lincoln v. Prince (2 Mass. 544), 471.
- Lincoln v. Smith (27 Vt. 328), 515. Lincoln v. Sun Vapor Light Co.
- (19 U. S. App. 431), 12. Lincoln v. Sun Vapor Street Light Co. (59 Fed. Rep. 756), 841.
- Co. (59 Fed. Rep. 756), 841. Lincoln St. Ry. Co. v. Lincoln (61
- Neb. 109), 11, 117. Linden Land Co. v. Milwaukee
- Elec. R. R. Co. (107 Wis. 493), 428.
- Lindsay v. Anniston (104 Ala. 257), 289, 714.
- Lindsay v. Chicago (115 Ill. 120), 168, 206, 597, 599.
- Linehan, in re (72 Cal. 114), 702, 704.
- Linkenhelt v. Garrett (118 Ind. 559), 490, 646.
- Liningston v. Paducah (80 Ky. 656), 644.
- Linn v. Chambersburg Borough, (160 Pa. St. 511), 112.
- Linneus v. Dusky (19 Mo. App. 20), 771, 787.
- Lippman v. South Bend (84 Ind. 276), 492, 504, 698.
- Liquor Cases (25 Kan. 751), 310.
 Lisbon v. Clark (18 N. H. 234), 220, 224, 334, 335, 338.
- Litchfield v. Parker (64 N. H. 443), 93.
- Little, in re (60 N. Y. 343), 252. Little v. Madison (42 Wis. 643),
- 678. Little v. Merrill (10 Pick. 543),
- 148, 151. Little Falls Electric & W. Co. v. Little Falls (102 Fed. Rep. 663),
- 377. Littlefield v. State (42 Neb. 223), 83, 425, 636, 766.
- Little Miami R. R. Co. v. Green County Commissioners (31 Ohio St. 338), 717.
- Little Rock v. Barton (33 Ark. 436), 665.
- Little Rock v. Board of Improvements (42 Ark. 152), 145, 805.
- Little Rock v. Fitzgerald (59 Ark. 494), 810.

- Little Rock v. Parish (36 Ark. 166), 802.
- Livingston v. Albany (41 Ga. 22), 24.
- Livingston v. Pippin (31 Ala. 542), 798.
- Livingston v. Wolf (136 Pa. St. 519), 25, 30, 291, 715.
- Livingston County Supervisors v. Weider (64 Ill. 427), 608.
- Llano v. Llano County (5 Tex. Civ. App. 132), 718.
- Lloyd v. Mayor, etc., of N. Y. (5 N. Y. 369), 674.
- Lobban v. Garnett (9 Dana 389), 774.
- Locke's Appeal (72 Pa. St. 491), 49, 648.
- Lockett v. Usry (28 Ga. 345), 383. Lockhart v. Troy (48 Ala. 579), 226, 867.
- Lockwood v. Mechanic's Nat. Bk. (9 R. I. 308), 166.
- Lockwood v. St. Louis (24 Mo. 20), 119, 819.
- Lockwood v. Wabash R. R. Co. (122 Mo. 86), 129, 742, 747, 876, 884, 887, 888, 891, 894.
- Loeb v. State (75 Ga. 258), 540. Loeb v. Trustees Columbia Tp. (91 Fed. Rep. 37), 820.
- Loeb & Co. v. Duncan (63 Miss. 89), 570.
- Logan v. Pyne (43 Iowa 524), 71, 76, 304, 613.
- Logan v. Tyler (1 Pitts 244), 200, 245.
- Logan Co. Supervisors v. Lincoln (81 III. 156), 548.
- Logansport v. Crockett (64 Ind. 319), 187, 210, 213.
- Logansport v. Dick (70 Ind. 65), 718.
- Logansport v. Dykeman (116 Ind. 15), 188.
- Logansport v. Legg (20 Ind. 315), 165, 168, 202, 845.
- Logansport v. Wright (25 Ind. 512), 842.
- London v. Vanacre (12 Mod. 272), 179.
- London v. Venacie (12 Mod. 269), 31.

- London v. Wood (12 Md. 686), 277.
- London Assn., etc., v. London & India Docks Joint Com. (3 Ch. 252), 2, 32.
- Lonergan v. Louisiana (83 Mo. App. 101), 22, 24, 468.
- Long v. Brookston (79 Ind. 183), 557.
- Long v. Doxey (50 Ind. 385), 533.
- Long v. Duluth (49 Minn. 280), 305.
- Long v. Jersey City (37 N. J. L. 348), 442.
- Long v. Shelby County Taxing Dist. (7 Lea 134), 359, 763.
- Long Island Water Supply Co. v. Brooklyn (166 U. S. 685), 819.
- Longworth v. Cincinnati (23 Wkly. Law Bul. 100), 836, 839.
- Lorain Plank Road v. Cotton (12 Ohio St. 263), 327.
- Lord v. Annoka (36 Minn. 176), 176.
- Lord v. Chadbourne (42 La. 429), 383.
- Lord v. Governor, etc. (2 Phill. 739), 155.
- Lord v. Oconto (47 Wis. 386), 93, 135.
- Lorenzen, ex parte (128 Cal. 431), 751.
- Lorenzen v. Woods (1 McGloin 373), 693.
- Los Angeles v. Hollywood Cemetery Assn. (124 Cal. 344), 297, 695, 696.
- Los Angeles v. Los Angeles City Water Co. (177 U. S. 558), 378, 906.
- Los Angeles v. Los Angeles Water Co. (61 Cal. 65), 378, 385.
- Los Angeles v. Waldron (65 Cal. 283), 581, 841.
- Los Angeles County v. Eikenberry (131 Cal. 461), 46, 645, 647.
- Los Angeles City Water Co. v. Los Angeles (88 Fed. Rep. 720), 436, 906.
- Los Angeles County v. Eikenberry (Cal. 1901, 63 Pac. Rep. 766), 442, 444.
- Los Angeles County v. Eikenberry (131 Cal. 461), 222.

- Los Angeles Lighting Co. v. Los Angeles (106 Cal. 156), 830.
- Lostutter v. Aurora (126 Ind. 436), 875.
- Loughbridge v. Huntington (56 Ind. 253), 248, 251, 811.
- Louisburg v. Harris (7 Jones L. 281), 770.
- Louisburg v. Harris (53 N. C. 281), 671
- Louisiana v. Hardin (11 Mo. 551), 465.
- Louisiana v. Jumel (107 U. S. 711), 382.
- Louisiana v. Miller (66 Mo. 467), 841.
- Louisiana v. New Orleans (109 U. S. 285), 371, 389.
- Louisiana v. New Orleans (102 U. S. 203), 372, 373, 385.
- Louisiana v. Pilsbury (105 U. S. 278), 324.
- Louisiana v. Police Jury, etc. (111 U. S. 716), 372.
- Louisiana v. Texas (176 U. S. 1), 261, 421.
- Louisville v. Bannon (99 Ky. 74), 814.
- Louisville v. Com. (1 Duval 295), 263.
- Louisville v. Hyatt (2 B. Mon. 177), 168, 592.
- Louisville v. Henderson (5 Bush. 515), 866.
- Louisville v. Louisville University (15 B. Mon. 642), 95.
- Louisville v. McKegney (70 Ky. 651), 200.
- Louisville v. Roupe (6 B. Mon. 591), 298.
- Louisville v. Selvage (106 Ky. 730), 234.
- Louisville v. Webster (108 Ill. 414), 738.
- Louisville v. Wible (84 Ky. 290), 130, 706.
- Louisville City R. R. Co. v. Louisville (8 Bush. 415), 66, 742.
- Louisville Gas Co. v. Citizens' Gas Co. (115 U. S. 683), 379.
- Louisville Gas Co. v. Citizens' Gas Co. (115 U. S. 683), 307,

- Louisville Home Tel. Co. v. Cumberland Tel. Co. (111 Fed. Rep. 663), 429, 725.
- Louisville N. A. & C. Ry. Co. v. Shires (108 Ill. 617), 547, 599.
- Louisville & N. R. Co. v. East St. Louis (134 Ill. 656), 119, 813.
- Louisville & N. R. Co. v. Mobile, etc., R. R. (124 Ala. 162), 429, 881.
- Louisville Natural Gas Co. v. State ex rel Reynolds (135 Ind. 49), 908.
- Louisville Water Co. v. Clark (143 U. S. 1), 380.
- Love v. Raleigh (116 N. C. 296), 676.
- Love v. Recorders' Court (128 Mich. 545), 360.
- Loveland v. Detroit (41 Mich 367), 114.
- Lovingston v. Wider (53 Ill. 302), 607.
- Low v. Evans (16 Ind. 486), 278. Low v. Marysville (5 Cal. 214), 797.
- Low v. Pettengill (12 N. H. 337), 215, 216.
- Low v. Pilotage Com'rs (R. M. Charlt, 302), 185.
- Low v. Printing Co. (41 Neb. 127), 311.
- Low v. Rees Ptg. Co. (41 Neb. 127), 777.
- Lowber v. New York (5 Abb. Pr. 325), 140.
- Lowe, in re (54 Kan. 757), 306, 655, 705.
- Lowe v. Prospect Hill Cemetery Assn. (58 Neb. 94), 696.
- Lowell v. Boston (111 Mass. 454), 71.
- Lowell v. Gathright (97 Ind. 313), 640.
- Lowell v. Oliver (8 Allen 247), 104.
- Lowell v. Short (4 Cush. 275), 717. Lowell v. Simpson (10 Allen 88), 895.
- Lowell v. Spaulding (4 Cush. 277), 718.
- Lowell v. Wheelock (11 Cush. 391), 855.

Lowrey v. Central Falls (23 R. I. 354), 158.

Lowrey v. Lexington (24 Ky. L. Rep. 516), 86, 128, 229, 231.

Lowry v. City of Lexington (24 Ky. Law Rep. 516), 316, 336, 442.

Loze v. New Orleans (2 La. 427), 219, 252.

Lozier v. Newark (48 N. J. L. 452), 25.

Lucas v. Macomb (49 III. App. 60), 630.

Lucas v. San Francisco (7 Cal. 463), 116.

Lucas v. Tippecanoe (44 Ind. 524), 607.

Lucker v. Com. (4 Bush. 440), 582. Luchrman v. Taxing District (2

Lea 425), 140. Lufkin v. Galveston (56 Tex. 522),

Lufkin v. Haskell (3 Pick. 355), 471.

Lumber Co. v. Columbia (62 N. H. 286), 411,

Lumsden v. Cross (10 Wis. 282), 824.

Luques v. Dresden (77 Me. 186), 74.

Lusk v. Chicago (176 Ill. 207), 859. Luske v. Hotchkiss (37 Conp. 219)

Luske v. Hotchkiss (37 Conn. 219), 779.

Lutterloch v. Cedar Keys (15 Fla. 306), 762.

Lyddy v. Long Island City (104 N. Y. 218), 531, 861.

Lynch v. Forbes (161 Mass. 302), 132.

Lynch v. Murphy (119 Mo. 163), 225, 226.

Lynch v. People (16 Mich. 472), 498, 505, 572, 760.

Lynchburg & R. St. Ry. Co. v. Dameron (95 Va. 545), 72.

Lyng v. Michigan (135 U. S. 161), 395.

Lynn v. Chicago, R. I. & Pac. R. R. Co. (75 Mo. 167), 587, 745.

Lyon v. Elizabeth (43 N. J. L. 158), 607.

Lynch v. People (16 Mich. 472), 537.

Lyon v. Jerome (26 Wend. 485), 128.

Lyon v. Tonawanda (98 Fed. Rep. 361), 820.

Lyons v. Cooper (39 Kan. 324), 617.

Lyons v. Cooper (39 Kan. 334), 635.

Lyons v. Wellman (56 Kan. 285), 564.

Lyth v. Buffalo (48 Hun. 175), 131, 240.

M.

McAlister v. Clark (33 Conn. 91), 537, 751, 752, 753.

McAllister v. Tacoma (9 Wash, 272), 866.

McAndrew v. St. Louis & S. Ry. Co. (88 Mo. App. 97), 601.

McAndrews v. Collerd (42 N. J. L. 189), 741.

McBean v. Chandler (9 Heisk. 349), 819.

McBride v. Newlin (129 Cal. 36), 438.

McCain v. State (62 Ala. 138), 884. McCall v. California (136 U. S. 104), 401.

McCann v. Otoe County (9 Neb. 324), 113.

McCarthy, ex parte (72 Cal. 384), 506.

McCarthy v. Chicago (53 III. 38), 716, 894.

McCarthy v. New York (96 N. Y. 1), 778.

McCaskell v. State (53 Ala. 510), 641.

McCauley v. Brooks (16 Cal. 11), 386.

McChesney v. Chicago (161 Ill. 110), 335.

McChesney v. Chicago (171 Ill. 253), 425.

McChesney v. Chicago (159 Ill. 223), 599.

McChesney v. Chicago (152 III 543), 827.

McChesney v. People, ex rel (200 Ill. 146), 780.

McClain, ex parte (134 Cal. 110), 756.

McClaughry v. Hancock County (46 Ill, 356), 136.

- McClellan v. Pettigrew (44 La. Ann. 356), 630.
- McCless v. Meekins (117 N. C. 34), 382.
- McCloskey v. Kreling (76 Cal. 511), 65, 439, 735, 736.
- McCormack's Appeal, In re Shiloh Street (165 Pa. St. 386), 834.
- McCormack v. Patchin (53 Mo. 35), 118, 223, 424, 692, 810, 812, 819, 864.
- McCormick v. Bay City (23 Mich. 457), 203, 204, 212.
- McCormick v. Calhoun (30 S. C. 93), 788.
- McConologue v. McCaffrey (29 Misc. 139), 467.
- McConvill v. Jersey City (39 N. J. L. 38), 29, 30, 79, 282, 447, 732.
- McCortle v. Bates (29 Ohio St. 419), 145.
- McCoull v. Manchester (85 Va. 579), 679.
- McCoun v. N. Y. Cent. R. R. (50 N. Y. 176), 388.
- McCourt v. Beam (Oregon 1902, 69 Pac. Rep. 990), 163.
- McCoy v. Briant (53 Cal. 247), 116, 218.
- McCoy v. Philadelphia W. & B. Ry. Co. (5 Houst. 599), 746.
- McCracken v. Hayward (2 How. 608), 381.
- McCracken v. Moody (33 Ark. 81), 386.
- McCracken v. San Francisco (16 Cal. 591), 115, 166, 168, 170, 264.
- McCready v. Guardians (9 Serg. & R. 94), 166.
- McCready v. Virginia (94 U. S. 391).
- McCready v. State (73 Ala. 480), 452.
- McCrowell v. Bristol (5 Lea 685), 680.
- McCrowell v. Bristol (89 Va. 652),
- 808. McCulley v. Elizabeth (66 N. J. L. 555), 7, 116.
- McCulloch v. Maryland (4 Wheat 316), 352.
- McCulloch v. State (11 Ind. 424), 257.

- McCullough v. Com. (67 Pa. St. 30), 483.
- McCullough v. Virginia (172 U. S. 102), 382.
- McCune v. Norwich City Gas Co. (30 Conn. 521), 897.
- McCutchon and City of Toronto, Re (22 Up. Can. Q. B. 613), 272, 292.
- McCutcheon v. People (69 Ill. 601), 540.
- McDade v. Chester (117 Pa. St. 414), 676, 680.
- McDermott v. Kenny (45 N. J. L. 251), 237, 238.
- McDermott v. Miller (45 N. J. L. 251), 165, 238.
- McDonald v. Dodge (97 Cal. 112), 236, 846.
- McDonald v. Hearst (95 Fed. Rep. 656), 478.
- McDonald v. Lane (80 Ga. 497), 591.
- McDonald v. Louisville (24 Ky. Law Rep. 271), 806.
- McDonald v. Newark (42 N. J. Eq. 136), 762.
- McDonald v. New York (68 N. Y. 23), 861.
- McDonald v. State (81 Ala. 279), 655.
- McDonald v. Toledo Consolidated R. R. Co. (43 U. S. App. 79), 16.
- McElhaney v. McHenry (26 Mo. 174), 274, 622.
- McEneney v. Sullivan (125 Ind. 407), 832, 845.
- McFarlain v. Jennings (106 La. 541), 83.
- McFarlan v. Tritton Ins. Co. (4 Denio 392), 206.
- McFarland v. Gordon (70 Vt. 455), 142.
- McGahey v. Virginia (135 U. S. 622, 685), 373, 382.
- McGarty v. Deming (51 Conn. 422), 562.
- McGavock v. Omaha (40 Neb. 64),
- McGear v. Woodruff (33 N. J. L. 213), 498, 516.
- McGee, Appeal of (114 Pa. St. 470), 883, 895.

McGhee v. State (92 Ga. 21), 630. McGinness v. New York (26 Hun. 142), 102.

McGinnis v. St. Louis (157 Mo. 191), 832.

McGrath v. Chicago (24 Ill. App. 19), 351.

McGrath v. Clemens (49 Mo. 552), 819.

McGraw v. Marion (98 Ky. 673), 82.

McGraw v. Whitson (69 Iowa 348), 16, 181, 183, 190.

McGregor v. Lovington (48 III App. 202), 247, 565, 568, 597.

McGuinn v. Peri (16 La. Ann. 326), 831.

McGuire v. Brockman (58 Mo. App. 307), 818.

McGulgan v. Belmont (89 Wis. 637), 647.

McGunnigle v. Washington (2 Cranch. C. C. 460), 485.

McGurn v. Board of Education (133 Ill. 122), 225.

McInerney v. Denver (17 Colo. 302), 3, 274, 277, 468, 517, 520, 526, 786.

McKean County v. Young (11 Pa. Super. Ct. 481), 103.

McKee v. McKee (8 B. Mon. 433), 34, 273, 433, 551, 671.

McKeesport v. McKeesport Pass. Ry. (158 Pa. St. 447), 900.

McKeesport v. M. & R. P. Ry Co. (2 Sup. Ct. 242), 130.

McKenna, ex parte (126 Cal. 429), 302, 313, 632, 659.

McKenna v. St. Louis (6 Mo. App. 320), 675, 677.

McKenzie v. Wooley (39 La. Ann. 944), 238.

McKnight v. Toronto (3 Ont. Rep. 284), 702, 704.

McKibbin v. Ft. Smith (35 Ark. 352), 737.

McKinney v. Alton (41 Ill. App. 508), 660.

McKinsey v. Bowman (58 Ind. 88), 390.

McKissick v. Mt. Pleasant Tp. (48 Mo. App. 416), 192.

McKune v. Weller (11 Cal. 49), 828.

McKusick v. Stillwater (44 Minn. 372), 251.

McLaughlin v. South Bend (126 Ind. 471), 400.

McLaughlin v. Stephens (2 Cranch. C. C. 148), 788, 792.

McLauren v. Grand Forks (6 Dak. 397), 839.

McLoud and Town of Kincardine, Re (38 Up. Can. Q. B. 617), 272.

McMahon v. Savannah (66 Ga. 217), 66.

McManus v. People ex rel (183 Ill. 391), 855.

McMath v. Parson (26 Minn. 246), 489, 493.

McMichael v. Inter-County Ry. Co. (167 Pa. St. 126), 239.

McMillan v. Portage La Prairie (11 Manitoba Rep. 216), 28.

McMillan v. Sprague (4 How. 647), 390.

McMillen v. Boyles (6 Iowa 304), 266.

McMillen v. Terrell (23 Ind. 163), 492.

McMillian v. Sun Life Assurance Co. (4 Scots L. T. 98), 727.

McMullen v. Hoffman (174 U. S. 639), 862.

McNair, ex parte (13 Neb. 195), 37. McNaughton v. Elkhart (85 Ind. 384), 717.

McNulty v. Conners (50 Ind. 569), 466.

McNulty v. Wilson (4 Strob. 231),

McPherson v. Chebanse (114 Ill. 46), 24, 79, 670, 759, 775, 786, 792. McPherson v. Nichols (48 Kan. 430), 97, 582.

McPhearson v. State (22 Ga. 478), 538.

McQuiddy v. Brannock (70 Mo. App. 535), 861,

McQuiddy v. Vineyard (60 Mo. App. 610), 131, 132, 177.

McRea v. Americus (69 Ga. 168), 783, 794.

McRickard v. Flint (114 N. Y. 222), 603.

McWerthy v. Aurora Electric L.

&. P. Co. (202 III. 218), 885, 895, 896.

McVey v. Barker (92 Mo. App. 498), 732.

McVey v. McVey (51 Mo. 406), 329. Machine Co. v. Gage (100 U. S.

676), 397. Mackenzie v. Wooley (39 La. Ann. 944), 255.

Mackin v. Wilson (20 Ky. L. Rep. 218), 188, 234.

Macomber v. Nichols (34 Mich. 212), 747.

Macon v. First Nat. Bank (59 Ga. 648), 613.

Macon v. Hughes (110 Ga. 795), 225.

Macon v. Patty (57 Miss. 378), 715, 808, 810, 819.

Madden v. Smeltz (2 Ohio Cir Ct. 168), 180, 183, 184, 575.

Madison Ave. Baptist Church v. Baptist Church (5 Robt. 649), 165.

Madison v. Hatcher (8 Blatchf. 341), 465, 786.

Madison County Bank v. Suman (79 Mo. 527), 481.

Madison Turnpike Co., ex parte (62 Ala. 93), 56, 572.

Maddox v. Graham (2 Metc. 56), 145.

Magneau v. Fremont (30 Neb. 843), 153, 176, 177, 179, 451, 611, 618, 630, 639.

Maher v. Atlantic & Pac. R. R. Co. 64 Mo. 267), 749.

Mahoney v. Dankwart (108 Iowa 321), 585.

Mahoney v. Detroit Street R. Co. (93 Mich. 612), 751.

Main v. Ft. Smith (49 Ark. 480), 855.

Maine v. Grand Trunk Ry. Co. (142 U. S. 217), 410, 415, 650.

Maine v. McCarty (15 Ill. 441), 483.

Maine Water Co. v. Waterville (93 Me. 586), 74.

Mairs v. Manhattan Real Estate Assn. (89 N. Y. 498), 56.

Malcom v. Rogers (5 Cow. 188), 125.

Malloy v. Board of Education (102 Cal. 642), 170.

Manayunk v. Davis (2 Pars Eq. Cas. 289), 559.

Manchester v. Smyth (64 N. H. 380), 439.

Manhattan Mfg. & F. Co. v. Van Keuren (23 N. J. Eq. 251), 698. Manhattan Trust Co. v. Dayton

(59 Fed. Rep. 327), 50. Manice v. New York (8 N. Y. 120),

827. Mankato v. Arnold (36 Minn. 62), 491, 512, 513, 794.

Mankato v. Fowler (32 Minn. 364), 618, 620.

Manker v. Faulhaber (94 Mo. 430), 329, 342, 344.

Mann v. Jersey City (24 N. J. L. 662), 851.

Mann v. Lemars (109 Iowa 244), 183), 215.

Mann v. Richardson (66 Ill. 481). 113, 129.

Manning v. Gen. (90 Cal. 610), 811.

Manning v. Gloucester (6 Pick. 6), 209, 212.

Mansfield, In re (106 Cal. 400), 451, 645.

Mansfield v. People (164 Ill. 611), 850.

Manson v. South Bound R. Co. (64 S. C. 120), 430.

Manufacturing Co. v. Schell City (21 Mo. App. 175), 6.

March v. Com. (12 B. Mon 25), 25, 344, 566, 578, 786.

Marietta v. Fearing (4 Ohio 427), 23, 26, 33, 34, 552.

Marion v. Chandler (6 Ala. 899), 84, 296, 440, 570, 571.

Marion v. Robertson (84 Ill. App. 113), 736.

Marionville to use v. Henson (65 Mo. App. 397), 118, 425, 813.

Mark v. State (97 N. Y. 572), 343, 346.

Mark v. West Troy (69 Hun. 442), 9.

Markle v. Akron (14 Ohio 586), 19, 25, 66, 117, 477, 513, 647.

Markley v. Mineral City (58 Ohio St. 430), 797.

Marmaduke, ex parte (91 Mo. 228), 83, 112, 576.

Marmet v. State (45 Ohio St. 63), 611, 616, 773.

Marquis v. Santa Ana (103 Cal. 661), 366.

Marron, In re (60 Vt. 199), 525. Marshall, ex parte (64 Ala. 266), 619, 635.

Marshall v. Cadwalader (36 N. J. L. 283), 143.

Marshall v. Com. (59 Pa. St. 455), 246, 249.

Marshalltown v. Forney (61 Iowa 578), 814.

Marshall v. Guion (4 Denio 581), 811.

Marshall v. Guion (11 N. Y. 461), 799.

Marshall v. Leavenworth (44 Kan. 459), 830.

Marshall v. Nashville (Tenn. 1903, 71 S. W. Rep. 815), 353, 862.

Marshall v. Silliman (61 Ill. 218), 267.

Marshal v. Smith (L. R. 8 C. P. 416), 286.

Marshall v. Standard (24 Mo. App. 192), 477, 502, 513, 522, 787.

Marshalltown v. Blum (58 Iowa 184), 403.

Marshall Field & Co. v. Chicago (44 Ill. App. 410), 536, 709.

Martin, In re (62 Kan. 638), 635. Martin v. Gleason (139 Mass. 183), 707.

Martin v. Mott (12 Wheat 19), 224, 490, 689.

Martin v. Rosendale (130 Ind. 109), 401.

Martin v. State (23 Neb. 371), 201. Martin v. Swift (120 III. 488), 446.

Martindale v. Martindale (10 Ind. 566), 335.

Martindale v. Palmer (52 Ind. 411), 160, 161, 186, 241, 245, 445, 846, 850.

Martineau v. Rochester Ry. Co. (81 Hun. 330).

Martini, ex parte (23 Fla. 343), 278, 279.

Martinowsky v. Hannibal (35 Mo. App. 70), 680.

Martinsville v. Frieze (33 Ind. 507), 498.

Martel v. East St. Louis (94 III. 67), 548.

Martens v. People ex rel (186 III. 314), 627.

Marvin Safe Co. v. New York (38 Hun. 146), 436.

Mary Maguire, In re (57 Cal. 604), .364.

Marx, ex parte (86 Va. 40), 512.

Mashburn v. Bloomington (32 Ill. App. 245), 715.

Mason v. Cumberland (92 Md. 451), 623, 635, 636, 644.

Mason v. Fearson (9 How. 248), 125, 126.

Mason v. Lancaster (4 Bush. 406), 633, 635.

Mason v. Shawneetown (77 Ill. 533), 3, 18, 116, 260.

Mason v. Spencer (35 Kan. 512), 867.

Mason City v. Barngrover (26 Ill. App. 296), 42.

Masonic Bldg. Assn. v. Brownell (164 Mass. 306), 842.

Massachusetts v. Western Union (141 U. S. 40), 408.

Massinger v. Millville (63 N. J. L. 123), 269, 282.

Massoth v. D. & H. Canal Co. (64. N. Y. 524), 56.

Masters v. McHolland (12 Kan. 17), 182, 193.

Mastin v. Sloan (98 Mo. 252), 578.

Mather v. Ottawa (114 Ill. 659).

Mathews v. Tripp (12 R. I. 256), 516.

Mathie v. McIntosh (40 Wis. 120), 463, 465, 468, 469.

Matthews v. Alexandria (68 Mo. 115), 92, 93, 129, 130, 133, 742.

Matthews v. Associated Press (136 N. Y. 333), 304.

Matthews v. Westborough (134 Mass. 555), 102, 115.

Mattingly v. District of Columbia (97 U. S. 687), 867.

Mauldin v. Greenville (33 S. C. 1), 100, 798.

Maulding v. Greenville (42 S. C. 293), 824.

Maupin v. Franklin Co. (67 Mo. 327), 192.

May, In re (82 Fed. 422), 398.

May v. Holdridge (23 Wis. 93), 867.

May v. People (1 Colo. App. 157), 294, 310, 313, 698.

Maybin v. Biloxi (77 Miss. 673), 244.

Maybury v. Mutual Gas Light Co. (38 Mich. 154), 880.

Mayhew v. Gay Head (13 Allen 129), 140, 209.

Mayhew v. Norton (17 Pick. 357), 4.

Mayo v. Com'rs of Hampden Co. (141 Mass. 74), 862.

Mayo v. Dover and F. C. Village Fire Co. (96 Me. 539), 84.

Mayor, ex parte of Birmingham (3 Ellis & E. 222), 156.

Mayor v. Broadway, etc. Ry Co. (97 N. Y. 275), 318.

Mayor of Detroit v. Park Comrs. (44 Mich. 602), 89.

Mayor, etc. of Guthrie v. Territory, ex rel. Losey (1 Okla. 188), 348.

Mayor, etc. of New York v. D. D. E. B. & B. R. Co. (133 N. Y. 104), 299.

Mays v. Cincinnati (1 Ohio St. 268), 25, 612, 766.

Mayson v. Atlanta (77 Ga. 662), 482, 535, 591, 650, 789.

Maywood Co. v. Maywood (140 Ill. 216), 801.

Maxmillian v. New York (62 N. V. 160), 674, 675.

Y. 160), 674, 675. Maxwell v. Durkin (86 Ill. App.

257), 603. Maxwell v. Jonesboro (11 Heisk.

257), 761. Maxwell v. Tumlin (79 Ga. 570), 569.

Mazet v. Pittsburg (137 Pa. 548), 431, 863.

Mead v. Acton (139 Mass. 341), 105, 106.

Mead v. Boston (3 Cush. 404), 114. Mead v. Chicago (186 Ill. 54), 850. Mead v. New Haven (40 Conn. 72), 654.

Meadowcroft v. People (154 Ill. 416), 849.

Meadow Dam Co. v. Gray (30 Me. 547), 322.

Meagher v. Storey County (5 Nev. 244), 9, 467.

Meaher v. Chattanooga (1 Head 74), 474, 483, 533.

Meadville v. Dickson (129 Pa. St. 1), 869.

Mechanics' and Farmers' Bank, appeal of (31 Conn. 63), 383.

Mechanicsburg v. Koons (18 Pa. Super. Ct. 131), 630.

Meday v. Rutherford (65 N. J. L. 645), 75.

Meech v. Buffalo (29 N. Y. 198), 113.

Megowan v. Com. (2 Metc. 3), 504, 534, 760.

Meissner v. Boyle (20 Utah 316), 367.

Melick v. Washington (47 N. J. L. 254), 134, 282.

Memphis v. Bing (94 Tenn. 644), 624.

Memphis v. Cornell (3 Shan. Cas. 477), 733.

Memphis v. O'Connor (53 Mo. 468), 477, 491.

Memphis v. Schade (12 Heisk. 579), 566.

Memphis v. Winfield (8 Humph. 707), 362.

Memphis v. Wright (6 Yerg. 497), 95.

Memphis Brokerage Assn. v. Cullen (79 Tenn. 75), 656.

Memphis, etc. v. Nolan (14 Fed. 532), 399.

Memphis Gayoso Gas Co. v. Williamson (9 Heisk. 314), 379.

Memphis & Little Rock R. R. Co. v. R. R. Comrs. (112 U. S. 609), 877.

Mendel v. Wheeling (28 W. Va. 233), 675, 676.

Mendenhall v. Burton (42 Kan. 570), 546.

Mendenhall v. Clugish (84 Ind. 94), 844.

- Menken v. Atlanta (78 Ga. 668), . 789.
- Mendota v. Thompson (20 III. 197), 546.
- Menser v. Risdon (36 Cal. 239), 128.
- Merced County v. Fleming (68 Ga. 816), 647.
- Merced County v. Fleming (111 Cal. 46), 590.
- Mercer v. Corbin (117 Ind. 450), 727.
- Mercer v. Pittsburg, etc. Ry. Co. (36 Pa. St. 99), 890.
- Merchants v. Memphis (9 Baxter 76), 610.
- Merchants National Bank v. Jaffray (36 Neb. 218), 758.
- Merchants' Union Barb-wire Co. v. Chicago R. I. & P. Ry. Co. (70 Iowa 105), 893.
- Meredith v. Sayre (32 N. J. Eq. 557), 262.
- Merkee v. Rochester (13 Hun. 157), 278, 481.
- Merkle v. Bennington (68 Mich. 133), 336.
- Merriam v. New Orleans (14 La. Ann. 318), 444, 448, 658.
- Merriam v. People ex rel. (160 III. 555), 390.
- Merriam v. Yuba Co. (72 Cal. 517), 261.
- Meriden v. Camp (46 Conn. 284), 827.
- Meriwether v. Garrett (102 U. S. 472), 370, 371.
- Merrill v. Abbott (62 Ind. 549), 851.
- Merritt v. Portchester (29 Hun. 619), 808.
- Merrill v. St. Louis (83 Mo. 244), 527
- Merz v. Mo. Pac. Ry. Co. (88 Mo. 672), 40, 744, 745.
- Merz v. Mo. Pac. R. R. (14 Mo. App. 459), 601, 748.
- Meservey v. Webster County (46 Iowa 702), 610.
- Messerole v. Brooklyn (8 Paige 198), 806.
- Metcalf v. People (2 Colo. App. 262), 465.

- Metcalf v. St. Louis (11 Mo. 103), 66, 694.
- Methodist Protestant Church v. Baltimore (6 Gill. 391), 118, 222.
- Metropolitan Board of Health v. Heister (37 N. Y. 661), 144.
- Metropolitan Board of Health v. Schmades (3 Daly 282), 741.
- Metropolitan City Ry. Co. v. Chicago (96 III. 620), 720, 894.
- Metropolitan Life Ins. Co. v. Darenkamp (23 Ky. Law Rep. 2249),
- Metropolitan Street R. R. Co. v. Johnson (90 Ga. 500), 208, 596, 598.
- Metzger v. Beaver Falls (178 Pa. St. 1), 377.
- Meuser v. Risdon (36 Cal. 239), 809.
- Meyer v. Bridgeton (37 N. J. L. 160), 496, 497.
- Meyer v. Kalkmann (6 Cal. 582), 469, 470.
- Meyer v. Fromm (108 Ind. 208), 248.
- Meyer v. Tentopolis (131 III. 552), 257, 814.
- Meyers v. Chicago R. I. & P. R. Co. (57 Iowa 555), 42, 452, 744, 746.
- Michigan Central R. Co. v. Huehn (59 Fed. Rep. 335), 839.
- Michigan Tele. Co. v. Benton Harbor (121 Mich. 512), 8, 904.
- Michigan Telephone Co. v. St. Joseph (121 Mich. 502), 376, 904.
- Middle Savings Bank v. Dubuque 15 Iowa 394), 96.
- Middlesex R. R. Co. v. Wakefield (103 Mass. 261), 900.
- Middleton v. Ames (7 Vt. 166), 472.
- Middleton v. Robins (53 N. J. L. 555), 440.
- Middleton v. N. J. West Line Ry Co. (26 N. J. Eq. 269), 335.
- Miles City v. Kern (12 Mont. 119), 491.
- Miles v. Chamberlain (17 Wis. 446), 272, 275, 731.
- Milford v. Holbrook (9 Allen 17), 63.

Milford v. Orono (50 Me. 529), 105, 125.

Milford Borough v. Milford Water Co. (124 Pa. St. 610), 173.

Milford School Town v. Powner (126 Ind. 528), 197.

Milhau v. Sharp (15 Barb, 194), 263.

Milhau v. Sharp (17 Barb. 435), 901, 913.

Milhau v. Sharp (27 N. Y. 611), 321, 880.

Miller, In re (89 Cal. 41), 283.

Miller, In re (44 Mo. App. 125), 279, 477, 530, 532.

Miller v. Amsterdam (149 N. Y. 288), 831.

Miller v. Anheuser (2 Mo. App. 167), 223, 839.

Miller v. Bellefountaine (2 Ohio Cir. Ct. Rep. 139), 574.

Miller v. Burch (32 Tex. 208), 21, 668, 684.

Miller v. Com. (88 Va. 618), 523. Miller v. Horton (152 Mass. 540), 691, 693.

Miller v. Milwaukee (14 Wis. 642), 84, 799.

Miller v. New York & Erie Ry. Co. (21 Barb. 513), 317, 322.

Miller v. O'Reilly (84 Ind. 168), 565.

Miller v. State (15 Wall. 478), 322, 323.

Miller v. Trustees (88 Ill. 26), 571. Miller v. Webster City (94 Iowa 162), 812.

Millerstown v. Bell (123 Pa. St. 151), 642.

Milliter v. People (117 III. 294), 667.

Milliken v. Weatherford (54 Tex. 388), 360.

Milloy, Re and Tp. of Onondaga (6 Ontario Rep. 573), 290.

Miln v. New Orleans (13 La. 69), 802.

Milne v. Davidson (5 Martin N. S. 409), 19, 80, 683.

Mills, ex parte (135 U. S. 263), 561. Mills v. Charleton (29 Wis. 400), 864, 867. Mills v. Detroit (95 Mich. 422), 829.

Mills v. Gleason (11 Wis. 470), 111, 155, 170.

Mills v. San Antonio (Tex. Civ. App. 1901, 65 S. W. Rep. 1121), 116, 177, 192.

Mills County v. B. & M. R. R. Co. (47 Iowa 66), 113.

Milton Borough v. Hoagland (3 Pa. Co. Ct. Rep. 283), 233, 482, 765.

Miltonvale v. Lanoue (35 Kan. 603), 277.

Milwaukee v. Gross (21 Wis. 243), 79.

Milwaukee v. Gross (21 Wis. 241), 300, 304, 699.

Milwaukee Elec. Ry. & Light Co. v. Milwaukee (95 Wis. 39), 914.

Milwaukee Elec. Ry & Light Co. v. Milwaukee (87 Fed. Rep. 577), 909.

Milwaukee Fire Department v. Heifenstein (16 Wis. 136), 660.

Minden v. Silverstein (36 La. Ann. 912), 362, 541, 760.

Minneapolis Brewing Co. v. Mc-Gillivray (104 Fed. Rep. 258), 402.

Minneapolis Gas Light Co. v. Minneapolis (36 Minn. 159), 134, 196, 807.

Minnesota Linseed Oil Co. v. Palmer (20 Minn. 468), 609.

Miners' Ditch Co. v. Zellerbach (37 Cal. 543), 53.

Minersville Borough v. Schuylkill Electric Ry. Co. (Pa. 1903, 54 Atl. Rep. 1050), 897, 914.

Minot v. West Roxbury (112 Mass. 1), 75, 106.

Minturn v. Larue (23 How. 435), 75, 309.

Mintzer v. Schilling (117 Cal. 361), 141.

Mirande, ex parte (73 Cal. 365), 145, 178, 644.

Mississippi v. Johnson (4 Wall. 475), 261.

Missouri City v. Hutchinson (71 Mo. 46), 506.

Missouri ex rel Laclede Gas Light

Co. v. Murphy (170 U. S. 78), 722.

Missouri K. & T. Ry Co. v. Haber (169 U. S. 613), 392.

Missouri, Kansas & T. Trust Co. v. Smart (51 La. Ann. 416), 324.

Mo. Pac. Ry. Co. v. Chick (6 Kan. App. 481), 593.

Mo. Pac. R. R. Co. v. Wyandotte (44 Kan. 32), 218, 225, 229.

Mitchell, ex parte (104 Mo. 121), 574, 575.

Mitchell v. Brown (18 N. H. 315), 194.

Mitchell v. Lemon (34 Md. 176), 484.

Mitchell v. Rockland (45 Me. 496), 672.

Mitchell v. Rockland (41 Me. 363), 675, 694.

Mitchell v. William (27 Ind. 62), 640, 733.

Mixer v. Manistee Co. Supervisors (26 Mich. 422), 487.

Moale v. Baltimore (61 Md. 224), 814.

Moberly v. Hogan (131 Mo. 19), 583, 588, 822.

Moberly v. Hoover (93 Mo. App. 663), 443, 658.

Moberry v. Jeffersonville (38 Ind. 198), 168, 202.

Mobile v. Allaire (14 Ala. 400), 345, 786, 784, 794.

Mobile v. Barton (47 Ala. 84), 565, 566.

Mobile v. Leloupe (76 Ala. 401), 399.

Mobile v. Louisville and N. R. Co. (84 Ala. 115), 377, 435, 880, 885.

Mobile v. Moog (53 Ala. 561), 74. Mobile v. Richardson (1 Stewart & P. 12), 113.

Mobile v. Rouse (8 Ala. 515), 509, 786.

Mobile v. Yuille (3 Ala. 137), 24, 82, 270, 273, 281, 283, 298, 634, 656, 769.

Mobile & Ohio Railroad Co. v. Tennessee (153 U. S. 486), 374. Moir v. Munday (Sayer 181), 428.

Monaghan v. Randall (38 Wis. 100), 208, 209.

Monett v. Beaty (79 Mo. App. 315), 337.

Mongenais v. Corporation of Rigand (Quebec Rep. 11 Sup. Ct. 348), 28.

Monk v. Packard (71 Me. 309), 696.

Mono County v. Flanigan (130 Cal. 105), 659.

Monongahela v. Monongahela Electric Light Co. (3 Pa. Dist. Rep. 63), 817.

Montpelier v. Elmore (71 Vt. 193), 75.

Montpelier v. Huron (62 Fed. Rep. 778), 546.

Monroe v. Gerspach (33 La. Ann. 1011), 682, 706.

Monroe v. Hardy (46 La. Ann. 1232), 512, 520, 787, 792, 794.

Monroe v. Hoffman (29 La. Ann. 651), 734.

Monroe v. Lawrence (44 Kan. 607), 79, 304, 758.

Monroe v. Meuer (35 La. Ann. 1102), 511, 528.

Montgomery, ex parte, In re Knox (64 Ala. 463), 278, 279, 575, 611, 640.

Montgomery v. Belser (53 Ala. 379), 562, 571.

Montgomery v. Foster (54 Ala. 62), 482, 531.

Montgomery v. Louisville & N. R. Co. (84 Ala. 127), 435, 737.

Montgomery v. Montgomery & W. Plank Road Co. (31 Ala. 76), 671, 801.

Montgomery v. Parker (114 Ala. 118), 712, 714, 884.

Montgomery v. Shoemaker (51 Ala. 114), 611.

Montgomery Gaslight Co. v. Montgomery (87 Ala. 245), 260, 262, 379.

Montreal Street Ry Co. v. Montreal (23 S. C. 259), 653.

Montrose v. State (61 Miss. 429), 462.

Mooney v. Kennett (19 Mo. 551), 580, 583.

- Moor v. Newfield (4 Me. 44), 148, 151, 209.
- Moore, ex parte (62 Ala. 471), 276, 277, 279, 546.
- Moore v. Cape Girardeau (103 Mo. 470), 18, 892.
- Moore v. Chicago (60 III. 243), 808.
- Moore v. Cincinnati (26 Ohio St. 582), 346.
- Moore v. Crenshaw (1 White & W. Civ. Cas. Ct. App. Tex. sec. 264), 455, 552.
- Moore v. District of Columbia (12 App. D. C. 537), 544, 727.
- Moore v. Fairport (11 Misc. Rep. 146), 811.
- Moore v. Haddonfield (62 N. J. L. 386), 257.
- Moore v. Illinois (14 How. 13), 795.
- Moore v. Indianapolis (120 Ind. 483), 646.
- Moore v. Kenockee (75 Mich. 332), 335.
- Moore v. New York (73 N. Y. 238), 249.
- Moore v. People (14 How. 13), 788.
- Moore v. Perry (Iowa, 1903, 93 N. W. Rep. 510), 176, 180, 240, 241, 244, 245.
- Moore v. St. Louis Transit Co. (95 Mo. App. 728), 587, 744.
- Moore v. St. Paul (61 Minn. 427), 631.
- Moore v. St. Paul (48 Minn. 331), 631.
- Moore v. State (11 Lea 35), 276, 733.
- Moore v. Strickling (46 W. Va. 515), 366.
- Mootry v. Danbury (45 Conn. 550), 679.
- Moran v. Atlanta (102 Ga. 840), 784.
- Moran v. Lindell (52 Mo. 229), 813, 833, 854.
- Moran v. New Orleans (112 U. S. 69), 408, 413.
- Moran v. Pullman Palace Car Co. (134 Mo. 641), 61, 675.

- Moran v. Thompson (20 Wash. 525), 355.
- Morano v. New Orleans (2 La. 217), 763.
- Moreland v. Millen (126 Mich. 381), 82.
- Morey v. Brown (42 N. H. 373), 734.
- Morford v. Unger (8 Iowa 82), 225. Morgan, In re (26 Colo. 415), 666, 668.
- Morgan v. Johnson (106 Fed. Rep. 452), 12.
- Morgan v. Louisiana (118 U. S. 455), 419.
- Morgan v. Nolte (37 Ohio St. 23), 575.
- Morgan v. Orange (50 N. J. L. 389), 630.
- Morgan v. Parham (16 Wall. 471), 409.
- Morgan v. State (Neb. 1902, 90 N. W. Rep. 108), 625, 658.
- Morgan v. Wilfley (71 Iowa 212), 211.
- Morgan & Co. v. Cincinnati (9 Ohio Dec. 280), 705.
- Morgan Park v. Wiswall (155 Ill. 262), 825.
- Morgan's Steamship Co. v. Louisiana (118 U. S. 455), 422.
- Morley v. Lake Shore and Michigan Southern Ry (146 U. S. 162), 388.
- Morley v. Weakley (86 Mo. 451), 854.
- Morrill v. State (38 Wis. 428), 629. Morris v. Columbus (102 Ga. 792), 670, 693, 694.
- Morris Canal & B. Co. v. Jersey City (12 N. J. Eq. 252), 435, 575, 576.
- Morris, etc. R. R. v. Ayres (29 N. J. L. 393), 13.
- Morrison v. Lawrence (98 Mass. 219), 104, 186, 209, 676.
- Morrison v. McAvoy (Cal. 1902, 70 Pac. Rep. 626), 457, 536.
- Morrison v. McDonald (21 Me. 550), 465.
- Morrison v. Morey (146 Mo. 543), 819.
- Morrison v. St. L. I. M. & S. Ry. Co. (96 Mo. 602), 315.

Morse v. Westport (136 Mo. 276), 121, 290, 858, 860.

Morse v. West Port (110 Mo. 502), 690, 813, 866.

Morton and City of St. Thomas, In re (6 Ontario App. Rep. 323), 55.

Morton v. Broderick (118 Cal. 474), 238, 343.

Morton v. Comptroller Gen. (4 S. C. 430), 169.

Morton v. Macon (111 Ga. 162), 617.

Morton v. Moore (15 Gray 573), 707.

Moser v. White (29 Mich. 59), 198, 209.

Moses v. Pittsburgh, Ft. W. & C. R. R. Co. (21 Ill. 516), 875.

Moses v. Risdon (46 Iowa 251), 120.

Moses v. United States (16 App. Cases. D. C. 428), 313, 536, 712.

Moss v. Averell (10 N. Y. 449), 199.

Moss v. Oakland (88 Ill. 109), 251, 252, 568, 594, 595.

Mott v. Pa. R. R. Co. (30 Pa. St. 9), 130, 743.

Mott v. Reynolds (27 Vt. 206), 214, 215.

Mott v. Rush (2 Hill, 472), 832.

Moultrie v. Patterson (109 Ga. 370), 436, 437.

Moynier, ex parte (65 Cal. 33),

Moundsville v. Fountain (27 W. Va. 182), 513.

Moundsville v. Velton (35 W. Va. 217), 509, 583, 591.

Mount, ex parte (66 Cal. 448), 361.

Mt. Carmel v. Shaw (155 III. 37), 720.

Mt. Carmel v. Wabash County (50 III. 69), 617.

Mount Holly v. Peru (72 Vt. 68), 75.

Mount Hope Cemetery Assn. v. Boston (158 Mass. 509), 695, 806.

Mount Morris Square, In re (2 Hill. 14), 186.

Mt. Olive v. Hozelbart (26 Pittsb. L. J. 400), 643.

Mt. Pleasant v. Beckwith (100 U. S. 514), 67, 349.

Mt. Pleasant v. Breeze (11 Iowa 399), 271, 671, 754, 755.

Mt. Pleasant v. Clutch (6 Iowa 546), 656.

Mt. Sterling (Newport) v. Holly (108 Ky. 621), 770.

Mt. Sterling v. Holly (22 Ky. Law Rep. 358), 518.

Mt. Vernon First Nat. Bk. v. Sarlls (129 Ind: 201), 670.

Mowry v. Providence (16 R. I. 422), 94.

Mozley v. Alston (1 Phill. 790), 155.

Mueller v. Egg Harbor City (55 N. J. L. 245), 168, 169.

Mueller v. Milwaukee St. Ry. Co. (86 Wis. 340), 602.

Mugler v. Kansas (123 U. S. 623), 419, 665, 668, 691.

Muhlenbrinck v. Long Branch Comrs. (42 N. J. L. 364), 572, 698.

Muhler v. Hedekin (119 Ind. 481), 260.

Mulcahy v. Newark (57 N. J. L. 513), 341, 612.

Mullarky v. Cedar Falls (19 Iowa 21), 96, 128.

Mulligan v. Smith (59 Cal. 206), 830.

Mulliken v. Bloomington (72 Ind. 161), 547.

Mulrein v. Kalloch (61 Cal. 522), 864.

Muncie Natural Gas Co. v. Muncie (Ind. 1903, 66 N. E. Rep. 436), 908.

Municipality v. Blineau (3 La. Ann. 688), 310, 313.

Municipality v. Cutting (4 La. Ann. 335), 762.

Municipality No. 1 v. Barnett (13 La, 344), 763.

Municipality No. 1. v. Wilson (5 La. Ann. 747), 751.

Municipality No. 1 v. Young (5 La. Ann. 362), 801.

Municipality No. 2 v. Dubois (10 La. Ann. 56), 630, 654.

Municipality No. 2 v. McDonough (16 La. 553), 825.

Municipality No. 2 v. Orleans Cotton Press (18 La. 122), 95.

Munn v. Illinois (94 U. S. 113), 323, 665, 909.

Munn v. People (94 U. S. 113), 54.

Murdock v. Memphis (20 Wall. 590), 336, 339.

Murfin v. Detroit & Erie Plank Road Co. (113 Mich. 675), 645. Murnane v. St. Louis (123 Mo. 479), 68, 342, 804.

Murphy v. Chicago (29 Ill. 279), 875, 883, 887.

Murphy v. Com. (1 Met. 365), 528. Murphy v. East Portland (42 Fed. Rep. 308), 260, 261.

Murphy v. Jacksonville (18 Fla. 318), 114.

Murphy v. Lambert (59 Ind. 477), 492.

Murphy v. Lindell Ry. (153 Mo. 252), 601.

Murphy v. Louisville (9 Bush. 189), 33, 235, 845.

Murphy v. People (120 Ill. 234), 823.

Murphy v. People (2 Cow. 815), 512, 523.

Murphy v. Peoria (119 III. 509), 813, 843.

Murphy v. San Luis Obispo (119 Cal. 624), 17.

Murphy v. Waycross (90 Ga. 36), 798.

Murphy v. Wilmington (5 Del. Ch. 281), 708.

Murray, ex parte (93 Ala. 78), 401. Murray v. Charleston (96 U. S. 432), 368, 369, 370, 375.

Murray v. Kansas City (47 Mo. App. 105), 368.

Murray v. Mo. Pac. Ry. Co. (101 Mo. 236), 748.

Murray v. Railroad (101 Mo. 236), 585.

Murray v. Tucker (73 Ky. 240), 808.

Murtaugh v. St. Louis (55 Mo. 479), 675.

Muscatine v. Hershey (18 Iowa 39), 38.

Muscatine v. Keokuk Packet Co. (45 Iowa 185), 124.

Muscatine v. Steck (7 Iowa 505), 559, 562.

Musgrove v. Catholic Church (10 La. Ann. 431), 320, 696.

Musgrove v. Vicksburg & N. R. Co. (50 Miss. 677), 383.

Mutual Union Tel. Co. v. Chicago (11 Biss. C. C. 539), 722.

Myers v. Carr (12 Mich. 63), 498. Myers v. Croft (13 Wall. 291), 90. Myers v. Hinds (110 Mich. 300), 727.

Myers v. Malcolm (6 Hill. 292), 741.

Myers v. People (26 III. 173), 466, 530.

Myrick v. Lacross (17 Wis. 442), 811, 828.

N.

Naegely v. Saginaw (101 Mich. 532), 194, 839.

Naegle v. Centralia (81 Ill. App. 334), 135.

Nalle v. Austin (Tex. Civ. App. 1893, 21 S. W. Rep. 375), 798.

Napa v. Easterby (76 Cal. 222), 13, 221, 232, 241, 250, 253, 832, 833, 840.

Napa v. Easterly (61 Cal. 509), 594, 833.

Napman v. People (19 Mich. 352), 56, 83, 506, 595, 714.

Naschold v. Westport (71 Mo. App. 508), 883.

Nashville v. Althrop (5 Cold. 554), 312, 631, 632.

Nashville v. Linck (12 Lea 499), 79, 83, 671, 759.

Nashville v. Ray (19 Wall. 468), 55.

Natal v. Louisiana (139 U. S. 621), 353, 513, 517, 764.

Nathan v. Louisiana (8 How. 73), 394, 401, 656.

National Bank v. Matthews (98 U. S. 621), 90, 547, 915.

Nat. Bk. v. Mayor, etc. (8 Heisk. 814), 613.

Nat. Bk. v. Sebastin Co. (5 Dillon 414), 381.

National Bank v. Whitney (103 U. S. 99), 915.

National Bank v. Winston (5 Baxt. 685), 774.

National Bank of Commerce v. Grenada (44 Fed. Rep. 262), 3, 16, 46, 249.

National Fertilizer Co. v. Lambert (48 Fed. Rep. 458), 705.

National Foundry & P. Works v. Oconto Water Co. (52 Fed. Rep. 29), 798.

National Subway Co. v. St. Louis (169 Mo. 319), 886.

National Tube Works v. Chamberlain (5 Dak. 54), 841.

National Waterworks Co. v. Kansas City (28 Fed. Rep. 921), 816.

National Waterworks Co. v. Kansas City (20 Mo. App. 237), 128, 817.

Natoma W. & M. Co. v. Clarkin (14 Cal. 544), 90.

Naylor v. Galesburg (56 Ill. 285), 327, 334, 479.

Nazworthy v. Sullivan (55 Ill. App. 48), 51, 685, 689.

Neal v. Delaware (103 U. S. 370), 354.

Nealis v. Hayward (48 Ind. 19), 30, 359, 483, 726.

Neblett v. Nashville (12 Heisk. 684), 680.

Neenan v. Smith (60 Mo. 292), 848. Neenan v. Smith (50 Mo. 525), 819.

Neff v. Bates (25 Ohio St. 169), 346, 347.

Neff v. Paddock (26 Wis. 546), 717, 720.

Negus v. Brooklyn (62 How. Pr. 291), 261.

Nehr v. State (35 Neb. 638), 734.
Neier v. Mo. Pac. R. R. Co. (12 Mo. App. 25), 529, 744, 745, 749.
Neill, ex part (32 Tex. Crim. App.

275), 354.

Neill v Gates (152 Mo. 585), 133, 352.

Neitzel v. Concordia (14 Kan. 446), 523, 563.

Nelson v. Campbell (28 Pa. St. 156), 737.

Nelson v. Eaton (26 N. Y. 410), 148. Nelson v. La Porte (33 Ind. 258), 798.

Nelson v. Milford (7 Pick. 18), 114, 115, 194.

Nelson v. New York (5 N. Y. Suppl. 688), 861.

Nelson v. St. Martin's Parish (111 U. S. 716), 320, 324.

Nelson v. Troy (11 Wash. 435), 10.

Nelson Lumber Co. v. Loraine (22 Fed. Rep. 54), 412.

Neosho Water Co. v. Neosho (136 Mo. 498), 309, 450.

New Albany v. Endres (143 Ind. 192), 846.

New Albany Gas Light, etc. Co. v. Crumbo (10 Ind. App. 360), 187, 204.

New Albany & S. R. Co. v. O'Daily (12 Ind. 551), 887.

Newark v. Bonnell (57 N. J. L. 424), 865.

Newark v. Elliott (5 Ohio St. 113), 90.

Newark v. Murphy (40 N. J. L. 145), 482.

Newark v. Watson (56 N. J. L. 667), 696.

Newark & O. H. C. Ry. Co. v. Hunt (50 N. J. L. 308), 668, 693.

Newaygo County Mfg. Co. v. Echtinaw (81 Mich. 416), 177.

Newberry v. Fox (37 Minn. 141), 811.

Newburgh Turnpike v. Miller (5 John Chan. 100), 127.

Newby v. Platte (25 Mo. 258), 819.Newcastle v. Electric Light Co. (16 Pa. Co. Ct. Rep. 663), 230.

New Castle v. Raney (130 Pa. Sy. 546), 720.

New Decatur v. Barry (90 Ala. 432), 71, 694.

New England T. & T. Co. v. Boston Term. Co. (182 Mass. 397), 723.

New Hampton v. Conroy (56 Iowa 498), 79, 271, 273, 451, 453, 757.

New Haven v. N. H. & D. R. R. Co. (62 Conn. 252), 113, 895.

New Haven v. New Haven Water Co. (44 Conn. 105), 634, 636.

New Haven Local Board v. School Board (30 Ch. Div. 350), 164.

Board (30 Ch. Div. 350), 164. New H. & W. R. R. v. Chatham (42 Conn. 465), 151, 217.

New Iberia v. Miques (32 La. Ann. 923), 612, 641.

New Jersey v. Yard (95 U. S. 104), 305, 317, 376.

New Jersey R. & Transp. Co. v. Jersey City (29 N. J. L. 170), 439.

Newland Ave., In re (38 N. Y. St. Rep. 796), 178.

Newland v. Aurora (14 Ill. 364), 248, 532.

New London v. Brainard (22 Conn. 552), 70, 71, 103.

Newman v. Ashe (9 Baxt. 380), 89, 95.

Newman v. Chicago (153 Ill. 469), 851.

Newman v. Emporia (32 Kan. 456), 4, 11.

Newmeyer v. Mo. & Miss. R. R. Co. (52 Mo. 81), 430.

New Orleans, In re (20 La. Ann. 497), 823.

New Orleans v. Boudro (14 La. Ann. 303), 567.

New Orleans v. Brooks (36 La. Ann. 641), 172, 179, 233.

New Orleans v. Chappuis (105 La. 179), 444.

New Orleans v. Clark (95 U. S. 644), 265.

New Orleans v. Clark (15 La. Ann. 614), 654.

New Orleans v. Comptoir National d'Escompte de Paris (104 La. 214), 659.

New Orleans v. Collins (52 La. Ann. 973), 787.

New Orleans v. Costello (14 La. Ann. 37), 279, 751.

New Orleans v. Dubarry (33 La. Ann. 481), 633.

New Orleans v. Elliott (10 La. Ann. 59), 823.

New Orleans v. Graffina (52 La. Ann. 1082), 764.

New Orleans v. Graves (34 La. Ann. 840), 612.

New Orleans v. Great Southern Tel. Co. (40 La. Ann. 41), 378, 660, 723. New Orleans v. Guillotte (12 La. Ann. 818), 310.

New Orleans v. Home Mut. Ins. Co. (23 La. Ann. 449), 631.

New Orleans v. Hop Lee (104 La. 601), 774.

New Orleans v. Kaufman (29 La. Ann. 283), 772.

New Orleans v. Labatt (33 La. Ann. 107), 582.

New Orleans v. Lagman (43 La. Ann. 1180), 656.

New Orleans v. Lambert (14 La. Ann. 247), 697.

N. O. & L. R. Co. v. Louisiana (157 U. S. 219), 383.

New Orleans v. L. & N. R. R. Co. (109 U. S. 221), 115.

New Orleans v. Lozes (51 La. Ann. 1172), 762.

New Orleans v. McDonough (9 Rob. 408), 825.

New Orleans v. Mechanics and Traders Ins. Co. (25 La. Ann. 389), 351.

New Orleans v. Mechanics & T. Bank (15 La. Ann. 107), 610.

New Orleans v. Morris (3 Woods 103, 115), 385, 761.

New Orleans v. Miller (7 La. Ann. 651), 784.

N. O. M. & C. R. Co. v. New Orleans (26 La. Ann. 577), 882.

New Orleans v. New Orleans Waterworks Co. (142 U. S. 79), 374.

New Orleans v. O'Neil (43 La. Ann. 1182), 656.

New Orleans v. Penn Mut. Life Ins. Co. (106 La. Ann. 31), 655.

New Orleans v. Peyroux (6 Mart. (N. S.) 155), 676.

New Orleans v. Phillippi (9 La. Ann. 44), 25, 79, 83, 613.

New Orleans v. Pontchartrain R. Co. (41 La. Ann. 519), 629.

New Orleans v. Railroad Co. (40 La. Ann. 587), 650, 652.

New Orleans v. St. Louis Church (11 La. Ann. 244), 320, 321, 695, 697.

New Orleans v. Southern Bank (15 La. Ann. 89), 338.

- New Orleans v. Stafford (27 La. Ann. 417), 764.
- New Orleans v. Staiger (11 La. Ann. 68), 630.
- New Orleans v. Steinhardt (52 La. Ann. 1043), 886.
- New Orleans v. Turpin (13 La. Ann. 56), 658.
- New Orleans v. Wilmot (31 La. Ann. 65), 38.
- New Orleans Gas Co. v. Louisiana Light Co. (115 U. S. 650), 305, 308, 379, 665, 880.
- New Orleans Gas Light Co. v. Hart (40 La. Ann. 474), 665, 682, 719, 720.
- New Orleans Gas Light & B. Co. v. Paulding (12 Rob. 378), 897.
- New Orleans E. R. Co. v. New Orleans (39 La. Ann. 127), 236, 261.
- New Orleans, etc. R. Co. v. Watkins (48 La. Ann. 1550), 894.
- New Orleans S. F. & L. R. Co. v.New Orleans (La. 1902, 33 So.Rep. 192), 915.
- New Orleans Waterworks Co. v. Louisiana S. R. Co. (125 U. S. 18), 370, 371, 879.
- New Orleans W. W. Co. v. Rivers (115 U. S. 674), 307, 379.
- New Orleans Waterworks v. New Orleans (164 U. S. 471), 18, 260, 345, 438.
- Newport Charter, In re (14 R. I. 655), 143.
- Newport v. Batesville & B. Ry. Co. (58 Ark. 270), 799.
- Newport v. Bridge Co. (90 Ky. 193), 437.
- Newport v. Newport Light Co. (84 Ky. 166), 101, 305, 379, 798, 880
- Newport News & O. P. Ry & E. Co. v. Newport News (100 Va. 157), 650.
- New Rochelle v. Clark (65 Hun. 140), 707.
- New Rochelle v. Lang (75 Hun. 608), 439.
- Newson v. Galveston (76 Tex. 559), 764.
- Newton v. Atchison (31 Kan. 151), 611.

- Newton v. Belger (143 Mass. 598), 25, 295, 626, 681, 736, 738.
- Newton v. Joyce (166 Mass. 83), 704.
- Newton v. Lyons (11 App. Div. 105), 705.
- New York v. Broadway and 7th Ave. (97 N. Y. 275), 322, 331. 650, 651, 652.
- New York v. Corlies (2 Sandf. Sup. Ct. Rep. 301), 458.
- New York v. Dry Bock, etc. R. R. Co. (133 N. Y. 104), 72, 223, 295, 670, 751.
- New York v. Eighth Ave. Ry Co. (118 N. Y. 389), 651.
- New York v. Eisler (10 Daly 396), 485.
- New York v. Furze (3 Hill 612), 126.
- New York v. Heft (13 Daly 301), 61.
- New York v. Hyatt (3 E. D. Smith 156), 787.
- New York v. Nichols (4 Hill 209), 24, 25.
- New York v. N. H. & H. R. Co. 19 N. Y. Supp. 67), 899.
- New York v. Ordrenan (12 Johns 122), 273, 287.
- New York v. Reesing (79 N. Y. Suppl. 331), 643.
- New York v. Sands (105 N. Y. 210), 9.
- New York v. Second Ave. R. R. Co. (102 N. Y. 572), 900.
- New York v. Second Ave. Ry. (32 N. Y. 261), 318, 545, 652.
- New York v. Slack (3 Wheeler Cr. Cas. 237), 695.
- New York v. Third Ave. Ry. Co. (33 N. Y. 42), 318), 545, 652.
- New York v. Twenty-third Street Ry. Co. (79 N. Y. Suppl. 323), 651, 652.
- New York v. Williams (15 N. Y. 502), 740.
- New York v. Wood (15 Daly 341), 330.
- New York v. Workman (35 U. S. App. 201), 676.
- N. Y. E. R. Co., In re (70 N. Y. 327), 305.

N. Y. Public School, In re (47 N. Y. 556), 252.

N. Y. P. E. Public Schools, In re (46 N. Y. 178), 806.

New York Fire D. v. Braender (14 Daly 53), 554.

N. Y. Fire Depart. v. Buffum (2 E. D. Smith 511), 736.

New York Fire Dept. v. Buhler (1 Daly 391), 737.

New York Fire Dept. v. Chapman (10 Daly 377), 736.

N. Y. Fire Department v. Sturte-vant (3 Hun. 407), 132.

New York Fire Dept. v. Wendell (13 Daly 427), 736.

New York Health Department v. Knoll (70 N. Y. 530), 13, 143.

New York Health Department v. Trinity Church Rectors, etc. (145 N. Y. 32), 776.

New York Life Ins. v. Cravens (178 U. S. 389), 398.

N. Y. Life Ins. Co. v. Prest. (71 Fed. Rep. 815), 826.

New York, etc. R. R. Co. v. Bristol (151 U. S. 556), 380.

New York & N. E. R. Co. v. Waterbury (55 Conn. 19), 161, 240.

Nevada v. Eddy (123 Mo. 546), 4, 6, 71, 115, 838, 840, 841.

Nevada v. Hutchins (59 Iowa 506), 42, 271, 686.

Nevada Co. v. Hicks (50 Ark. 416), 388.

Nevin v. Roach (86 Ky. 492), 172, 189, 201, 224, 846.

Niagara Falls v. Salt (45 Hun. 41), 537.

Nichols, In re (48 Fed. Rep. 164. 401, 405.

Nichols v. Bridgeport (23 Conn. 189), 818.

Nichols v. Walters (37 Minn. 264), 311.

Nicholson v. Detroit (Mich. 1902), 88 N. W. Rep. 695), 675.

88 N. W. Rep. 695), 675. Nicolson Pav. Co. v. Painter (35

Cal. 699), 864. Nicoulin v. Lowrey (49 N. J. L. 391), 42, 297, 490, 496.

Nightingale, In re (11 Pick. 168), 30, 657, 763.

Niver v. Bath-on-the-Hudson (27 Misc. Rep. 605), 835.

Nixon v. Bolioxi (Miss. 1889, 5 So. Rep. 621), 717.

Noble v. Durell (3 T. R. 271), 110. Noble v. Kansas City (95 Mo. App. 167), 85.

Noblesville v. Noblesville Gas & Imp. Co. (157 Ind. 162), 897.

Nodine v. Union (13 Oreg 587), 496.

Noecker v. People (91 III. 494), 540.

Noel v. San Antonio (11 Tex. Civ. App. 580), 841.

Nohrden v. North Eastern Ry Co. (54 S. C. 492), 585.

Nolin v. Mayor, etc. (4 Yerg. 163), 686.

Noonan v. People (183 III. 52), 321, 325.

Norfolk v. Chamberlain (89 Va. 196), 824.

Norfolk v. Ellis (26 Gratt 224), 121.

Norfolk City v. Chamberlain (29 Gratt 534), 719.

Norfolk Ry Co. v. Pennsylvania (136 U. S. 114), 410.

Norris v. Crocker (13 How. 429), 327.

Norris v. Staps (Hob. 210), 22.

Norris v. Wurster (23 App. Div. 124), 912.

Norristown v. Fitzpatrick (94 Pa. St. 121), 676.

Norristown v. Norristown Pass. Ry. (148 Pa. St. 87), 900.

North v. Cary (4 Thomp. & C. 357), 148, 238.

Northampton v. Abell (127 Mass. 507), 828.

Northern Central Ry Co. v. Baltimore (21 Md. 93), 49, 133, 137, 809.

North Baptist Church v. Orange (54 N. J. L. 111), 249.

North Birmingham St. R. Co. v. Calderwood (89 Ala. 247), 31, 32.

North Braddock v. Second Ave. Tract Co. (20 Pittsb. L. J. 27), 652.

North Chicago City R. R. v. Lake

View (105 Ill. 207), 299, 687, 691, 747, 895.

North Hempstead v. Hempstead (2) Wend. 109), 89.

North Hudson Ry Co. v. Hoboken (41 N. J. L. 71), 615, 620, 652.

North Platte v. North Platte Water Works Co. (56 Neb. 403), 171.

Northern Liberties v. Northern Liberties Gas Co. (12 Pa. St. 318), 714.

Northern Liberties v. O'Niell (1 Phila. 427), 538, 573.

North Pennsylvania R. Co. v. Stone (3 Phila. 421), 817.

North Plainfield v. Cary (50 N. J. L. 176), 643.

North River Meadow Co. Shrewsbury Church (22 N. J. L. 424), 389.

Northern Central Ry Co. v. Baltimore (21 Md. 93), 884.

Northville v. Westfall (75 Mich. 603), 564.

Northwestern Fertilizing Co. v. Hyde Park (97 U. S. 659), 682, 698.

Northwestern Packet Co. v. St. Paul (3 Dill C. C. 454), 416.

North W. Telephone Exch. Co. v. Minneapolis (81 Minn. 140), 723.

Northwood v. Barrington (9 N. H. 369), 149, 150.

North Whitehall Tp., In re (47 Pa. St. 156), 253.

Norton v. Beckman (53 Minn. 456),

Norton v. St. Louis (97 Mo. 537), 587, 897.

Norwick v. Breed (30 Conn. 535), 717.

(22 Conn. Norwich v. Hubbard 587), 810.

Norwich v. Story (25 Conn. 44), 329, 803.

Norwich Gas Light Co. v. Norwich City Gas Co. (25 Conn. 19), 304, 379, 880.

v. Baker (172 U. Norwood 269), 353, 819, 820, 821, 826, 858.

Norwood v. Gonzales County (79 Tex. 218), 803,

Norton v. St. Louis (97 Mo. 537), 61.

Nottage v. Portland (35 Or. 539), 265, 867.

Nugent v. Jackson (72 Miss. 1040). 830, 811.

Nugent v. State (18 Ala, 521), 463, 562.

Nugent v. Wrinn (44 Conn. 273), 179.

Nute v. Boston, etc. Co. (149 Mass. 465), 810.

0.

Oak Grove v. Juneau (66 Wis. 534), 15, 48, 248,

Oakland v. Carpentier (13 Cal. 540), 70, 128, 131, 148, 154, 166.

Oakland v. Oakland Water F. Co. (118 Cal. 160), 3.

Oakland Pav. Co. v. Rier (52 Cal. 270), 805.

Oakland R. R. Co. v. Oakland, B. & F. V. R. R. Co. (45 Cal. 365), 916.

Oakley v. Atlantic City (63 N. J.

L. 127), 193. Oakley v. Williamsburgh (6 Paige 262), 576.

O'Brien v. Cleveland (1 Cleveland Law Rep. 100), 530, 753.

O'Brien v Cleveland (4 Ohio Dec. 189), 485, 493.

Ocean Springs v. Green (77 Miss. 472), 224.

O'Connor v. Memphis (6 Lea 730),

O'Connor v. Pittsburg (18 Pa. St. 187), 881.

O'Connor v. Shahbona (49 App. 619), 591.

Oconto County Supervisors v. Hall (47 Wis. 208), 172.

O'Dea v. Winona (41 Minn. 424), 207.

Odell v. Atlanta (97 Ga. 670), 755. Odell v. Reynolds (40 Mich. 21), 528.

Odell v. Schroeder (58 Ill. 353), 560, 676.

Ogden, ex parte (Tex. Cr. App. 1902, 66 S. W. Rep. 1100), 23.

Ogden v. Lake View (121 III. 422), 852, 855.

- Ogden v. McLaughlin (5 Utah 387), 752.
- Ogden v. Madison (111 Wis. 413), 513, 520, 753, 792.
- Ogdensburgh v. Lyon (7 Lans. 215), 222, 423, 691.
- Ogg v. Lansing (35 Iowa 495), 675. Ogilvie v. Crawford County (7 Fed. Rep. 745), 411.
- O'Hara v. State (112 N. Y. 146), 867.
- O'Hare v. Park River (1 N. D. 279), 249.
- Ohio Life Ins. & Trust Co. v Debolt (16 How. 416), 447.
- Ohio & M. R. R. R. Co. v. Mc-Cutchin (27 III. 9), 482.
- Oil City v. Oil City Boiler Works (152 Pa. St. 348), 813.
- Oil City v. Oil City Trust Co. (11 Pa. Co. Ct. Rep. 350), 635.
- O'Keefe, In re (19 N. Y. Supp. 676), 269.
- Old Colony T. Co. v. Atlanta (83 Fed. Rep. 39), 909.
- Oldham v. Birmingham (102 Ala. 357), 367.
- Olds v. Erie City (79 Pa. St. 380), 249.
- Oldstein v. Fireman's Building Assn. (44 La. Ann. 492), 65.
- O'Leary v. Board (79 Mich. 281), 675.
- O'Leary v. Cook (28 Ill, 534), 646. O'Leary, ex parte (65 Miss. 80), 687, 704.
- Olin v. Meyers (55 Iowa 209), 187, 205.
- Oliver, In re (21 S. C. 318), 486. Oliver v. Worcester (102 Mass. 489), 263.
- Olp v. Leddick (59 Hun. 627), 113. Olsen v. Citizens' Ry. Co. (152 Mo. 426), 745.
- Olympia v. Mann (1 Wash. St. 389), 735, 738.
- Omaha v. Harmon (58 Neb. 339), 425, 452.
- Omaha v. Olmstead (5 Neb. 446), 472.
- Omaha Horse Ry. Co. v. Cable Tramway Co. (30 Fed. Rep. 324), 378.
- O'Maley v. Dorn (7 Wis. 236), 726.

- O'Maley v. Freeport (96 Pa. St. 24), 302, 769.
- O'Malia v. Wentworth (65 Me. 129), 583.
- O'Mally v. McGinn (53 Wis. 353), 201, 207, 239.
- O'Meara and City of Ottawa, In re (11 Ontario Rep. 603), 298.
- O'Meara v. Green (16 Mo. App. 118), 827.
- O'Neil v. Ins. Co. (166 Pa. St. 72), 49.
- O'Neil v. Tyler (3 N. D. 47), 187, 205, 316, 610.
- O'Neil v. Vermont (144 U. S. 323), 354.
- Opelousas v. Andrus (37 La. Ann. 699), 161, 238.
- Opelousas v. Giron (46 La. Ann. 1364), 285, 360, 512, 520, 792.
- Opinion of Justices (150 Mass. 592), 798.
- Opinion of Justices (58 Me. 590), 606),
- Opinion of Justices (52 Me. 595), 75, 104.
- Opp v. Ten Eyck (99 Ind. 345), 221. Ord v. Nash (50 Neb. 335), 874. O'Reilly v. Kingston (114 N. Y. 439), 832.
- Oren v. Bolger (128 Mich. 355), 805.
- Organ v. Toronto (C. P., 24 Ont. Rep. 318), 457.
- O'Rourke v. Citizens Street R. Co. (103 Tenn. 124), 751.
- O'Rourke v. Hart (9 Bosw. 301), 807.
- O'Rourke v. Hays (93 Pa. St. 72), 264.
- Osborn v. Bank of U. S. (9 Wheat 738), 261.
- Osborne v. Detroit (32 Mich. 282), 829.
- Osborne v. Florida (164 U. S 650), 410.
- Osborne v. Mobile (16 Wall. 479), 399, 408.
- Osburn v. Lyons (104 Iowa 160), 866.
- Oskaloosa v. Tullis (25 Iowa 440), 79.
- Oshkosh v. Schwartz (55 Wis. 483), 478, 532,

Oshkosh Waterworks Co. v. Oshkosh (U. S. 1903, 23 Sup. Ct. Rep. 234), 382, 385.

Osterhoudt v. Rigney (98 N. Y. 222), 430.

Oswald v. Gosnell (21 Ky. L. Rep. 1660), 233, 234, 235.

Ottawa v. Carey (101 U. S. 110), 75, 84.

Ottawa v. LaSalle County (12 Ill. 339), 339.

Ottawa v. People ex rel. (48 Ill. 233), 127, 225.

Ottawa v. Rohrbough (42 Kan. 253), 803.

Ottawa County Com'rs v. Nelson 19 Kan. 234), 823.

Otis v. Chicago (161 Ill. 199), 847. Otoe Co. v. Baldwin (111 U. S. 1),

266. Otsego Lake v. Kirtsen (72 Mich.

1), 113. Ottumwa v. Chinn (75 Iowa 405),

692. Ottumwa v. City Water Supply Co. (U. S. C. C. A., 119 Fed. Rep. 315), 438.

Ottumwa v. Schaub (52 Iowa 515), 565, 599.

Ottumwa v. Zekind (95 Iowa 622), 614, 632, 634, 637.

Ouachita Packet Co. v. Aiken (121 U. S. 444), 415, 417.

Ould v. Richmond (23 Gratt. 464), 618, 641.

Ouray v. Corson (Colo. 1900, 59 Pac. Rep. 876), 8.

Outwater v. Borough of Carlstadt (66 N. J. L. 510), 25, 165, 170.

Overali v. Ruenzi (67 Mo. 203), 430.

Overhouser v. American Cereal Co. (Iowa, October 3, 1902, 92 N. W. Rep. 74), 601.

Overton v. Vicksburg (70 Miss. 558), 401.

Owens v. Crossett (105 III. 354), 717.

Owens v. Farm Ridge (103 III. 408), 717.

Owens v. Kinsey (7 Jones Law 245), 774.

Owensboro v. Simms (99 Ky. 49), 466.

Owensboro v. Simms (17 Ky. Law Rep. 1393), 271, 753.

Owensboro v. Sparks (99 Ky. 351), 672, 755.

Owensboro v. Sparks (18 Ky. Law Rep. 269), 271, 284.

Owings v. Jones (9 Md. 108), 58.

Owings v. Speed (5 Wheat. 420), 207.

Owosso v. Richfield (80 Mich. 328), 838.

Oxford v. Benton (36 N. H. 395), 206.

P.

Pabst Brewing Co. v. Terre Haute (98 Fed. Rep. 330), 404, 405.

Packard v. Bergen Neck Ry. Co. (48 N. J. Eq. 281), 842.

Packet Co. v. Catlettsburg (105 U. S. 599), 416.

Packet Co. v. Keokuk (95 U. S. 80), 39, 415, 417.

Packet Co. v. St. Louis (100 U. S. 423), 416.

Packet Co. v. St. Louis (100 U. S. 423), 38, 39, 416.

Pacific v. Seifert (79 Mo. 210), 447. Pacific Junction v. Dyer (64 Iowa 38), 403, 631, 632, 911.

Pacific Ry. Co. v. Cass County (53 Mo. 17), 329.

Pacific R. R. Co. v. Governor (23 Mo. 353), 46, 187, 209.

Padavano v. Fagan (66 N. J. L. 167), 239.

Paducah v. Allen (20 Ky. Law Rep. 1342), 680.

Paducah v. Allen (23 Ky. Law Rep. 701), 680.

Page, ex parte (49 Mo. 291), 575. Page v. Baltimore (34 Md. 558), 429.

Page v. Chicago (60 Ill. 441), 808. Page v. Hardin (8 B. Mon. 648), 366.

Page v. St. Louis (20 Mo. 136), 119.

Page v. Symonds (63 N. Y. 17), 695.

Page v. Weeks (13 Mass. 199), 83. Paige v. Fazackerly (36 Barb. 302), 769.

Paine v. Boston (124 Mass. 486), 258.

- Palaquemines v. Roth (29 La. Ann. 261), 79.
- Palestine v. Barnes (50 Tex. 538), 310, 761.
- Palmer v. Danville (166 Ill. 42), 384.
- Palmer v. Hicks (6 Johns 132), 38. Palmer v. Larchmont Electric Co. (158 N. Y. 231), 892.
- Palmer v. Tingle (55 Ohio St. 389), 669.
- Palmer v. Way (6 Colo. 106), 810, 819, 823.
- Palmyra v. Morton (25 Mo. 593), 31.
- Pancoast v. Troth (34 N. J. L. 377), 803.
- Paola, etc. R. R. C. v. Commissioners (16 Kan. 302), 175.
- Papworth v. Fitzgerald (106 Ga. 378), 278.
- Paralee v. Camden (49 Ark. 165), 361, 752.
- Parchen v. Ashby (5 Mont. 68), 883.
- Paret v. Bayonne (39 N. J. L. 559),
- Paris v. Berry (2 J. J. Marsh. 483), 810.
- Paris v. Graham (33 Mo. 94), 25. Parish of Orleans v. Cochran (20 La. Ann. 373), 633.
- Park Ecclesiastical Soc. v. Hartford (47 Conn. 89), 832, 838.
- Parker v. Astoria (25 Oreg. 425), 240.
- Parker v. Baker (1 Clarke Ch. 223), 76.
- Parker v. Bernard (135 Mass. 116), 57.
- Parker v. Buckner (67 Tex. 20), 385.
- Parker v. Catholic Bishop of Chicago (146 Ill. 158), 187, 845.
- Parker v. Concord (71 N. H. 468), 430, 438.
- Parker v. Macon (39 Ga. 725), 716. Parker v. New Brunswick (30 N. J. L. 395), 835.
- Parker v. Saratoga County (106 N. Y. 392), 105.
- Parker v. Zeisler (73 Mo. App. 537), 244.

- Parkersburg v. Brown (106 U. S. 487), 431.
- Parkersburg Gas Co. v. Parkersburg (30 W. Va. 435), 72, 305, 308.
- Parkey v. Concord (71 N. H. 468), 196.
- Parkhurst v. Capital City R. Co. (23 Oreg. 471), 882.
- Parkinson v. State (14 Md. 185), 274.
- Parks v. Boston (8 Pick. 218), 260, 861.
- Parlin v. Mills (11 Ill. App. 396), 880.
- Parr v. Greenbush (72 N. Y. 463), 198.
- Parry v. Berry (Comyns. 269), 158. Parsons v. District of Columbia (170 U. S. 45), 821.
- Parsons v. Goshen (11 Pick. 396), 75.
- Parsons v. Monmouth (70 Me. 262), 74.
- Partridge v. Hyde Park (131 Ill. 537), 321.
- Partridge v. Snyder (78 Ill. 519), 486.
- Passenger Cases (7 How. 283), 411.
- Paterson v. Barnet (46 N. J. L. 62), 4, 5, 220.
- Paton v. People (1 Colo. 77), 617.Patterson v. Detroit, etc., Ry. (56 Mich. 172), 57.
- Patterson v. Kentucky (97 U. S. 501), 418.
- Patterson v. Vail (43 Iowa 142), 687, 716.
- Patterson Gas Light Co. v. Brady (27 N. J. L. 245), 897.
- Patton v. Stephens (14 Bush. 324),
- Paul v. Coulter (12 Minn. 41), 761. Paul v. Detroit (32 Mich. 108),
- Paul v. Gloucester County (50 N. J. L. 585), 648.

874.

- Paul v. Virginia (94 U. S. 391), 410.
- Paul v. Virginia (8 Wall. 168), 398, 410.
- Paulk v. Syracuse (104 Ga. 24), 577.

- Paulk v. Sycamore (104 Ga. 728), 789.
- Paulsen v. Portland (149 U. S. 30), 819.
- Paulson v. Portland (16 Oreg. 450), 813.
- Paulterers Co. v. Phillips (6 Bingham's N. C. 314), 442.
- Paxson v. Sweet (13 N. J. L. 196), 296, 690, 810.
- Paxton v. Borardus (201 Ill. 628), 845.
- Payne v. Com. (14 Ky. Law Rep. 302), 562.
- Payne v. South Springfield (161 Ill. 285), 844.
- Payne v. Springfield (161 Ill. 285), 853.
- Pearce v. Atwood (13 Mass. 324), 471.
- Pearce v. Hyde Park (126 Ill. 287), 848, 852, 853, 855.
- Pearson v. Chicago (162 Ill. 383), 851.
- Pease v. Chicago (21 Ill. 500), 827. Peay v. Schenck (1 Woolw. C. C. 175), 147.
- Peck and Town of Galt, in re (46 Up. Can. Q. B. 211), 55.
- Peck v. Booth (42 Conn. 271), 150.
- Peck v. Elder (3 Sandf. 126), 699. Peck v. Powell (62 Vt. 296), 463.
- Peck v. Rochester (3 N. Y. Supp. 872), 256.
- Pedrick v. Bailey (12 Gray 161), 295, 721.
- Peed v. Millikan (79 Ind. 86), 610.
- Peete v. Morgan (19 Wall. 581), 422.
- Pegram v. Cleveland County Com'rs (64 N. C. 557), 145.
- Pegues v. Ray (50 La. Ann. 574), 400.
- Pekin v. Smelzel (21 III. 464), 271, 285.
- Pells v. Boswell (8 Ontario Rep. 680), 55..
- Pemberton v. Doley (43 Mo. App. 176), 890.
- Pembina Mining Co. v. Pennsylvania (125 U. S. 181), 410.
- Pendergast v. Peru (20 Ill. 51), 535, 558, 597.

- Pennoyer v. Saginaw (8 Mich. 534), 679.
- Plenrose v. Erie Canal Co. (56 Pa. St. 46), 381.
- Pensacola v. Sullivan (23 Fla. 1), 337.
- Pensacola Gas. Co. v. Provisional Municipality (33 Fla. 322), 903.
- Pennsylvania Co. v. Frana (13 III. App. 91), 441, 529.
- Pennsylvania Co. v. James (81 Pa. St. 194), 41.
- Pennsylvania Co. v. Stegemeier (118 Ind. 305), 750.
- Pa. Globe Gas Light Co. v. Scranton (97 Pa. St. 538), 242.
- Pennsylvania R. Co. v. Jersey City (47 N. J. L. 286), 452.
- Penn. R. R. Co. v. Riblet (66 Pa. St. 164), 130, 742.
- Pennsylvania G. G. Co. v. Scranton (97 Pa. St. 538), 239.
- Pentecost v. Stiles (5 Okla. 500), 315.
- People v. Albany (4 Hun. 675), 93. People ex rel v. Albertson (55 N. Y. 50), 66, 260.
- People v. Adams (9 Wend. 333), 206.
- People v. Amsterdam (90 Hun. 488), 237.
- People v. Angle (109 N. Y. 564), 351.
- People v. Armstrong (73 Mich. 288), 21, 292, 298, 301, 450, 715, 730.
- People v. Auditors (13 Mich 233), 119.
- People v. Austin (47 Cal. 353), 818.
- People v. Ayhens (85 Cal. 86), 489. People ex rel Kimball v. B. & A.
- R. R. Co. (70 N. Y. 569), 321.People ex rel v. Bagley (85 Mo. 343), 69.
- People v. Bailcache (52 Cal. 310), 144.
- People v. Bartlett (67 Cal. 156), 805.
 - People v. Batchelor (22 N. Y. 128), 147, 157, 179.
- People v. Batchelor (28 Barb. 310), 176.

- People ex rel v. Beck (30 N. Y. Supp. 473), 780.
- People ex rel Shumway v. Bennett (29 Mich. 451), 140, 143.
- People ex rel v. Board of Excise of N. Y. (3 N. Y. St. Rep. 253), 464, 567.
- People v. Board of Health (33 Barb. 344), 19, 143, 249.
- People v. Board of Supervisors (131 N. Y. 468), 120.
- People v. Board of Supervisors (73 N. Y. 173), 434.
- People v. Board of Supervisors, etc., (45 N. Y. 196), 434.
- People v. Bresler (171 N. Y. 302), 163.
- People v. Brill (120 Mich 42), 338. People v. Brooklyn (149 N. Y. 215), 367.
- People v. Brown (2 Utah 462), 771, 784.
- People v. Buchanan (1 Idaho 681), 580, 582, 591.
- People v. Bunker (128 Mich. 160), 401.
- People v. Bussell (59 Mich. 104), 329.
- People v. Carpenter (24 N. Y. 86), 546.
- People v. Chicago (51 Ill. 17), 267, 805.
- People v. Chicago Gas Trust Co. (130 III. 268), 863.
- People v. Chicago, etc., Ry. Co. (118 Ill. 113), 376.
- People v. Chicago & N. W. Ry. Co. (118 III. 520), 803.
- People v. C. W. D. Ry. Co. (18 Ill. App. 125), 322.
- People v. Cipperly (101 N. Y. 634), 767.
- People v. Clark (70 N. Y. 518), 546.
- People ex rel v. Coffey (66 Hun. 160), 899.
- People v. Cole (70 Cal. 59), 245, 248.
- People ex rel v. Coler (166 N. Y. 1), 778, 864.
- People v. Coleman (4 Cal. 46), 611, 629.
- People v. Compagnie Generale

- Transatlantique (107 U. S. 59), 411.
- People ex rel v. Coon (25 Cal. 635), 112, 145.
- People v. Counts (89 Cal. 15), 13. People ex rel v. Court of Special Sessions Justices (7 Hun. 214), 19, 144.
- People ex rel v. Cox (76 N. Y. 47), 509, 519.
- People v. Cregier (138 III. 401), 44, 257, 258, 298, 428.
- People v. Crotty (93 Ill. 180), 4, 124, 625.
- People v. Cunningham (1 Denio. 524), 717.
- People ex rel v. Curley (5 Colo. 412), 461.
- People v. Davie (114 Cal. 363), 367.
- People v. Davis (61 Barb. 456), 331, 332.
- People v. Deehan (153 N. Y. 528), 903.
- People ex rel v. Detroit (28 Mich. 228), 66, 607, 805.
- People v. Detroit Citizens', etc., R. R. Co. (116 Mich. 132), 269.
- People v. Detroit White Lead Works (82 Mich. 471), 697, 710, 787, 792.
- People v. De Wolf (62 III. 253), 209.
- People v. D'Oench (111 N. Y. 359), 736, 737, 739.
- People v. Draper (15 N. Y. 532), 66, 144.
- People v. Dupuyt (71 III, 651), 84.
- People ex rel v. Dutcher (83 N. Y. 240), 512, 523.
- People v. Dwyer (90 N. Y. 402), 261.
- People v. East Saginaw (33 Mich. 164), 609.
- People v. Eberspacher (79 Hun. 410), 484.
- People v. Eddy (59 Hun. 615), 767. People ex rel v. Evans. (18 III. 361), 469.
- People ex rel v. Fairbury (51 Ill. 149), 178.
- People v. Farnham (35 III. 562), 802,

- People v. Fisher (20 Barb. 652), 524.
- People v. Fitchie (76 Hun. 80), 238.
- People ex rel v. Fleming (10 Colo. 53), 546.
- People ex rel Detroit v. Fort Street & E. Ry. Co. (41 Mich. 413), 900.
- People ex rel v. French (102 N. Y. 583), 43, 522, 758.
- People v. Frost (36 Ill. App. 242), 176.
- People v. Furman (85 Mich. 110), 341.
- People v. Garebed (20 Misc. Rep. 127), 770.
- People ex rel Hughes v. Gillespie (1 Cal. 342), 465.
- People v. Gillson (109 N. Y. 389), 669, 864,
- People v. Gleason (121 N. Y. 631), 861.
- People v. Goodwin (5 Wend. 251), 528.
- People v. Goosemann (80 Mich. 611), 468.
- People v. Gordon (81 Mich. 306), 705.
- People ex rel v. Grant (126 N. Y. 473), 772.
- People v. Green (58 N. Y. 295), 467.
- People v. Hanrahan (75 Mich. 611), 224, 272, 280, 329, 339, 345, 518, 522, 671, 752, 753, 787, 792.
- People v. Harris (4 Cal. 9), 797.
- People v. Harrison (185 III. 307), 329, 330.
- People v. Harrison (191 III. 257), 349.
- People ex rel v. Harshaw (60 Mich. 200), 157.
- People v. Haverstraw (137 N. Y. 88), 808.
- People ex rel v. Henshaw (76 Cal. 436), 69, 341, 463.
- People ex rel v. Hillsdale & Chatham Turnpike Co. (2 Johns. 190), 441.
- People ex rel v. Holly (119 Mich. 637), 114.
- People v. Holladay (25 Cal. 300), 268.

- People ex rel v. Holladay (93 Cal. 241), 720.
- People v. Hurlbut (24 Mich. 44), 66, 70, 82.
- People v. Hurst (41 Mich. 328), 529.
- People v. Ingham (20 Mich. 95), 881.
- People v. Iverson (14 N. Y. Crim. Rep. 155), 484, 513.
- People v. Jackson (8 Mich. 110), 562, 578.
- People v. James (16 Hun. 426), 518.
- People v. Jenkins (1 Hill. 469), 423.
- People ex rel v. Jobs (7 Colo. 475), 341.
- People v. Johnson (2 Parker Cr. Rep. 322), 522.
- People v. Jones (6 Mich. 176), 881.
- People v. Judge of Recorders Ct. of Detroit (40 Mich. 64), 831.
- People ex rel v. Justices (74 N. Y. 406), 486, 512, 515.
- People v. J. & M. P. R. Co. (9 Mich. 285), 669.
- People v. Keir (78 Mich. 98), 43, 48, 232, 248, 453, 714, 762, 764, 766.
- People v. Kerr (27 N. Y. 188), 886, 890.
- People v. Kingman (24 N. Y. 559), 873.
- People v. Kipley (167 III. 638), 366. People v. LaRue (67 Cal. 526), 54.
- People v. Lathrop (3 Colo. 428), 606.
- People v. Lawber (7 Abb. Pr. 158), 761.
- People v. Lawrence (36 Barb. 177), 825.
- People ex rel v. Lawrence (41 N. Y. 137), 226.
- People v. Leavitt (41 Mich. 470), 471.
- People ex rel v. Lee (112 III. 113), 232, 610.
- People v. Lewis (86 Mich. 273), 44, 312, 710.
- People v. Linden (107 Cal. 94), 13.

- People v. Liscomb (6 Thomp. & C. 258), 489.
- People v. Little (86 Mich. 125), 744.
- People v. Lowber (28 Barb. 65), 88.
- People v. Lynch (51 Cal. 15), 265, 868.
- People v. McCarthy (45 How. Pr. 97), 513, 559, 572.
- People ex rel v. McClintock (45 Cal. 11), 88.
- People v. McCreery (34 Cal. 432), 606.
- People v. McWethy (165 Ill. 222), 335.
- People ex rel v. Madison Co. (125 III. 334), 209.
- People v. Maher (56 Hun. 81), 865. People v. Mangold (71 Mich. 335),
- 468. People v. Manhattan Gas Light Co.
- (45 Barb. 136), 897. People v. Marley (2 Wheeler Cr.
- Cas. 74), 737.

 People ex rel v. Martin (5 N. Y.
- 22), 179.
 People v. Marx (99 N. Y. 377), 669,
- 763.
 People v. Mather (4 Wend. 229),
- 524. People ex rel v. Matteson (17 Ill.
- 157), 449.
- People v. Mattimore (45 Hun. 448), 715.
- People v. Maynard (15 Mich. 463), 440.
- People v. Mayor, etc. (21 Ill. 17), 607.
- People v. Maxon (139 III. 306), 427.
- People v. Maxton (38 Ill. App. 152), 168.
- People v. Medberry (39 N. Y. Supp. 207), 647.
- People ex rel v. Mellen (32 Ill. 181), 225, 226.
- People v. Miller (38 Hun. 82), 481, 530, 533, 559, 753.
- People ex rel v. Minck (21 N. Y. 539), 208.
- People ex rel v. Mitchell (35 N. Y. 551), 74,

- People v. Mount (87 Ill. App. 194), 329.
- People ex rel v. Mount (186 III. 560), 5, 7, 11, 21, 50, 156, 315, 337, 624.
- People v. Mulholland (82 N. Y. 324), 765.
- People ex rel v. Mutual Gas Light Co. (38 Mich 154), 441.
- People ex rel v. Murphy (67 Ill. 333), 469.
- People v. Murray (57 Mich. 396), 207, 232, 590, 596.
- People v. Naglee (1 Cal. 232), 629. People v. New York (11 Abb. Pr. 114), 126.
- People v. New York (32 Barb. 35), 260.
- People v. New York (32 Barb. 35), 435.
- People v. New York (7 How. Pr. 81), 580, 584.
- People v. New York (18 Abb. N. C. 123), 718.
- People v. New York Board of Health (33 Barb. 344), 688.
- People v. New York Fire Com'rs (23 Hun. 317), 87.
- People v. New York Gas Light Co. (64 Barb. 55), 698.
- People ex rel v. N. Y. N. H. & H. R. R. Co. (11 Hun. 297), 474.
- People v. N. H. & H. R. Co. (45 Barb, 73), 883.
- People v. Niles (35 Cal. 282), 415.
- People v. Nyland (41 Cal. 129), 463, 562.
- People v. O'Brien (111 N. Y. 1), 321, 323, 380, 912.
- People ex rel v. Pease (27 N. Y. 45), 185.
- People v. Peoria (166 Ill. 517), 441.
- People ex rel v. Peoria D. & E. R. R. Co. (116 Ill. 410), 46, 609.
- People v. Phalen (49 Mich. 492), 468.
- People v. Police Board (24 How. Pr. 481), 276.
- People v. Port Jervis (100 N. Y. 283), 832.
- People v. Potter (35 Cal, 110), 487.

- People v. Pratt (129 N. Y. 68), 290, 696.
- People v. Queens County Supervisors (62 Hun. 619), 803.
- People ex rel v. Queens Co. Super. (153 N. Y. 370), 260.
- People v. Reclamation Dist. (130 Cal. 607), 441.
- People v. Reclamation Dist. (53 Cal. 346), 54.
- People ex rel v. Rector, etc. (48 Barb, 603), 162, 163, 165.
- People v. Rich (54 Cal. 74), 894.
- People v. Roby (52 Mich. 577), 539, 542.
- People ex rel v. Rochester (5 Lans. 11), 148, 178, 193, 829.
- People v. Rochester (45 Hun. 102), 768.
- People ex rel v. Rochester (44 Hun. 166), 770.
- People v. Rochester (21 Barb. 656), 830.
- People v. Roff (2 Parker Cr. Rep. 216), 693.
- People v. Rosenberg (138 N. Y. 410), 351, 447, 687, 688, 699.
- People v. Rosenberg (67 Hun. 52), 667.
- People v. Russell (74 Cal. 578), 253.
- People v. Russell (49 Mich. 617), 636.
- People v. Sacramento (6 Cal. 422), 270.
- People v. St. Louis (10 Ill. 351),
- 716. People v. Salomon (46 III. 415),
- 838. People v. Sands (1 Johns. 78), 741.
- People ex rel v. San Francisco (27 Cal. 655), 112, 253.
- People ex rel v. San Francisco (36 Cal. 595), 812, 883. People v. Scannell (62 N. Y. Suppl.
- 930), 367.
- People v. Schroeder (12 Hun. 413), 8.
- People v. Schroeder (76 N. Y. 160), 236, 237, 239.
- People v. Slaughter (2 Doug. 334), 464.
- People v. Smith (Mich. 1902, 90 N. W. Rep. 666), 546.

- People v. Smithville (85 Hun. 114), 9.
- People v. Spring Valley (129 Ill. 169), 546.
- People ex rel v. Starne (35 Ill. 121), 200.
- People v. Starr (50 Ill. 52), 534. People v. Steele (94 Mich. 437), 527.
- People v. Stein (80 N. Y. Suppl. 847), 512, 523.
- People v. Stephens (71 N. Y. 527), 862.
- People v. Stevens (13 Wend. 341), 792, 795.
- People v. Stowell (9 Abb. N. C. 456), 145.
- People v. Strack (1 Hun. 96), 158. People v. Stratton (28 Cal. 382), 10.
- People v. Sturtevant (9 N. Y. 263), 261, 262.
- People ex rel v. Suburban R. R. Co. (178 III. 594), 879.
- People v. Superior Court (19 Wend. 68), 145.
- People v. Supervisors (3 Mich. 475), 119.
- People ex rel v. Supervisors (112 N. Y. 585), 881.
- People v. Supervisors Queens Co. (131 N. Y. 468), 118.
- People v. Supervisors of City and County of San Francisco (27 Cal. 655), 252.
- People ex rel v. Sutter Street Ry. Co. (117 Cal. 604), 880, 914.
- People ex rel v. Terry (108 N. Y. 1), 470.
- People v. Toal (85 Cal. 333), 462. People ex rel v. Thompson (155 Ill. 451), 3.
- People ex rel v. Throop (12 Wend. 183), 296, 301.
- People v. Thurber (13 Ill. 554), 398, 620, 621.
- People ex rel v. Utica Ins. Co. (15 John 358), 76, 155, 879.
- People v. Van Houten (35 N. Y. Supp. 186), 478, 482, 515, 516, 517, 551.
- People v. Van Houten (13 Misc. Rep. 603), 770.

- People v. Van Houten (69 N. Y. St. 265), 479, 484, 513, 536.
- People v. Van Nort. (64 Barb. 205), 339.
- People ex rel Trundy v. Van Nort. (65 Barb, 331), 865.
- People v. Van Tassel (135 N. Y. 638), 196.
- People v. Vinton (82 Mich. 39), 531, 568.
- People v. Wagner (86 Mich. 594), 224, 769.
- People v. Walker (23 Barb. 304), 145, 176.
- People v. Walsh (96 Ill. 232), 883.
- People v. Weber (89 Ill. 347), 8. People v. Weiss-Chapman Drug Co. (5 Colo, App. 153), 532.
- People v. West (106 N. Y. 293), 351, 767.
- People v. White (24 Wend, 520), 158.
- People ex rel v. Whitney's Point (32 Hun. 508), 833, 846.
- People v. Williams (64 Cal. 87), 13. People v. Williams (56 Cal. 647), 54.
- People ex rel v. Wilson (15 III. 388), 472.
- People v. Wilson (50 Hun. 606), 867.
- People v. Wintermute (1 Dak. 63), 331.
- People v. Wong Wang (92 Cal. 277), 467.
- People v. Wright (68 Hun. 264), 609.
- People v. Yonkers (39 Barb. 266), 844.
- People ex rel v. Zeyst (23 N. Y. 140), 206, 209.
- People's Gas Light Co. v. Jersey City (46 N. J. L. 297), 893.
- People's Gaslight & Coke Co. v. Hale (94 Ill. App. 406), 444.
- Peoria v. Calhoun (29 Ill. 317), 289, 296, 529.
- Peoria v. Gugenheim (61 Ill. App. 374), 632, 636.
- Peoria v. Simpson (110 III. 294), 457.
- Perdue v. Ellis (18 Ga. 586), 17. Pereria v. Wallace (129 Cal. 397),
- Pereria v. Wallace (129 Cal. 397), 885.

- Perkins v. Corbin (45 Ala. 103), 461, 463, 464.
- Perkins v. Fielding (119 Mo. 149), 153.
- Perkins v. Slack (86 Pa. St. 270), 607.
- Perkins v. Watertown (5 Biss. 320), 383.
- Perkinson v. Partridge (3 Mo. App. 60), 828, 845.
- Perry v. Keene (58 N. H. 40), 142. Perry v. New Orleans, M. & C. Ry. Co. (55 Ala. 413), 580, 882, 885, 892.
- Perry v. State (37 Neb. 623), 506, 752.
- Perry v. State (41 Tex. 488), 574.
- Perry v. Stowe (111 Mass. 60), 94.
- Perry v. Washburn (20 Cal. 318), 606.
- Perryman v. Greenville (51 Ala. 507), 207, 582.
- Pesterfield v. Vickers (3 Coldw. 205), 26, 359, 484.
- Peters v. Chicago (192 III. 437), 853.
- Petersburg v. Cocke (94 Va. 244), 641.
- Petersburg v. Mappin (14 III. 193), 73, 102, 112.
- Petersburg v. Metzker (21 III. 205), 24, 70, 72, 284, 285.
- Petersburg v. Whitnack (48 III App. 663), 531, 539.
- Peterson v. New York (17 N. Y. 449), 111, 123, 137.
- Petsch v. Biggs (31 Minn. 392), 467, 468.
- Pettibone v. Hamilton (40 Wis. 402), 831.
- Pettibone v. U. S. (148 U. S. 197), 524.
- Pettis v. Johnson (56 Ind. 139), 358, 913.
- Pettit v. Duke (10 Utah 311), 826.
- Pletty v. Jones (1 Ired. 408), 570.
- Peyton v. Morgan Park (172 III. 102), 425.
- Pfirrman, ex parte (134 Cal. 143), 607.
- Pfleger v. Groth (103 Wis. 104), 695.
- Phelps v. Hawley (52 N. Y. 23).

- Phelps v. New York (112 N. Y. 216), 808.
- Phelon v. Granville (140 Mass. 386), 9.
- Philadelphia v. American U. Tel. Co. (167 Pa. St. 406), 406, 407.
- Philadelphia v. Atl. & P. Tel. Co. (42 C. C. A. 325), 407.
- Philadelphia v. Atlantic & P. Tel. Co. (109 Fed. Rep. 55), 639.
- Philadelphia v. Bowman (175 Pa. St. 91), 318.
- Philadelphia v. Brahender (201 Pa. St. 574), 231, 301, 313 719, 730.
- Philadelphia v. Donath (13 Phila. 4), 811.
- Philadelphia v. Duncan (4 Phila. 145), 559.
- Philadelphia v. Eastwick (35 Pa. St. 75), 813.
- Philadelphia v. Edwards (78 Pa. St. 62), 811.
- Phila. v. Empire, etc., Ry. (3 Brewst. 570), 900.
- Philadelphia v. Empire Pass. Ry. Co. (177 Pa. St. 382), 650, 897, 900.
- Philadelphia v. Evans (139 Pa. St. 483), 814.
- Philadelphia v. Field (58 Pa. St. 320), 806.
- Philadelphia v. Hughes (4 Phila. 148), 558.
- Philadelphia v. Hestonville R. R. (177 Pa. St. 371), 900.
- Philadelphia v. Houseman (2 Phila. 349), 143.
- Philadelphia v. Kitchen (2 Phila. 44), 556.
- Philadelphia v. Lea (5 Phila. 77), 831.
- Philadelphia v. Linnard (97 Pa. St. 242), 815.
- Philadelphia v. Meighan (159 Pa. St. 495), 811.
- Philadelphia v. Michener (10 Phila. 30), 736.
- Philadelphia v. Nell (3 Yeates 475), 487, 534, 559.
- Philadelphia v. P. & R. R. R. Co. (58 Pa. St. 253), 719.
- Philadelphia v. Philadelphia, etc., Ry Co. (177 Pa. St. 379), 900.

- Philadelphia v. Postal Tel. Cable Co. (21 N. Y. Supp. 556), 406, 407. Philadelphia v. Provident Life,
 - etc., Co. (132 Pa. St. 224), 682, 706.
- Philadelphia v. Ridge Ave. Pass. Ry. Co. (143 Pa. St. 444), 898, 899. Philadelphia v. Roney (2 Phila. 43), 559.
- Philadelphia v. Spring Garden, etc., R. Co. (161 Pa. St. 522), 898.
- Philadelphia v. Thirteenth & Fifteenth Streets P. R. Co. (8 Phila. 648), 719.
- Philadelphia v. Thirteenth, etc., Ry. Co. (169 Pa. St. 269), 898.
- Philadelphia v. Thirteenth St. Ry. Co. (3 Pa. Dis. Ct. Rep. 468), 899.
- Philadelphia v. Trust Co. (132 Pa. St. 224), 691.
- Philadelphia v. Tyron (35 Pa. St. 401), 831, 832.
- Philadelphia v. Wards (1 Phila. 517), 536.
- Philadelphia v. W. U. Tel. Co. (11 Phila. 327), 445.
- Philadelphia v. W. U. Tel. Co. (89 Fed. Rep. 454), 406, 407.
- Philadelphia v. W. U. Tel. Co. (82 Fed. Rep. 797), 406.
- Philadelphia v. W. U. Tel. Co. (40 Fed. Rep. 615), 406, 407, 634.
- Philadelphia Assn. v. Wood (39 Pa. St. 73), 606.
- Philadelphia Co. v. Freeport (167 Pa. St. 279), 884.
- Philadelphia Fire Assn. v. New York (119 U. S. 110), 410.
- Philadelphia & Reading R. R. Co. v. Ervin (89 Pa. St. 71), 65.
- Phila. Steamship Co. v. Pennsylvania (122 U. S. 326), 410.
- Philadelphia Steam Supply Co. v. Philadelphia (41 Leg. Int. 252), 885.
- Philadelphia & T. E. Co.'s Case (6 Whart, 25), 882.
- Phillips, in re (60 N. Y. 16), 252.
- Phillips v. Allen (41 Pa. St. 481), 273, 768, 769.
- Phillips v. Atlanta (87 Ga. 62), 556.
- Phillips v. Atlanta (78 Ga. 773), 573, 653, 774.

- Phillips v. Denver (19 Colo. 179), 21, 26, 31, 71, 289, 292, 703.
- Phillips v. Stone Mountain (61 Ga. 386), 436.
- Phillipsburg v. Central Penn. Tel. & Sup. Co. (22 Wkly. Notes Cas. 572), 660.
- Phillips Semmer Glass Co. v. Nassau Show Case Co. (28 Miss. 577), 469.
- Pickering v. Pickering (11 N. H. 141), 206.
- Picket v. State (22 Ohio St. 405), 557.
- Pickett v. School District (25 Wis. 551), 172.
- Pickford v. Lynn (98 Mass. 491), 845.
- Pickles v. McLellan Dry Dock (38 La. Ann. 412), 671.
- Pickton v. Fargo (10 N. D. 469), 205.
- Pidgeon v. McCarthy (82 Ind. 32), 802.
- Pierce v. Bartrum (Cowp. 269), 31, 33, 704.
- Pierce v. Emery (32 N. H. 484), 879.
- Pierce v. Kimball (9 Me. 54), 769.Pierce v. Richardson (37 N. H. 306), 201, 216.
- Pieri v. Shieldsboro (42 Miss. 493), 295, 668.
- Piermont v. Crouch (10 Cal. 315), 327, 339.
- Pike v. Megoun (44 Mo. 491), 259, 474.
- Pillsbury v. Brown (47 Cal. 477), 486, 524, 531.
- Pim v. Nicholson (6 Ohio St. 176), 225.
- Pimental v. San Francisco (21 Cal. 351), 4, 95, 115, 166, 168, 170.
- Pine v. St. Paul City R. Co. (50 Minn, 144), 751.
- Pine River School Dist. v. Union School Dist. (81 Mich. 339), 211.
- Pineville v. Burchfield (19 Ky. L. Rep. 984), 213.
- Pingree v. Snell (42 Me. 53), 336. Piper v. Boonville (32 Mo. App.
- 138), 787. Piper v. Chappell (14 Exch. 649),
- Piper v. Pearson (2 Gray 120), 465.

- Piqua v. Zimmerlin (35 Ohio St. 507), 450.
- Pirie and Town of Dundas, In re (29 Up. Can. Q. B. 401), 310.
- Pitts v. District of Opelika (79 Ala. 527), 47, 249, 510, 568.
- Pitts v. Vicksburg (72 Miss. 181), 619, 773.
- Pittsburgh's Appeal (115 Pa. St. 4), 884.
- Pittsburg v. Cluney (74 Pa. St. 262), 209.
- Pittsburg v. Coyle (165 Pa. St. 61), 631.
- Pittsburg v. Craft (1 Pitts. 77), 35.
- Pittsburg v. Grier (22 Pa. St. 54), 676.
- Pittsburg v. Keech Co. (21 Pa. Super. Ct. 548), 444.
- Pittsburg v. Reynolds (48 Kan. 360), 247, 249, 251.
- Pittsburg v. Walter (69 Pa. St. 365), 831.
- Pittsburg v. Young (3 Watts 363), 461.
- Pittsburgh & B. Pass. Ry. Co. v. Pittsburgh (80 Pa. St. 72), 901.
- Pittsburg, C., C. & St. L. Ry. Co. v. Hays (17 Ind. App. 261), 839.
- Pittsburg, C. & St. L. Ry. Co. v. Hood (94 Fed. Rep. 618), 17.
- Pittsburg, etc., Ry. v. Backus (154 U. S. 421), 409.
- Pittsburgh, etc., R. W. Co. v. Crown Point (146 Ind. 421), 289.
- Pittsburg, etc., R. R. Co. v. Crown Point (150 Ind. 536), 168.
- Place v. Providence (12 R. I. 1), 121.
- Placerville v. Wilcox 35 Cal. 21), 21.
- Placke v. U. D. Ry. Co. (140 Mo. 634), 891, 892.
- Plaquemine v. Roth (20 La. Ann. 261), 642.
- Platt v. Harrison (6 Iowa 79), 576. Platte & D. Canal & M. Co. v. Lee (2 Colo. App. 184), 435.
- Platte, etc., C. & M. Co. v. Dowell (17 Colo. 376), 604.
- Platteville v. Bell (43 Wis. 488), 478.
- Platteville v. McKernan (54 Wis. 487), 479, 564, 788.

- Plattsburg 1, Riley (42 Mo. App. 18), 292, 299, 690.
- Plattsburg v. Trimble (46 Mo. App. 459), 756, 787, 792.
- Player v. Archer (2 Sid. 121), 273. Plimpton v. Somerset (33 Vt. 283), 366, 516.
- Plumey v. Massachusetts (155 U. S. 461), 420.
- Plymouth v. Pettijohn (4 Devereux 591), 33, 34, 231, 455, 552.
- Plymouth v. Schultheis (135 Ind. 339), 682, 687.
- Plymouth Borough v. Penkok (7 Kulp. 101), 573.
- Plymouth Tp. v. Chestnut Hill & N. R. Co. (168 Pa. St. 181), 897, 914.
- Pocock v. Toronto (27 Ontario Rep. 635), 222, 263.
- Poe v. Machine Works (24 W. Va. 517), 570, 571, 572.
- Poillon v. Brooklyn (101 N. Y. 132), 117.
- Polack v. Trustees, etc. (48 Cal. 490), 884,
- Poland v. Connolly (16 Ohio St. 64), 30.
- Pollard, ex parte (40 Ala. 77), 452. Pollasky v. Schmid (128 Mich. 699), 170.
- Polinsky v. People (73 N. Y. 65). 19, 143, 767.
- Polinsky v. People (11 Hun. 390), 793.
- Pollock v. San Diego (118 Cal. 593), 237, 593, 611.
- Pomeroy v. Lappens (9 Oreg. 363), 580, 584.
- Pond v. Negus (3 Mass. 230), 195. Pontiac v. Axford (49 Mich. 69),
- Pooley v. Buffalo (122 N. Y. 592), 828.
- Pope v. Savannah (74 Ga. 365), 437.
- Poppen v. Holmes (44 Ill. 360), 274, 275.
- Popper v. Broderick (123 Cal. 456), 343.
- Port Clinton Borough v. Shafer (5 Pa. Dist. Ct. 583), 400.

- Porter v. Shields (200 Pa. St. 241), 806.
- Porter v. Waring (69 N. Y. 250), 591.
- Porter v. Water Valley (70 Miss 560), 765.
- Port Gibson v. Moore (13 Smed. & M. 157), 347.
- Port Huron v. Jenkinson (77 Mich. 414), 810.
- Port Huron v McCall (46 Mich. 565), 77.
- Port Jervis v. Close (6 N. Y. Supp. 211), 551, 653.
- Port of Mobile v. L. & N. R. R. Co. (84 Ala. 115), 377.
- Portland v. Bangor (42 Me. 403), 517.
- Portland v. Bangor (65 Me. 120), 517.
- Portland v. Meyer (32 Oreg. 368), 701.
- Portland v. Portland Bituminous P. & I. Co. (33 Oreg. 307), 866.
- Portland v. Richardson (54 Me. 46), 717.
- Portland v. Rolfe (37 Me. 400), 482.
- Portland v. Schmidt (13 Oreg. 17), 332, 445.
- Portland v. Terwilliger (16 Oreg. 465), 696.
- Postal Telegraph Co. v. Adams (155 U. S. 688), 408.
- Postal Tel. Co. v. Baltimore (79 Md. 502), 407.
- Postal Tel. Cable Co. v. Charleston (153 U. S. 692), 399, 406.
- Postal Tel. & Cable Co. v. Norfolk (Va. 1903, 43 S. E. Rep. 207), 399.
- Potter v. Collis (156 N. Y. 16), 881, 882.
- Pottsville & Marburger (1 Leg. Chron. 60), 482.
- Potwin v. Johnson (108 III. 70),
- Powell v. Bentley & G. Furniture Co. (34 W. Va. 804), 697.
- Powell v. Com. (114 Pa. St. 265), 669, 763.
- Powell v. Pennsylvania (127 U. S. 678), 419, 420.

813.

Powell v. People (47 Mich. 108), 572.

Powell v. State (69 Ala. 10), 452. Powelton Avenue, In re (11 Phila. 447), 841, 842.

Power v. Athens (99 N. Y. 592), 306.

Powers v. Decatur (54 Ala. 214),

Poyer v. Des Plaines (123 Ill. 111), 437, 449.

Poyer v. Des Plaines (22 Ill. App. 576), 636, 659.

Poyer v. Des Plaines (20 III. App. 30), 576.

Pound v. Chippewa Co. Supervisors (43 Wis. 63), 837.

Pratt v. Litchfield (62 Conn. 112), 314, 320, 735.

Prather v. People (85 Ill. 36), 549, 554, 637.

Pratt v. Swanton (15 Vt. 147), 149. Preble v. Portland (45 Me. 241), 196, 237.

Predu v. Ellis (18 Ga. 586), 66.

Prell v. McDonald (7 Kan. 426), 483, 485, 492, 493, 590.

Prendergast v. Richards (2 Mo. App. 187), 213.

Presbyterian Church v. New York (5 Cowen 538), 18, 130, 742.

Prescott's Case (2 N. Y. City Hall Record 161), 710.

Preston and Manvers (21 U. C. Q. B. 626), 160.

Preston v. Cedar Rapids (95 Iowa 71), 186, 204, 595.

Preston v. Finley (72 Fed. Rep. 850), 393, 404.

Pretz's Appeal (35 Pa. St. 322), 737. Prewitt v. M., K. & T. Ry. Co. (134 Mo. 615), 585, 744, 748.

Prezinger v. Harness (114 Ind. 491), 177.

Price v. Beale (5 Pa. County Ct. Rep. 491), 156.

Price v. People (193 III. 114), 613. Price v. R. R. (13 Ind. 58), 165.

Price v. Thompson (48 Mo. 361), 92, 708, 890.

Priestly v. Watkins (62 Miss. 798), 386.

Prince and City of Ottawa, in re (25 Up. Can. Q. B. 175), 298.

Prince v. Crocker (166 Mass. 347), 838, 883.

Prince v. Skillin (71 Me. 361), 367. Primm v. Carondelet (23 Mo. 22), 367.

Prindiville v. Jackson (79 Ill. 337), 811, 827.

Prior v. Buehler & Cooney Construction Co. (170 Mo. 439), 854.

Pritchard v. Magoun (109 Iowa 364), 609.

Pritz, ex parte (9 Iowa 30), 225. Protestant Episcopal Public School, In re (40 How. Pr. 198),

Prout v. Pittsfield Fire Dist. (154 Mass. 450), 112.

Providence v. Union R. R. Co. (12 R. I. 473), 329, 330, 336.

Pryor, In re (55 Kan. 724), 908.

Pruden v. Alden (23 Pick. 184), 208.

Pruden v. Love (67 Ga. 190), 721.Public Ledger Co. v. Memphis (93 Tenn. 77), 262.

Public School Trustee v. Taylor (30 N. J. Eq. 618), 341.

Pugh v. Little Rock (35 Ark. 75), 598, 599.

Pullen v. Raleigh (68 N. C. 451), 612.

Pullman Palace Car Co. v. Pennsylvania (141 U. S. 18), 409.

Pullman Palace Car Co. v. State (64 Tex. 274), 631.

Pundman v. St. Charles County (110 Mo. 594), 876.

Purdy v. Sinton (56 Cal. 133), 649. Purrington v. People (79 III. 11), 609.

Pye v. Mankato (36 Minn. 373), 799.

Pye v. Peterson (45 Tex. 312), 734.

Q.

Quartlebaum v. State (79 Ala. 1), 617.

Queen v. Jarvies (3 F. & F. 108), 763.

Queen v. Osler (32 Up. Can. Q. B. 324), 31.

Queen v. Waterhouse (26 L. T. [N. S.] 761), 710.

Quigley v. Aurora (50 Ind. 28), 476, 477, 562.

Quimbo Appo v. People (20 N. Y. 531), 577.

Quincy v. Ballance (30 Ill. 185), 532.

Quincy v. Bull (106 Ill. 337), 324, 452, 625, 875, 879.

Quincy v. Chicago, B. & Q. Ry.Co. (92 III. 21), 11, 593, 594.

Quincy v. Kennard (151 Mass. 563), 704.

Quincy v. O'Brien (24 III. App. 591), 285, 731.

Quincy v. Quimby (38 III. 274), 287.

Quinette v. St. Louis (76 Mo. 402), 21, 338, 442.

Quinn v. Cumberland County (162 Pa. St. 55), 86.

Quinn v. Heisel (40 Mich. 576), 483.

Quinn v. Middlesex Electric Light Co. (140 Mass. 109), 622, 638.

Quint v. Merrill (105 Wis. 406), 219, 249, 597, 598.

Quintini v. Board, etc. (64 Miss. 483), 687.

Quong Woo, In re (13 Fed. Rep. 229), 613, 617, 627.

Quong Woo, In re (7 Sawyer 526), 681, 773.

R.

Raborn v. Mish (12 Wash. 167),

Radereaugh v. Plain City (11 Ohio Dec. 612), 630.

Rackliff v. Greenbush (93 Me. 99). 74.

Rae v. Flint (51 Mich. 526), 97.

Raffery v. Mo. Pac. Ry. Co. (91 Mo. 33), 748.

Ragan v. McElroy (98 Mo. 349), 90.

Rahrer, In re (140 U. S. 545), 405, 418.

Rahway Gas Light Co. v. Rahway (58 N. J. L. 510), 42, 452.

Railroad Co. v. Ellerman (105 U. S. 166), 371.

Railroad v. Engle (76 Ill. 317), 594.

Railroad Co. v. Georgia (98 U. S. 359), 879.

Railroad Co. v. Husen (95 U. S. 465), 421.

Railroad v. Jacksonville (67 Ill. 37), 687.

Railroad Co. v. Maine (96 U. S. 499), 323, 380.

Railroad Co. v. Marion Co. (36 Mo. 294), 197.

Railroad Co. v. Peniston (18 Wall. 5), 406.

R. R. Co. v. Pennsylvania (State tax on foreign-held bonds, 15 Wall 300), 375.

R. R. Co. v. Philadelphia (101 U. S. 528), 652.

Railroad Co. v. Richmond (96 U. S. 521), 44, 324, 747.

Railroad Co. v. Veazie (39 Me. 571), 322.

Rains v. Oshkosh (14 Wis. 372), 582.

Raker v. Maquon (9 Ill. App. 155), 247, 251, 252, 532, 593, 594, 598.

Raleigh v. Dougherty (3 Humph. 11), 771, 785.

Raleigh v. Peace (110 N. C. 32), 223, 823, 839.

Raleigh v. Sorrell (1 Jones 49), 157, 768.

Raley v. Umatilla County (15 Oreg. 172), 90.

Ralls County v. Douglass (105 U. S. 728), 546.

Ramsey County v. Heenan (2 Minn. 330), 232.

Ramsey County v. Robt. P. Lewis Co. (Minn. 1901, 86 N. W. Rep. 611), 821.

Rand v. Wilder (11 Cush. 294), 148,-

Randall v. Brigham (7 Wall. 523), 472.

Randle v. Pac. Ry. Co. (65 Mo. 325), 747.

Randolph v. Bayue (44 Cal. 366), 170.

Randolph v. Wood (49 N. J. L. 85), 311.

Ranken v. McCallum (25 Tex. Civ. App. 83), 348.

Rankin v. Henderson (9 Ky. Law Rep. 861), 633,

Rankin v. Jauman (Idaho 1895, 39 Pac. Rep. 1111), 145.

Ranney v. Bader (67 Mo. 476), 430.

Ransom v. Boal (29 Iowa 68), 92.

Rash v. Farley (12 Ky. Law Rep. 913), 405.

Rathbun v. Acker (18 Barb. 393), 252, 811.

Rau v. Little Rock (34 Ark. 393), 451.

Ravenna v. Pennsylvania Co. (45 Ohio St. 118), 743, 750.

Rawson v. Chicago (185 Ill. 87), 836, 851,

Raymond v. Cleveland (42 Ohio St. 522), 346.

Raymond v. Fish (51 Conn. 80), 697.

Raynor v. Nugent (1 Am. & Eng. Corp. Cas. 271), 697.

Read v. Atlantic City (49 N. J. L. 558, 440.

Read v. Cambridge (126 Mass. 427), 708.

Read v. Camden (54 N. J. L. 347), 440, 859.

Read v. Mississippi (69 Ark. 365), 388.

Reading v. Bitting (167 Pa. St. 21), 642.

Reading v. Consumers Gas Co. (41 Leg. Int. 428), 885.

Reading v. Heppleman (61 Pa. St. 233), 341.

Reading v. O'Reilly (1 Woodw. Dec. 408), 573,

·Reading v. O'Reilly (169 Pa St. 366), 848.

Reading v. Savage (120 Pa. St. 198), 868.

Reading City v. Reiner (167 Pa. St. 41), 456.

Reagan v. Farmers' L. & Trust Co. (154 U. S. 362), 910.

Reardon v. St. Louis County (36 Mo. 555), 876.

Rector v. State (6 Ark. 187), 466, 523.

Rector, etc., of Trinity Church v. Higgins (4 Robertson 1), 223.

Red v. Augusta (25 Ga. 386), 193. Redden v. Covington (29 Ind. 118), 466, 546.

Reddick v. Amelin (1 Mo. 5), 414, 659.

Redell v. Moores (63 Neb. 219), 805.

Redersheimer v. Flower (52 La. Ann. 2089), 854.

Redlands L. & C. Domestic Water Co. v. Redlands (121 Cal. 312), 907.

Red Star Steamship Co. v. Jersey City (45 N. J. L. 246), 313, 907.

Red Wing v. Chicago, M. & St. P. Ry. Co. (72 Minn. 240), 750.

Redwood City v. Grimmenstein (68 Cal. 512), 368.

Rêed v. Conway (20 Mo. 22), 474. Reed v. Erie (79 Pa. St. 346), 873.

Reed v. Lancaster (152 Mass. 500), 145.

Reed v. Louisville (22 Ky. Law Rep. 1636), 127, 250.

Reed v. Orleans (1 Ind. App. 25), 9. Reedy v. St. Louis Brewing Association (161 Mo. 523), 64.

Reeves v. State (96 Ala. 33), 527.

Regina v. Aberdeen Canal Co. (14 Ad. & E. 854), 174.

Reg. v. Charlesworth (16 B. Q. B. 1012), 876.

Reg. v. Flory (17 Ontario Rep. 715), 310.

Reg. v. Gravelle (10 Ontario Rep. 735), 290.

Reg. v. Howard (4 Ont. Rep. 377), 737.

Reg. v. Huntingdon (4 Q. B. Div. 522), 252.

Reg. v. Jim Sing (4 British Columbia Rep. 338), 450.

Reg. v. Johnson (38 Up. Can. Q. B. 549), 310.

Reg. v. Justin (24 Ont. Rep. 327), 727.

Reg. v. Listers (3 Jur. 572), 740.

Reg. v. Longton Gas Co. (2 El. & El. 651), 876.

Reg. v. Longton Gas Co. (29 L. J. Mag. Cas. 118), 887.

Reg. v. Lundie (8 Jur. N. S. 640), 450.

Regina v. Mines (25 Ont. Rep. 577), 555.

Reg. v. Paramore (10 Ad. & El. 286), 140.

Reg. v. Parker (59 J. P. 793), 727. Regina v. Parnell (14 Cox Cr. Cas. 508), 524.

Reg. v. Petersky (4 British Columbia Rep. 384), 298.

Reg. v. Pipe (1 Ont. Rep. 43), 312, 543, 681.

Reg. v. Plumber (30 Up. Can. Q. B. 41), 727.

Reg. v. Robinson (17 Q. B. Eng. Law Rep. 46), 451.

Reg. v. Stevenson (3 F. & F. 106), 762.

Regina v. Williams (1 Salk 384), 540.

Rehberg v. New York (99 N. Y. 652), 207.

Reich v. State (53 Ga. 73), 466, 784.

Reid v. Wood (102 Pa. St. 312), 573.

Reiff v. Conner (10 Ark. 241), 195. Reighard v. Flinn (189 Pa. St. 355), 93, 431.

Reilly, Ex parte (85 Cal. 632), 462. Reilly v. Racine (51 Wis. 526), 239.

Reinken v. Fuehring (130 Ind. 382), 826.

Reis v. Graff (51 Cal. 86), 71.

Remington v. Harrison County Court (12 Bush. 148), 113.

Repaying Fulton Street, In re (29 How. Pr. 429), 900.

Respublica v. Dallas (3 Yeates 300), 472.

Respublica v. Duquet (2 Yeates 493), 735.

Reuting v. Titusville (175 Pa. St. 512), 808, 832.

Rex v. Abingdon (1 Salk. 432), 498.

Rex v. Ashwell (12 East. 22), 319. Rex v. Atkyns (3 Mod. 23), 156.

Rex v. Barlow (2 Salkeld 609) 126.

Rex v. Bellringer (4 Term Rep. 810), 146, 156, 164, 175.

Rex v. Bird (13 East. 367), 319. Rex v. Bower (1 Barn & Cress 492), 156, 164.

Rex v. Bumstead (2 Barn & Ad. 704), 450,

Rex v. Carter (Cowp. 59), 156.

Rex v. Commissioner (2 Keeble 43), 561.

Rex v. Coopers of Newcastle (7 Term Rep. 547), 498.

Rex v. Corry (5 East. 379), 156.

Rex v. Croke (Cowp. 26), 158, 275. Rex v. Dawes (4 Bur. 2279), 156.

Rex v. Devonshire (1 Barn & Cress 609), 164.

Rex v. Favershan (8 Term Rep. 356), 450.

Rex v. Gaborian (11 East. 87), 164. Rex v. Hall (1 Q. B. 767), 525.

Rex v. Harrison (3 Burrows 1322), 223, 428.

Rex v. Hartford (1 Ld. Raym. 426), 155.

Rex v. Head (4 Burr 2513), 158.

Rex v. Headley (7 Barn & Cress 496), 164.

Rex v. Hebden (Andr. 391), 156. Rex v. Hill (4 Barn. & Cress. 441), 147.

Rex v. Ipswich (2 Ld. Raym. 1237), 156.

Rex v. Killet (4 Burr. 2063), 559. Rex v. Liverpool (2 Burr. 723), 177, 480.

Rex v. London (2 Lev. 201), 280.

Rex v. Macdaniell (19 St. Tri. 746), 525.

Rex v. Mashiter (6 A. & E. 153), 108.

Rex v. Mitchell (10 East, 511), 140. Rex v. Monday (Cowp. 539), 156, 164.

Rex v. Moreley (2 Burr. 1040), 561.

Rex v. Morris (4 East. 26), 146. Rex v. Neil (2 Car. & P. 483), 699.

Rex v. Newdigate (Comb. 10), 269.

Rex v. Powell (2 Barn & Adol. 75), 525.

Rex v. Selway (9 B. & C. 424), 108.

Rex v. Smart (4 Burr. 2243), 156. Rex v. Spencer (3 Burr. 1839), 21.

Rex v. Sturgeous (2 Burr. 892), 304.

Rex v. Taylor (2 Strange 1167), 741.

Rex v. Thornton (4 East, 308), 156.

Rex v. Trew (2 Barnard 370), 156. Rex v. Turner (5 M. & Sel. 206), 543.

Rex v. University of Cambridge (1 Str. 567), 480.

Rex v. Varlo (Cowp. 250), 156, 164, 175.

Rex v. Vipont (2 Burr. 1163), 559. Rex v. Walker (L. R. 10 Q. B. 355),

Rex v. Walker (L. R. 10 Q. B. 355) 525.

Rex v. Wells (4 Dowling 562), 464. Rex. v. Westwood (4 Barn. & Cress. 799), 158.

Rex v. Williams (1 Burr. 402), 155. Rex v. Woodfall (5 Burr. 2667), 538.

Rex. v. York (5 Term Rep. 72), 156.

Reymann Brewing Co. v. Brister (179 U. S. 445), 406.

Reynolds, Ex parte (87 Ala. 138), 280.

Reynolds, In re (21 N. Y. Supp. 592), 806.

Reynolds v. Baldwin (1 La. Ann. 162), 163, 444.

Reynolds v. Harris (27 Weekly Law Bul. 229), 15, 48.

Reynolds v. Hindman (32 Iowa 146), 603.

Reynolds v. New Salem (6 Metc. 340), 148, 150.

Reynolds v. Schweinefus (27 Ohio St. 311), 836,

Reynolds v. Schultz (34 How. Pr. 147), 698.

Reynolds v. U. S. (98 U. S. 145), 518.

Reynolds v. Waterville (92 Me. 292), 74.

Reynolds' Heirs v. Stark County Commrs. (5 Ohio 204), 91.

Rhines v. Clark (51 Pa. St. 96), 383, 516.

Rhodes v. Dunbar (57 Pa. St. 274), 688, 740.

Rhodes v. Iowa (170 U. S. 412), 406, 412. Rice v. Detroit, Y. & A. A. Ry. (122 Mich. 677), 912.

Rice v. Foster (4 Harr. 479), 319. Rice v. Jefferson (50 Mo. App. 464), 692.

Rice v. State (3 Kan. 141), 285, 568, 783, 793.

Rice v. Watts (71 Ala. 593), 469.

Rich, In re (10 Kan. App. 280), 464, 525, 563.

Rich v. Chicago (152 III. 18), 808, 852.

Rich v. Chicago (59 Ill. 286), 168, 187, 202.

Rich v. Flanders (39 N. H. 304), 383.

Rich v. Naperville (42 Ill. App. 222), 729.

Richards v. Clarksburg (30 W. Va. 491), 75, 142.

Richardson v. Danvers (176 Mass. 413), 727.

Richardson v. Heydenfeldt (46 Cal. 68), 808.

Richmond v. Dudley (129 Ind. 112), 294, 681, 740.

Richmond v. Henrico County (83 Va. 204), 89, 694.

Richmond v. Long (17 Gratt. 375), 674.

Richmond v. McGirr (78 Ind. 192), 71, 111.

Richmond v. Southern Bell Tel. & Tel. Co. (85 Fed. 19), 322, 325.

Richmond & A. R. R. Co. v. Lynchburg (81 Va. 473), 823.

Richmond & Danville Ry. Co. v. Reidsville (101 N. C. 404), 650.

Richmond Mayoralty Case (19 Gratt. 673), 463.

Richmond, etc., Railroad v. Richmond (96 U. S. 521), 313.

Richter v. Harper (95 Mich. 221), 248, 251, 585.

Rickcords v. Hammond (67 Fed. Rep. 380), 853.

Ricketts v. Hyde Park (85 Ill. 110), 827, 843.

Ridenbaugh, In re (Idaho, 1897, 49 Pac. Rep. 12), 23.

Ridenour v. Saffin (1 Handy, 464), 823.

Rideout v. Dunstable (1 Allen 232), 151.

- Ridge Ave. Ry. Co. v. Philadelphia (124 Pa. St. 219), 900.
- Rider v. Clark (132 Cal. 382), 451. Ridgway v. Hinton (25 W. Va. 554), 570, 574.
- Ridgway v. West (60 Ind. 371), 124, 273.
- Ridler v. Seaboard & R. R. Co. (118 N. C. 996), 887.
- Rienken v. Fuehring (130 Ind. 382), 823.
- Rieser v. Parker (27 Misc. 205), 469.
- Riley v. K. C. (31 Mo. App. 439),
- Riley v. Rochester (9 N. Y. 64), 89.
- Riley v. Trenton (51 N. J. L. 498), 133, 649.
- Riley v. The W. St. L. & P. Ry. Co. (18 Mo. App. 385), 585.
- Rio Grande R. Co. v. Brownsville (45 Tex. 88), 719.
- Ripley County Commrs. v. Ward (69 Ind. 441), 114.
- Ritchie v. Boynton (114 Mass. 431), 768.
- Kitchie v. People (155 III. 98), 777, 778.
- Ritchie v. South Topeka (38 Kan. 368), 347.
- Rittenhouse's Estate (140 Pa. St. 172), 145.
- Ritter v. Kunkle (39 N. J. L. 259), 572.
- Ritterskamp v. Stifel (59 Mo. App. 510), 6, 80, 827, 842.
- River Rendering Co. v. Behr (77 Mo. 91), 353, 358, 689, 705.
- Rivers v. Augusta (65 Ga. 376), 676.
- Roach, Ex parte (104 Cal. 272), 645.
- Roach v. Sulter (54 Ga. 458), 574. Road in Borough of Easton, In re (3 Rawle 195), 803.
- Roanoke Gas Co. v. Roanoke (88 Va. 810), 129, 817.
- Robb v. Indianapolis (38 Ind. 49), 36, 752.
- Roberson v. Lambertville (38 N. J. L. 69), 646.
- Robert v. Coco (25 La. Ann. 199), 383.
- Roberts, In re (89 N. Y. 618), 807.

- Roberts v. Cincinnati (5 Ohio Dec. 361), 676.
- Roberts v. Formhalls (46 Ill. 66), 482, 568.
- Roberts v. Louisville (92 Ky. 95), 263.
- Roberts v. Paducah (95 Fed. Rep. 62), 6, 234.
- Roberts v. Ogle (30 III, 459), 26, 551, 670, 689, 731.
- Robertson v. Breedlove (61 Tex. 316), 111.
- Robertson v. Lambertville (38 N. J. L. 69), 497, 501.
- Robertson v. Omaha (55 Neb. 718), 865.
- Robertson v. W. St. Louis & Pac. Ry. Co. (84 Mo. 119), 585, 602, 745.
- Robbins v. People (95 Ill. 175), 285, 792, 794.
- Robbins v. Shelby Taxing District (120 U. S. 489), 392, 395, 396, 400.
- Robinson, ex parte (12 Nev. 263), 629.
- Robinson, ex parte (30 Tex. App. 493), 686.
- Robinson v. Baltimore (93 Md. 208), 319, 367.
- Robinson v. Benton County (49 Ark. 49), 469.
- Robinson v. Dodge (18 Johns. 351), 611.
- Robinson v. Greenville (42 Ohio St. 625), 676.
- Robinson v. Magee (9 Cal. 21), 386.
- Robinson v. Franklin (1 Humph. 156), 3, 23.
- Robinson v. Walker (45 Mo. 117), 565.
- Robison v. Miner & Hoag (68 Mich. 549), 649.
- Robison v. State (38 Ark. 641), 540.
- Roby v. Chicago (64 III. 447), 548. Roche v. Jersey City (40 N. J. L. 257), 327, 349.
- Rochester v. Collins (12 Barb. 559), 687, 707.
- Rochester v. Rood (Hill & D. Supp. 146), 763.

Rochester v. Simpson (134 N. Y. 414), 537, 708.

Rochester v. Upman (19 Minn. 108), 496, 618.

Rochester v. West (164 N. Y. 510), 726.

Rochester White Lead Co. v. Rochester (3 N. Y. 463), 260.

Rock Creek Tp. v. Codding (42 Kan. 649), 211.

Rockford v. Hilderbrand (61 Ill. 155), 20.

Rockford City Ry. Co. v. Matthews (50 Ill. App. 267), 580.

Rockland Water Co. v. Rockland 83 Me. 267), 817.

Rockville v. Merchant (60 Mo. App. 365), 185, 189, 203, 450, 597, 763, 764.

Roderick v. Whitson (51 Hun. 620), 17, 628, 729, 770.

Rodgers v. Kent Circuit Judge (115 Mich. 441), 403.

Rodgers v. McCoy (6 Dak. 238), 402.

Rodgers v. People (9 Colo. 450), 752.

Rogers, ex parte (7 Cowen 526), 176.

Rogers v. Barker (31 Barb. 447), 688, 694, 705.

Rogers v. Jones (1 Wend. 237), 345, 356, 450, 787.

Rogers v. Milwaukee (13 Wis. 610), 811.

Rogers v. People (9 Colo. 450), 343.

Rogers v. St. Paul (22 Minn. 494), 797, 854.

Rogers v. Slonaker (32 Kan. 191), 175.

Rogers Park Water Co. v. Fergus (180 U. S. 624), 318, 322, 324, 381, 445, 624, 905.

Rogers Park Water Co. v. Fergus (178 III. 571), 906, 909.

Rohland v. St. Louis (89 Mo. 180), 464.

Rohr v. Gray (80 Md. 274), 621. Rohtbacher v. Jackson (51 Miss. 735), 648.

Rolfs, In re (30 Kan. 758), 525, 575, 704.

Rollins, ex parte (80 Va. 314), 575.

Rolph v. Fargo (7 N. D. 640), 822. Rome v. Cabot (28 Ga. 50), 98, 798.

Rome v. McWilliams (52 Ga. 251), 611, 629.

Romero v. Chapman (2 Mich. 179), 487.

Re Tp. of Rommey and Tp. of Mersea (11 Ontario App. Rep. 712), 55.

Ronan v. People (193 III. 631), 600. Roodhouse v. Johnson (57 III. App. 73), 47.

Root v. Erdelmeyer (37 Ind. 225), 609.

Root v. Shields (Woolw. 340), 87. Roper v. Laurinburg (90 N. C. 427), 114.

Rose v. Estudille (39 Cal. 270), 386.

Rose v. Hardie (98 N. C. 44), 34, 276, 551, 731.

Rose v. St. Charles (49 Mo. 509), 472.

Rosebaugh v. Saffin (10 Ohio 31), 274, 275.

Rosenbaum v. Newbern (118 N. C. 83), 438, 630, 694, 773.

Rosenblatt, ex parte (19 Nev. 439), 400.

Rosenbloom v. State (Neb. 1902, 89 N. W. Rep. 1053), 630.

Rosenheim, ex parte (83 Cal. 388), 277.

Ross v. Madison (1 Ind. 281), 212. Ross v. Stackhouse (114 Ind. 200), 194, 822.

Ross v. United Counties of York and Peeland, Town of Belleville (30 Up. Can. Q. B. 81), 450.

Ross v. Wimberly (60 Miss. 345), 347.

Rost v. New Orleans (15 La. 129), 274.

Rotenberry v. Supervisors (67 Miss. 470), 120.

Roth v. State ex rel (158 Ind. 242), 355.

Rothrock v. School District (133 Pa. St. 487), 9.

Rothchild v. Darien (69 Ga. 503), 24, 759, 788.

Roulo v. Valcour (58 N. H. 347), 596.

Rounds v. Alee (116 Iowa 345), 656. Rounds v. Mumford (2 R. I. 154), 448, 808.

Roundtree v. Galveston (42 Tex. 612), 823.

Roush v. Morrison (47 Ind. 414), 390.

Rowland v. Greencastle (157 Ind. 591), 593, 594, 757.

Rowlett v. Shepherd (4 La. 86), 383.

Rowzee v. Pierce (75 Miss. 846), 92.

Roxbury v. Boston & Providence Ry. (6 Cush. 424), 317.

Royall v. Virginia (116 U. S. 572), 386.

Rozelle, In re (57 Fed. Rep. 155), 400.

Rubey v. Shain (54 Mo. 207), 430. Rude v. St. Louis (93 Mo. 408), 891.

Rudolph, In re (6 Sawyer 295), 402.

Rudolph v. New Orleans (11 La. Ann. 242), 675, 693.

Ann. 242), 675, 693. Ruell v. Alpena (108 Mich. 290),

337. Ruggles v. Collier (43 Mo. 353), 25, 66, 115, 133, 809, 810.

Ruggles v. Illinois (108 U. S. 526), 909.

Ruggles v. People (91 III. 256), 909.

Rumford School District v. Wood 13 Mass, 193), 75.

Rumsey Mfg. Co. v. Schell (21 Mo. App. 175), 248.

Rund v. Fowler (142 Ind. 214), 289, 701.

Rundle v. Baltimore (18 Md. 356), 562.

Runyon v. Bordine (14 N. J. L. 472), 717.

Ruohs v. Athens (91 Tenn. 20), 547.

Ruschberg v. Southern Electric R. Co. (161 Mo. 70), 81, 331, 746.

Rushville v. Rushville Natural Gas Co. (132 Ind. 575), 50, 101, 435, 897, 898, 908,

Rushville Gas Co. v. Rushville (121 Ind. 206), 163, 167, 168.

Russel v. Cage (66 Tex. 428), 128.

Russel v. Columbia (74 Mo. 480), 63.

Russel v. Filmore (15 Vt. 130), 774.

Russel v. Hamilton (3 Ill. 56), 472.

Russel v. Providence (7 R. I. 566), 104.

Russel v. Willington (157 Mass. 100), 176.

Russelville v. White (41 Ark. 485), 616.

Ruth, In re (32 Iowa 250), 310.

Ruth v. Abingdon (80 III. 418), 534.

Rutgers' College A. A. v. New Brunswick (55 N. J. L. 279), 249.

Rutherford v. Hamilton (97 Mo. 543), 122, 179, 201, 595, 859.

Rutherford v. Swink (96 Tenn. 564), 332, 334.

Rutherford v. Swink (90 Tenn. 152), 596.

Rutherford v. Taylor (38 Mo. 315), 91, 708, 890.

Ruthven, ex parte (17 Mo. 541), 575.

Rutland Electric Light Co. v. Marble City Electric Light Co. (65 Vt. 377), 723.

Ryan v. Lynch (68 Ill. 160), 186, 202, 232.

Ryan v. Thompson (6 Jones & S. 133), 60.

Ryce v. Osage (88 Iowa 558), 50, 337.

Ryder Estate v. Alton (175 III. 94), 214, 853, 857.

Ryers, In re (72 N. Y. 1), 174, 682.

S.

Sabatier v. Creditors (6 Mart. N. S. 585), 372.

Sackett, In re (74 N. Y. 95), 827.

Sackett v. State (74 Ind. 486), 180.

Saco v. Wentworth (37 Me. 165), 527.

Sacramento v. Bird (15 Cal. 294), 328.

Sacramento v. California Stage Co. (12 Cal. 134), 611, 613.

- Sacramento v. Crocker (16 Cal. 119), 611, 633.
- Sacramento v. Dillman (102 Cal. 107), 249.
- Sacramento v. Steamer New World (4 Cal. 41), 38.
- Safety Insulated W. & C. Co. v. Baltimore (25 U. S. App. 166), 377.
- Safford v. Detroit Board of Health (110 Mich. 81), 693.
- Sage v. Dillard (15 B. Mon. 340), 322.
- Saginaw v. Circuit Judge (106 Mich. 32), 630.
- Saginaw Gas Light Co. v. Saginaw (28 Fed. Rep. 529), 324, 379.
- St. Charles v. Elsner (155 Mo. 671), 83, 769.
- St. Charles v. Hackman (133 Mo. 634), 274, 622, 637, 787.
- St. Charles v. Meyer (58 Mo. 86) 428, 453, 770, 792.
- St. Charles v. Nolle (51 Mo. 122), 35, 353, 359, 623, 643.
- St. Charles v. O'Mailey (18 III. 407), 206, 213, 214, 532, 556, 598. St. Clair County Turnpike Co. v.
- Ill. (96 U. S. 63), 912.
- St. Cloud v. Water, Light & P. ('o. (Minn. 1903, 92 N. W. Rep. 1112), 915.
- San Joaquin & K. R. Co. v. Stanislaus County (113 Fed. Rep. 930), 381.
- St. John v. East St. Louis (136 Ill. 207), 326.
- St. Johns v. McFarlan (33 Mich. 72), 438.
- St. Johns v. New York (3 Bosw. 483), 762.
- St. Johnsbury v. Thompson (59 Vt. 300), 17, 72, 343, 344, 345, 540, 615.
- San Jose v. S. J. & S. C. Ry. Co. (53 Cal. 475), 611, 615, 742,
- San Jose Imp. Co. v. Auzerias (106 Cal. 498), 838.
- St. Joseph v. Dye (72 Mo. App. 214), 506, 214.
- St. Joseph v. Ernst (95 Mo. 360), 660.
- St. Joseph to use of Gibson v.

- Farrell (106 Mo. 437), 122, 818, 825.
- St. Joseph v. Harris (59 Mo. App. 122), 364, 365, 500, 506, 531, 758.
- St. Joseph v. Landis (54 Mo. App. 315), 853, 855, 871.
- St. Joseph v. Levin (128 Mo. 588), 477, 490, 491, 492, 503, 654, 775.
 St. Joseph v. Lung (93 Mo. App. 626), 613, 654.
- St. Joseph v. Owen (110 Mo 445), 809, 824, 852, 855.
- St. Joseph v. Porter (29 Mo. App. 605), 657.
- St. Joseph v. Vesper (59 Mo. App. 459), 25, 787.
- St. Joseph v. Wilshire (47 Mo. App. 125), 132, 808, 809.
- St. Joseph & Denver City R. R. Co. v. Buchanan County (39 Me. 485), 127.
- St. Joseph Tp. v. Rogers (16 Wall. 644), 164, 266.
- St. Louis v. Alexander (23 Mo. 483), 49, 245, 329, 336, 346.
- St. Louis v. Allen (53 Mo. 44), 389.
 St. Louis v. Allen (13 Mo. 400), 67.
 St. Louis v. Babcock (156 Mo. 148), 505, 772, 775.
- St. Louis v. Bell Telephone Co. (96 Mo. 623), 425, 885, 906.
- St. Louis v. Bentz (11 Mo. 61), 278, 345, 346, 672, 772, 787, 793. St. Louis v. Bircher (76 Mo. 431)
- St. Louis v. Bircher (76 Mo. 431), 607, 611, 654.
- St. Louis v. Boatmen's Ins. & Trust Co. (47 Mo. 150), 618, 620, 622, 660.
- St. Louis v. Boffinger (19 Mo. 13), 18, 117, 422, 693.
- St. Louis v. Bowler (94 Mo. 630), 39, 613, 614, 630, 658.
- St. Louis Brewing Assn. v. St. Louis (140 Mo. 419), 907.
- St. Louis v. Cafferata (24 Mo. 94), 25, 278, 345, 346, 672, 759, 787, 792.
- St. Louis v. Clemens (52 Mo. 133), 49, 133, 809.
- St. Louis v. Clemens (43 Mo. 395), 49, 66, 115, 808.
- St. Louis v. Clemens (36 Mo. 467),

- St. Louis v. Close (8 Mo. App. 599), 363.
- St. Louis v. Coffee (76 Mo. App. 318), 476, 563.
- St. Louis v. Connecticut Mut. Life Ins. Co. (107 Mo. 92), 63, 587.
- St. Louis v. Consolidated Coal Co. (158 Mo. 342), 414.
- St. Louis v. Consolidated Coal Co. (113 Mo. 83), 39, 630.
- St. Louis v. Davidson (102 Mo. 149), 560.
- St. Louis v. Dorr (145 Mo. 466), 21, 68, 342, 447, 739, 782, 804, 815.
- St. Louis v. Ernst (95 Mo. 360), 651.
- St. Louis v. Fischer (167 Mo. 654), 670, 703.
- St. Louis v. Fitz (53 Mo. 582), 363, 365, 506.
- St. Louis v. Flynn (128 Mo. 413), 481, 693.
- St. Louis v. Foster (52 Mo. 513), 17, 21, 185, 186, 210, 232, 245, 336, 597.
- St. Louis v. Frein (9 Mo. App. 590), 490, 698.
- St. Louis v. Freivogal (95 Mo. 533), 656, 763.
- St. Louis v. Gleason (89 Mo. 67), 581.
- St. Louis v. Gleason (15 Mo. App. 25), 808, 859.
- 25), 808, 859. St. Louis v. Green (7 Mo. App.
- 468), 225, 299, 620. St. Louis v. Green (6 Mo. App. 591), 644.
- St. Louis v. Green (70 Mo. 562), 274, 639, 644, 651.
- St. Louis v. Goebel (32 Mo. 295), 447.
- St. Louis v. Griswold (58 Mo. 175), 299, 690.
- St. Louis v. Grone (46 Mo. 574), 643.
- St. Louis v. Gurno (12 Mo. 414), 675.
- St. Louis v. Hardy (35 Mo. 261), 588.
- St. Louis v. Heitzberg P. & P. Co. (141 Mo. 375), 25, 294, 687, 689, 709.
- St. Louis v. Herthel (88 Mo. 128), 71, 442, 448, 614, 654.

- St. Louis v. Hill (116 Mo. 527), 815.
- St. Louis v. Hoblitzelle (85 Mo. 64), 340.
- St. Louis v. Howard (119 Mo. 41), 49, 135, 535, 700, 701, 703.
- St. Louis v. Independent Ins. Co. (47 Mo. 146), 329, 660.
- St. Louis v. Jackson (25 Mo. 37), 763, 665.
- St. Louis v. Juppier (16 Mo. App. 557), 827.
- St. Louis v. Kaime (2 Mo. App. 66), 443, 457.
- St. Louis to use of Duff v. Karr (85 Mo. App. 608), 561.
- St. Louis v. Knox (74 Mo. 79), 476, 491, 505, 508, 794.
- St. Louis v. Knox (6 Mo. App. 247), 654, 656.
- St. Louis v. Krentz (12 Mo. App. 591), 535, 700.
- St. Louis v. Lang (131 Mo. 412), 582.
- St. Louis v. Laughlin (49 Mo. 559), 49, 81, 445, 448, 641.
- St. Louis v. Lee (8 Mo. App. 599), 363, 507, 787.
- St. Louis v. Life Assn. of Am (53 Mo. 466), 329, 447, 660.
- St. Louis v. McCann (157 Mo. 301), 656.
- St. Louis v. McCoy (18 Mo. 238), 422, 694.
- St. Louis v. Mfrs. Saving Bank (49 Mo. 574), 18.
- St. Louis v. Marchel (99 Mo. 475), 564.
- St. Louis v. Melville (3 Mo. App. 597), 493, 751, 753.
- St. Louis v. Meyrose Lamp Co. (139 Mo. 560), 434, 627, 637, 654, 740.
- St. Louis v. Mo. Pac. Ry. Co. (114 Mo. 13), 92.
- St. Louis v. Oeters (36 Mo. 456), 832, 836, 853.
- St. Louis v. Pahl (114 Mo. 32), 464.St. Louis v. Priesmeyer (12 Mo. App. 592), 768.
- St. Louis v. Regina Flour Milling Co. (141 Mo. 389), 709.
- St. Louis v. Robinson (135 Mo. 460), 706.

- St. Louis v. Roche (128 Mo. 541), 363, 582.
- St. Louis v. Rothschild (3 Mo. App. 563), 732.
- St. Louis v. Russell (116 Mo. 248), 49, 133, 134, 313, 627, 700, 713.
- St. Louis v. Russell (9 Mo. 507), 66, 67.
- St. Louis v. St. Louis Gas Light Co. (70 Mo. 69), 95.
- St. Louis v. St. Louis Gas Light Co. (5 Mo. App. 484), 93.
- St. Louis v. St. Louis R. R. Co. (89 Mo. 44), 304, 450, 742, 751.
- St. Louis v. St. Louis R. R. Co. (50 Mo. 94), 848.
- St. Louis v. St. Louis R. Co. (14 Mo. App. 221), 452.
- St. Louis v. St. Louis Ry. Co. (12 Mo. App. 591), 583.
- St. Louis v. St. Louis & N. O. Trans Co. (84 Mo. 156), 39, 416.
- St. Louis v. Sanguinet (49 Mo. 581), 331.
- St. Louis v. Schefe (167 Mo. 666), 703.
- St. Louis v. Schnuckelberg (7 Mo. App. 536), 685, 687, 692.
- St. Louis v. Schoenbusch (95 Mo. 618), 87, 111, 278, 477, 672, 771, 787, 792.
- St. Louis v. Schulenburg & Boeckler Lumber Co. (13 Mo. App., 56), 38, 39, 417.
- St. Louis v. Sealy (8 Mo. App., 599), 363.
- St. Louis v. Shields (62 Mo. 247), 623.
- St. Louis v. Shields (52 Mo. 351), 67, 607.
- St. Louis v. Smith (10 Mo. 438), 477, 490, 491.
- 477, 490, 491. St. Louis v. Smith (2 Mo. 113), 646.
- St. Louis v. Spiegel (90 Mo. 587), 39, 634.
- St. Louis v. Spiegel (75 Mo. 145), 618, 634.
- St. Louis v. Spiegel (8 Mo. App., 478), 300, 690.
- St. Louis v. Steele (12 Mo. App., 570), 688, 692.
- St. Louis v. Stern (3 Mo. App., 48),
 185, 513, 688, 691, 692, 693, 704.
 St. Louis v. Sternberg (69 Mo.

- 289), 274, 277, 477, 632, 639, 640, 641, 655, 657.
- St. Louis v. Stoddard (15 Mo. App., 173), 584, 588.
- St. Louis v. Sullivan (8 Mo. App., 455), 755.
- St. Louis v. Tamm Bros. Glue Co. (139 Mo. 572), 654.
- St. Louis v. The R. J. Gunning Co. (138 Mo. 374), 565.
- St. Louis v. Tiefel (42 Mo. 578), 226, 466.
- St. Louis v. Vert (84 Mo. 204), 360, 477, 506, 507, 672, 771, 787.
- St. Louis v. Waterloo-Carondelet Turnpike Co. (14 Mo. App., 216), 414, 659.
- St. Louis v. Weber (44 Mo. 547), 72, 119, 300, 311, 425, 529, 690, 763.
- St. Louis v. Weitzel (130 Mo. 600), 229, 331, 448, 476, 491, 492, 543, 637, 638, 642, 643, 644, 655, 787, 794.
- St. Louis v Wennecker (145 Mo. 230), 430.
- St. Louis v. W. U. Tel. Co. (149 U. S. 465), 892.
- St. Louis v. Western Union Telegraph Co. (148 U. S. 92), 29, 316, 406, 407.
- St. Louis v. Western Union Tel. Co. (39 Fed. Rep. 59), 614.
- St. Louis v. White (99 Mo. 477), 564.
- St. Louis v. Wiley (8 Mo. App., 597), 754.
- St. Louis v. Withaus (90 Mo. 646), 177.
- St. Louis v. Woodruff (71 Mo. 92), 642.
- St. Louis Agr. and Mech. Assn. v. Delano (108 Mo. 217), 445.
- St. Louis Brewing Association v. St. Louis (140 Mo. 419), 110.
- St. Louis Gas Light Co. v. St. Louis (84 Mo. 202), 207.
- St. Louis Gas Light Co. v. St. Louis (46 Mo. 121), 36, 349.
- St. Louis & Meramec R. R. v. Kirkwood (159 Mo. 239), 886, 897.
- St. Louis Quarry & Cont. Co. v. Frost (90 Mo. App., 677), 302, 863, 865.

- St. Louis Quarry & C. Co. v. Van Versen (81 Mo. App., 519), 302, 863.
- St. Louis, etc. R. R. v. Belleville (122 Ill. 376), 894,
- St. Louis & S. F. Ry Co. v. Gill (156 U. S. 649), 131, 742, 910, 911.
- St. Louis & T. H. R. R. Co. v. Eggmann (161 Ill. 155), 50.
- St. Louis T. Ry. Co. v. St. L. M. B. Ry Co. (111 Mo. 666), 888.
- St. Martinsville v. Steamer "Mary Lewis" (32 La. Ann., 1293), 38, 799.
- St. Lukes' Ch. v. Mathews (4 Des. 578), 295.
- St. Paul v. Briggs (85 Minn. 290), 79, 612, 657.
- St. Paul v. Byrnes (38 Minn. 176), 701.
- St. Paul v. Colter (12 Minn 41), 25, 250, 290, 635, 656, 671, 764.
- St. Paul v. Dow (37 Minn. 20), 616.
- St. Paul v. Gilfillan (36 Minn. 298), 687, 710.
- St. Paul v. Johnson (69 Minn. 184), 710.
- St. Paul v. Laidler (2 Minn. 190), 21, 25, 76, 302, 589, 682, 765.
- St. Paul v. Lytle (69 Minn. 1), 654, 774, 775.
- St. Paul v. Smith (27 Minn. 364), 39, 296, 714.
- St. Paul v. Smith (25 Minn. 372), 538, 699.
- St. Paul v. Stultz (33 Minn. 233), 658.
- St. Paul v. Traeger (25 Minn. 248), 79, 616, 617, 698, 750.
- St. Peters v. Bauer (19 Minn. 327), 482, 483, 517, 562, 568, 579.
- St. Peters Episcopal Ch. v. Washington (109 N. C. 21), 696.
- St. Vincent Female Orphan Asylum v. Troy (76 N. Y. 108), 814.
- Salem v. Eastern R. R. Co. (98 Mass, 431), 683.
- Salem v. Maynes (123 Mass. 372), 735, 736.
- Salena v. Neosho (127 Mo. 627), 98, 160, 240, 242, 309.
- Salina v. Wait (56 Kan. 283), 564. Saline v. Seitz (16 Kan. 143), 24.

- Salisbury v. Herchenroder (106 Mass. 458), 58.
- Salisbury v. Patterson (24 Mo. App., 169), 579.
- Salisbury v. Pome (51 N. C. 134), 693.
- Salmon v. Haynes (50 N. J. L. 97), 196, 197.
- Salt Lake City v. Wagner (2 Utah 400), 42, 647.
- 400), 42, 647. Salvin v. North Brancepeth Coal
- Co. (L. R. 9 Ch. App. 705), 685. Samis v. King (40 Conn. 298), 206, 215, 216, 246.
- Sam Kee, In re (31 Fed. Rep., 680), 353.
- Samuels v. Nashville (3 Sneed 298), 713, 717.
- San Antonio v. Mackey (14 Tex. Civ. App., 210), 680.
- San Antonio v. Micklejohn (89 Tex. 79), 6, 367.
- Sanborn v. Machias Port (53 Me. 82), 105.
- Sanborn v. School District (12 Minn. 17), 208.
- Sanders v. Southern Elec Ry Co. (147 Mo. 411), 20, 61, 586, 601, 671, 732, 748, 749, 750.
- San Diego v. San Diego & L. A. R. Co. (44 Cal. 106) 95, 173.
- San Diego Land & Town Co. v. National City (174 U. S. 739), 907, 911.
- San Diego Water Co. v. Flume Co. (108 Cal. 549), 308.
- San Diego Water Co. v. San Diego (118 Cal. 556), 906.
- Sands v. Edmunds (116 U. S. 585), 386.
- Sands v. Manistee Improvement Co. (123 U. S. 288), 414.
- Sands v. Richmond (31 Gratt. 571), 810, 823.
- San Francisco v. Beideman (17 Cal. 443), 92.
- San Francisco v. Buckman (111 Cal 25), 219, 248, 719.
- San Francisco v. Certain Real Estate (42 Cal. 513), 866.
- San Francisco v. Hazen (5 Cal. 169), 166, 170.
- San Francisco v. Insurance Co. (74 Cal. 113), 661.

San Francisco v. Itsell (80 Cal. 57), 92.

San Francisco v. Spring Valley Waterworks (48 Cal. 493), 886.

San Francisco Gas Co. v. San Francisco (6 Cal. 190), 12, 237.

San Francisco Pioneer Woolen Factory v. Bickwedel (60 Cal. 166), 31.

San Francisco, etc. R. R. Co. v. Oakland (43 Cal. 502), 116.

Sang v. Duluth (38 Minn. 81), 834.

Sanitary R. Works v. California R. Co. (94 Fed. Rep., 693), 206, 693.

Sank v. Philadelphia (4 Brews. 133), 193, 256, 430, 435.

Sank v. Philadelphia (8 Phila. 117), 222.

San Luis Obispo v. Fitzgerald (126 Cal. 279), 17, 443.

San Luis Obispo v. Pettit (87 Cal. 499), 451, 609, 610.

San Luis Obispo County v. Greensberg (120 Cal. 300), 449.

San Luis Obispo Co. v. Hendricks (71 Cal. 242), 145, 153, 251.

San Mateo County v. Pac. R. R. Co. (8 Sawyer 238), 444.

San Pedro v. Southern Pac. R. Co. (101 Cal. 333), 799.

Sargent v. Evanston (154 III. 268), 851.

Sargent v. Webster (13 Metc. 497), 164, 166.

Sasser v. State (99 Ga. 54), 225. Santa Ana Water Co. v. San Buenaventura (56 Fed. Rep.,

339), 906. Santa Barbara v. Eldred (95 Cal. 378), 332.

Santa Barbara v. Sherman (61 Cal. 57), 486.

Santa Barbara v. Stearns (51 Cal. 499), 464, 617.

Santa Clara County v. So. Pac. R. R. Co. (118 U. S. 394), 354, 910. Santa Cruz v. Santa Cruz R. R.

Co. (56 Cal. 143), 475.

Santa Cruz Rock Pavement Co. v. Heaton (105 Cal. 162), 828, 841. Santa Rosa v. Central St. Ry. Co.

Santa Rosa v. Central St. Ry. Co. (Cal. 1895, 38 Pac. Rep. 986), 590, 593. Santa Rosa City R. Co. v. CentralSt. R. Co. (Cal. 1895, 38 Pac.Rep. 986), 594, 896.

Satterlee v. San Francisco (23 Cal. 314), 166, 170.

Santo v. State (2 Iowa 165), 319, 451, 453, 757.

Saunders v. Lawrence (141 Mass. 380), 8, 175, 182, 203.

Savage v. Gulliver (4 Mass. 171), 574.

Savannah v. Charlton (36 Ga. 460), 612, 620.

Savannah v. Hartridge (8 Ga. 23), 613.

Savannah v. Hines (53 Ga. 616), 640, 641.

Savannah v. Hussey (21 Ga. 80). 24, 351, 785.

Savannah v. Steamboat Co. (R. M. Charlt. 342), 95, 348.

Savannah v. Weed (96 Ga. 670), 843.

Savannah v. Wilson (49 Ga. 476). 888.

Savannah, etc. R. R. v. Savannah (45 Ga. 602), 882, 890.

Savings and Loan Society v. Multnomah County (169 U. S. 421), 375.

Sawyer, in re (124 U. S. 200), 155. Sawyer v. M. & K. R. R. (62 N. H. 135), 194, 198. 206, 209.

Sawyer v. San Francisco (50 Cal. 370), 92.

Sawyer v. State Board of Health (125 Mass. 182), 699.

Saxton v. Beach (50 Mo. 488), 5, 141, 236, 237, 846.

Saxton v. Nimms (14 Mass. 315), 209, 214.

Saxton v. Peoria (75 III. App. 397), 775.

Saxton v. St. Joseph (60 Mo. 153). 5, 115, 236, 237, 692, 813, 828, 845.

Sayre v. Louisville Union Benevolent Assn (1 Duv. 143), 304.

Sayre Borough v. Phillips (148 Pa. 482), 97, 302, 403, 404, 630, 765. Scammon v. Scammon (28 N. H.

419), 202, 214.

Schachan and County of Frontenac, Re (41 Up. Can. Q. B. 175), 102.

- Schafer v. Atlantic City (58 N. J. L. 131), 502.
- Schanck v. New York (69 N. Y. 444), 118.
- Schank v. New York (10 Hun. 124), 183.
- Schattner v. Kansas City (53 Mo. 162), 675.
- Schaul v. Charlotte (118 N. C. 733), 774.
- Scheftels v. Tabert (46 Wis. 439), 335.
- Schenectady v. Furman (61 Hun. 171), 249.
- Schenectady v. Union College (66 Hun. 179), 814, 865.
- Schenley v. Com. (36 Pa. St. 29), 213, 246, 265, 814.
- Schiffman v. St. Paul (Minn. 1902, 92 N. W. Rep. 503), 431.
- Schlereth v. Mo. Pac. Ry Co. (115 Mo. 87), 745.
- Schlereth v. Mo. Pac. Ry. Co. (96 Mo. 509), 748.
- Schmalzried v. White (97 Tenn. 36), 327, 458, 736.
- Schmidt, ex parte (24 S. C. 363), 512, 570.
- Schmidt v. Lewis (63 N. J. Eq. 565), 339.
- Schmidt v. St. Louis R. R. Co. (163 Mo. 645), 749.
- Schmidt v. St. Louis R. R. Co. (149 Mo. 269), 746.
- Schmulbach v. Speidel (50 W. Va. 553), 175.
- Schoen v. Atlanta (97 Ga. 697), 705.
- Schoff v. Bloomfield (8 Vt. 472), 113, 151.
- Schofield v. Hudson (56 Ill. App. 191), 168, 202, 205, 206.
- Schofield v. Tampico (98 Ill. App. 324), 176, 202, 204, 222, 224, 230, 232, 246, 451, 453, 598.
- School Dist v. Atherton (12 Met. 105), 209.
- School District v. Blakeslee (13 Conn. 227), 206.
- Schoop v. St. Louis (117 Mo. 131), 718, 747, 876, 885, 889, 891.

- Schott v. People (89 III. 195), 413, 552, 589, 592, 593, 594, 595.
- Schreiber, in re (53 How. Pr. 359), 846.
- Schreiber, in re (3 Abb. N. C. 68), 839.
- Schriber v. Langdale (66 Wis 616), 349, 547.
- Schroder v. Overman (61 Ohio St. 1), 821.
- Schroeder v. Charleston (3 Brev. 533), 23, 285, 461, 472, 785, 787.
- Schroeder v. Lancaster City (15 Pa. Co. Ct. Rep. 467), 338.
- Schulenburg & B. Lumber Co. v. St. L. K. & N. W. R. R. Co. (129 Mo. 455), 888, 892.
- Schultes, in re (33 N. Y. App. Div. 524), 465, 469, 470.
- Schumacher v. St. Louis (3 Mo. App. 297), 331.
- Schumaker v. Toberman (56 Cal. 508), 868.
- Schumm v. Seymour (24 N. J. Eq. 143), 145, 813.
- Schwab v. Madison (49 Ind. 329), 576.
- Schwartz v. Oshkosh (55 Wis. 490), 200, 242, 246, 249, 316, 594.
- Schweitzer v. Beottcher (84 III. 289), 482.
- Schweitzer v. Liberty (82 Mo 309), 48, 250, 251, 597, 646.
- Schwuchow v. Chicago (68 III. 444), 550, 638, 654.
- Scircle v. Neeves (47 Ind. 289), 359, 483.
- Scoettgen v. Wilson (48 Mo. 253), 474.
- Scofield v. Lansing (17 Mich. 437), 808.
- Scott v. Paulen (15 Kan. 162), 176.
- Scott v. Sandford (19 How. 393), 447.
- Scott v. Smith (121 N. C. 94), 437.
- Scott v. Toledo (36 Fed. Rep. 385), 821.
- Scott v. Union County (63 Iowa 583), 176.
- Scott's Executors v. Shreveport (20 Fed. Rep. 714), 96.

- Scotten v. Detroit (106 Mich. 564), 833.
- Scovill v. Cleveland (1 Ohio St. 126), 842.
- Scovill v. McMahon (62 Conn. 378), 696.
- Scranton v. Danenbaum (109 Iowa 95), 583, 591.
- Scranton v. McDonough (1 Lack. Leg. N. 177), 841.
- Scranton, etc Co.'s Appeal (122 Pa. St. 154), 901.
- Scudder v. Hinshaw (134 Ind. 56), 642.
- Scwartz, ex parte (2 Tex. Ct. Ap. 74), 574.
- Seaboard Nat. Bank v. Woesten (147 Mo. 467), 851, 861, 866.
- Seacord v. People (121 III, 623), 684, 699, 705.
- Seale v. Mitchell (5 Cal. 401), 467. Seanor v. Whatcom County Comrs. (13 Wash. 48), 805.
- Searcy v. Yarnell (47 Ark. 269), 546.
- Sears v. Boston (173 Mass. 71), 350, 820, 821, 826.
- Sears v. Street Commissioner (173 Mass. 350), 383.
- Sears v. Warren County Comrs. (36 Ind. 267), 402.
- Seattle v. Barto (Wash. 1903, 71 Pac. Rep. 735), 228, 230, 636.
- Seattle v. Columbia & P. S. R. Co. (6 Wash. 379), 818, 913.
- Seattle v. Doran (5 Wash. 482), 201, 239, 594, 600.
- Seattle v. Let (19 Wash. 38), 756, 788.
- Seattle v. Pearson (15 Wash. 575), 450.
- Second Ave. Methodist Episcopal Church, In re (66 N. Y. 395), 609.
- Second Municipality v. Morgan (1 La. Ann. 111), 451.
- Second Nat. Bk v. Caldwell (13 Fed. Rep. 429), 613.
- Seele v. Deering (79 Me. 343), 680. Seibert v. Lewis (122 U. S. 284), 372, 382, 385, 390.
- Seibert v. Tiffany (8 Mo. App. 33), 118, 425, 814.
- Seibold v. People (86 III. 33), 344, 786, 792.

- Seifert v. Brooklyn (101 N. Y. 136), 799.
- Seifried v. Hays (81 Ky. 377), 684. Seiger v. Cleveland (3 Ohio Nisi Prius 119), 709.
- Seitzinger v. Tamaqua (187 Pa. St. 539), 130, 250, 259.
- Selma v. Stewart (67 Ala. 338), 510, 531, 565, 567.
- Selleck v. Tallman (93 Wis. 246), 457.
- Semmes v. Columbus (19 Ga. 471), 91, 141.
- Senn v. Southern Ry Co. (124 Mo. 621), 225, 228, 743, 748, 749.
- Sentell v. N. O. & C. R. R. Co (166 U. S. 698), 733.
- Sewart v. Com. (10 Watts. 306), 736.
- Severin v. People (37 Ill. 414), 786.
- Seymour v. Tacoma (6 Wash. 138). 837.
- Shackford v. Newington (46 N. H. 415), 104, 106.
- Shafer v. Mumma (17 Md. 331), 361, 462, 511, 513, 752, 787, 792, 794.
- Shamokin v. Flannigan (156 Pa. St. 43), 631.
- Shamokin v. Shamokin St. Ry. Co. (178 Pa. St. 128), 901.
- Shanfelter v. Baltimore (80 Md. 483), 591.
- Shank v. Ravenswood (43 W. Va. 242), 201.
- Shanklin v. Madison (21 Ohio St. 575), 113.
- Shannon v. Hinsdale (180 III. 202), 812, 813, 850, 851, 854, 855, 859, 869, 871.
- Shannon v. O'Boyle (51 Ind. 565), 91.
- Shapleigh v. San Angelo (167 U. S. 646), 347, 348, 546.
- Sharon v. Hawthorne (123 Pa. St. 106), 766.
- Sharp v. Contra Costa Co. (34 Cal. 284), 385.
- Sharp v. New York (40 Barb. 256), 196.
- Sharpless v. Philadelphia (21 Pa. St. 147), 72, 105.

- Shattuck v. Smith (6 N. D. 56), 868.
- Shaub v. Lancaster City (156 Pa. St. 362), 5, 51, 114, 259.
- Shaver v. Salisbury Commissioners (68 N. C. 291), 94.
- Shawneetown v. Baker (85 III. 563). 113, 192.
- Shea v. Milford (145 Mass. 528), 145°.
- Shea v. Muncie (148 Ind. 14), 30, 245, 290, 476, 533, 757.
- Sheafe v. People (87 Ill. 189), 873.
- Sheehan v. Citizens' Ry Co. (72 Mo. App. 524), 586, 749.
- Sheehan v. Gleeson (46 Mo. 100), 133, 808, 809, 850, 854, 856.
- Sheehan v. Owen (82 Mo. 458), 597.
- Sheffield, In re (64 Fed Rep. 833), 403.
- Sheffield v. O'Day (7 Ill. App. 339), 277.
- Sheffield Waterworks Co. v. Bingham (25 Ch. Div. 443), 908.
- Sheidley v. Lynch (95 Mo. 487), 88, 111.
- Shelby v. Miller (114 Wis. 660), 131.
- Shelby County v. Union and Planters' Bank (161 U. S. 149), 373, 374.
- Shelbyville v. Cleveland, etc. R. W. Co. (146 Ind. 66), 289.
- Sheldon v. Kalamazoo (24 Mich. 383), 717.
- Sheldon Poor House Asn. v. Sheldon (72 Vt. 126), 75.
- Shelton v. Hill (33 Mich. 171), 485.
- Shelton v. Mobile (30 Ala. 540), 304, 356, 451, 766.
- Shepard v. Milwaukee Gas Light Co. (6 Wis. 539), 897.
- Shepherd v. Hees (12 Johns. 433), 40, 732.
- Shepherd v. Municipality No. 3 (6 Rob. 349), 799.
- Sherbourne v. Yuba Co. (21 Cal. 113), 675.
- Sheridan v. Colvin (78 III. 237), 367.
- Sherlock v. K. C. B. Ry Co. (142 Mo. 172), 129, 305, 742, 884, 888.

- Sherlock v. Winnetka (59 III. 389), 260, 263.
- Sherman v. Carr (8 R. I. 431), 114.
 Sherrell v. Murray (49 Mo. App. 233), 731.
- Sherwin v. Bugbee (16 Vt. 439), 107, 149, 150, 210.
- Shewalter v. Pirner (55 Mo. 218), 90, 546.
- Shields v. Ohio (95 U. S. 319), 317, 322, 380.
- Shields v. Ross (158 Ill. 214), 803. Shields v. Savannah (20 Ga. 57), 458.
- Shillito v. Thompson (L. R. 1 Q. B. Div. 12), 762.
- Shilo Street (165 Pa. St. 386), 264. Shimmins v. Saginaw (104 Mich. 511), 813.
- Shinkle v. Covington (83 Ky. 420), 258, 311.
- Shinner v. Merchants Bank (4 Allen 290), 587.
- Shipley v. Fifty Associates (101 Mass. 251), 63, 64.
- Shippy v. Mason (90 Mich. 45), 611.
- Shiras v. Olinger (50 Iowa 571), 703, 704.
- Shirk v. People (121 III. 61), 81.Shivers v. Newton (45 N. J. L. 469), 768.
- Shoemaker v. Entwisle (3 D. C. App. Rep. 252), 535.
- Shoemaker v. Harrisburg (122 Pa. St. 285), 823.
- Shook v. Thomas (21 Ill. 87), 482. Shrader, ex parte (33 Cal. 279), 699.
- Shreve v. Cicero (129 Ill. 226), 801. Shreveport v. Levy (26 La. Ann. 671), 313, 362.
- Shreveport v. Roos (35 La. Ann, 1010), 30, 271, 296, 752, 753.
- Shriedley v. State (23 Ohio St. 130), 169.
- Shrober v. Lancaster (6 Lanc. Bar. 201), 50.
- Shrum v. Salem (13 Ind. App. 115), 811, 831.
- Shuford v. Lincoln County Comrs. (86 N. C. 552), 823.
- Shultz v. Cambridge (38 Ohio St. 659), 448, 456, 758.

- Shuman v. Ft. Wayne (127 Ind. 109), 653, 774.
- Shumate v. Heman (181 U. S. 402), 821.
- Sic, In re (73 Cal. 142), 24, 784, 788.
- Siebenbauer, ex parte (14 Nev. 365), 612.
- Siemers v. Eisen (54 Cal. 418), 603. Sikes v. Hatfield (13 Gray 347), 145.
- Sikes v. Manchester (59 Iowa 65), 716.
- Siloam Springs v. Thomson (41 Ark. 456), 24.
- Silsby Mfg. Co. v. Allentown (153 Pa. St. 319), 865.
- Simis v. Brookfield (13 Misc. 569), 718, 721.
- Simmons v. De Barre (8 Abb. Pr. 269), 559.
- Simmons v. Gardiner (6 R. I. 255), 811.
- Simmons v. Mailing Rural District Council (13 Times L. R. 447), 290.
- Simmons v. State (12 Mo. 268), 641. Simmons Hdw. Co. v. McGuire (39 La. Ann. 848), 400.
- Simms, ex parte (40 Fla. 432), 447.
- Simon v. Atlanta (67 Ga. 618), 716.
 Simon v. Northrup (27 Oreg. 487), 806, 883.
- Simpson v. McGonegal (52 Mo. App. 540), 845.
- Simpson v. Savage (1 Mo. 359), 344. 653.
- Simrall v. Covington (90 Ky. 444), 25, 27, 428, 631, 660.
- 25, 27, 428, 631, 660. Sinclair v. State (69 N. C. 47), 403.
- Sinking Fund Cases (99 U. S. 700), 323.
- Singer v. Philadelphia (112 Pa. 410), 551, 553, 736.
- Singer Mfg. Co. v. Wright (97 Ga. 114), 396.
- Singer Mfg. Co. v. Wright (33 Fed. Rep. 121), 405, 630.
- Sing Lee, ex parte (96 Cal. 354), 135, 773.
- Sinnot v. Davenport (22 How. 227), 410.
- Sioux City & P. R. R. v. Washington County (3 Neb. 30), 113.

- Sioux City Street Ry. Co. v. Sioux City (138 U. S. 98), 380, 880, 899. Sioux Falls v. Kirby (6 S. D. 62),
- 477, 562.
- Sipe v. Murphy (49 Ohio St. 536), 637.
- Sira v. Wabash Ry. Co. (115 Mo. 127), 743.
- Sitzinger v. Tamaqua (187 Pa. St. 539), 121.
- Skaggs v. Martinsville (140 Ind. 476), 289, 715.
- Skakel v. Roche (27 Ill. App. 423),
- Skaneateles W. W. Co. v. Skaneateles (161 N. Y. 154), 380.
- Skidmore v. Bricker (77 Ill. 164), 786.
- Skinker v. Heman (148 Mo. 349), 822, 851.
- Skinker v. Heman (64 Mo. App. 441), 118, 291, 297, 424, 812.
- Skyes v. Columbus (55 Miss. 115). 85.
- Slack v. Maysville & Lexington R. R. Co. (13 B. Mon. 1), 77, 117.
- Slaren, ex parte (3 Tex. App. 662). 575, 636, 643.
- Slattery, ex parte (3 Ark. 484), 277, 466, 469, 771.
- Slattery v. Naylor (13 App. Cas. 446), 696.
- Slattery v. St. Louis (120 Mo. 183), 892.
- Slaughter v. Columbus (61 Ohio St. 53), 574.
- Slaughter v. O'Berry (126 N. C. 181), 445, 860, 869
- Slaughter v. People (2 Doug. 334), 523.
- Slaughter House Cases (16 Wall. 36), 310, 354, 667, 699.
- Slessman v. Crozier (80 Ind. 487), 115, 274, 732.
- Slight v. Gutzlaff (35 Wis. 675), 698.
- Sloan v. Beebe (24 Kan. 343), 841.
 Sloane v. People's El. Ry. Co. (7
 Ohio Cir. Ct. Rep. 84), 896.
- Slocum v. Brookline (163 Mass. 23), 827.
- Smiley v. MacDonald (42 Neb. 5), 705.
- Smith, In re (146 N. Y. 68), 693.

- Smith, In re (99 N. Y. 424), 831. Smith, In re (65 Barb, 283), 252
- Smith, ex parte (38 Cal. 702), 298.
- Smith, ex parte (135 Mo. 233), 363, 538, 576.
- Smith and City of Toronto, In re (10 Up. Can. Com. Pleas. 225), 443.
- Smith & Keating, ex parte (38 Cal. 702), 758.
- Smith v. Adrain (1 Mich. 495), 486), 500, 537, 543, 546.
- Smith v. Alabama (124 U. S. 465), 399.
- Smith v. Albany (61 N. Y. 444), 172.
- Smith v. Barrett and Clifford (1 Siderfin 161), 91.
- Smith v. Birmingham Waterworks Co. (104 Ala. 315), 907.
- Smith v. Buffalo (90 Hun. 118), 267.
- Smith v. Cheshire (13 Gray 318), 107.
- Smith v. Clinton (53 N. J. L. 329), 269, 570, 572.
- Smith v. Columbus L. & S. Ry. Co. (8 Ohio 1), 189.
- Smith v. Columbus & L. S. Ry Co. (8 Ohio N. P. Rep. 1), 16, 181, 190, 249.
- Smith v. Com. (41 Pa. St. 335), 7, 9.
- Smith v. Duncan (77 Ind. 92), 851.Smith v. Eastend St. R. R. (87 Tenn. 626), 890.
- Smith v. Eau Claire (78 Wis. 457), 249.
- Smith v. Emporia (27 Kan. 528), 224, 228, 492, 494, 502, 566, 732.
- Smith v. Gouldy (58 N. J. L. 562), 269, 556.
- Smith v. Hazard (110 Cal. 145), 829.
- Smith v. Hoyt (14 Wis. 252), 331, 332.
- Smith v. Hudson Tp. Commissioners (150 Ill. 385), 570.
- Smith v. Jackson (103 Tenn. 673), 398.
- Smith v. Janesville (52 Wis. 680), 582.
- Smith v. Kingston Borough (120 Pa. St. 357), 810.

- Smith v. Knoxville (3 Head 245), 761.
- Smith v. Law (21 N. Y. 296), 167, 179.
- Smith v. Los Angeles I., etc. Assn. (78 Cal. 289), 164.
- Smith v. Louisville (9 Ky. Law. Rep. 779), 633.
- Smith v. McCarthy (56 Pa. St 359), 49, 261.
- Smith v. McConathy (11 Mo. 517), 698, 704.
- Smith v. McDowell (148 Ill. 51), 719, 814.
- Smith v. Madison (7 Ind. 86), 77, 346, 616, 756.
- Smith v. Marston (5 Tex. 426), 487.
- Smith v. Milwaukee B. & T. Exch. (91 Wis. 360), 602, 739.
- Smith v. Moore (38 Conn. 105), 216.
- Smith v. Morse (2 Cal. 524), 86, 133, 348, 383.
- Smith v. Newbern (70 N. C. 14), 72, 761.
- Smith v. New York (37 N. Y. 518), 367.
- Small v. Orne (79 Me. 78), 163.
- Smith v. People (154 Ill. 58), 346.
 Smith v. Philadelphia (13 Phila. 177), 113.
- Smith v. Proctor (N. Y. 1891) (14 L. R. A. 403), 166.
- Smith v. San Antonio (17 Tex. 643), 518, 528.
- Smith v. Sheeley (12 Wall, 358), 90.
- Smith v. Sherry (50 Wis. 210), 67.
 Smith v. Silsbe (53 N. Y. App. Div. 462), 467.
- Smith v. Smith (2 Pick. 621), 63.
- Smith v. Tobener (32 Mo. App. 601), 145, 177, 845.
- Smith v. Utica (53 Hun. 638), 238. Smith v. Westerly (19 R. I. 437),
- Smith v. Worcester (182 'Mass. 232), 823.

901.

- Smither v. Blanton (1 Met. 44), 467, 468.
- Smyrk v. Sharp (82 Md. 97), 325, 328, 335.

- Smyth v. Ames (169 U. S. 466), 910.
- Snell, In re (58 Vt. 207), 343, 616, 756.
- Snell and Town of Belleville, In re (30 Up. Can. Q. B. 81), 272, 298, 453, 673.
- Snell v. Ft. Dodge (45 Iowa 564), 610.
- Sneller v. Belleville (30 Up. Can. Q. B. 81), 36.
- Snoddy v. Bolen (122 Mo. 479), 890.
- Snyder, ex parte (64 Mo. 58), 153, 575.
- Snyder, ex parte (29 Mo. App. 256), 574.
- Snyder v. North Lawrence (8 Kan. 82), 79, 448, 456.
- Snyder v. Rockport (6 Ind. 237), 799.
- Society for Savings v. New London (29 Conn. 174), 151, 217.
- Society of Scriveners v. Brooking (3 Q. B. 95), 292.
- Soloman v. Denver (12 Colo. App. 179), 653.
- Soloman v. Hughes (24 Kan. 211), 205, 495, 566, 583, 591.
- Solomon, ex parte (91 Cal. 440), 24, 285, 755, 784, 788.
- Sommercamp v. Kelly (Idaho 1902, 71 Pac. Rep. 147), 177.
- Somerset v. Smith (20 Ky. Law. Rep. 1488), 166.
- Somerville v. Dickerman (127 Mass. 272), 76, 113.
- Somerville v. Middlesex County Comrs. (122 Mass. 292), 842.
- Somerville v. Wood (129 Ala. 369), 7.
- Sonora v. Curtin (137 Cal. 583), 334, 641.
- Soon Hing v. Crowley (113 U. S. 703), 44, 258, 311, 312, 356, 361, 672, 691, 773.
- Soule v. Passaic (47 N. J. Eq. 28), 799.
- South Covington, etc. Ry. Co._v. Berry (93 Ky. 43), 437, 732, 747. Southern Bell Tel. & Tel. Co. v. Bishmond (68 Fed. 671)
 - Richmond (98 Fed. 671), 320, 321, 322, 325.

- South Bend v. Martin (142 Ind. 31), 396, 397, 658.
- Southern Express Co. v. Ensley (116 Fed. Rep. 756), 435, 655.
- Southern Express Co. v. Tuscaloosa (Ala. 1902, 31 So. Rep. 450), 655.
- South Florida R. R. Co. v. Rhodes (25 Fla. 40), 296.
- South Highland Land & Imp. Co. v. Kansas City (172 Mo. 523), 853, 854.
- South Market St., In re (76 Hun. 85), 187, 204.
- South Pasadena v. Los Angeles, etc. R. Co. (109 Cal. 315), 36, 673, 910.
- Southport v. Ogden (23 Conn. 128), 24, 344, 788.
- Southport v. Stanley (125 N. C. 464), 90.
- South Royalton Bank v. Suffolk Bk. (27 Vt. 505), 684.
- South School District v. Blakeslee (13 Conn. 227), 151.
- Southwark v. Neil (3 Yeates 54), 38, 83.
- Southwest Mo. Light Co. v. Joplin (101 Fed. 23), 377.
- Southworth v. P. & J. R. R. 2 Mich. 287), 169.
- Soutier v. Kellerman (18 Mo. 509), 110.
- Sower v. Philadelphia (35 Pa. St. 231), 6, 841.
- Spring Valley W. W. v. San Francisco (82 Cal. 286), 436
- Spain, In re (47 Fed. 208), 397, 402.
- Spangler v. Jacoby (14 III. 297), 187, 202, 205.
- Sparks, ex parte (120 Cal. 395), 462, 464.
- Sparks v. Stokes (40 N. J. L. 487), 573.
- Sparling v. Dwenger (60 Ind. 72), 803.
- Sparr v. St. Louis (4 Mo. App. 572), 678.
- Sparta v. Lewis (91 Tenn. 370), 534.
- Spaulding v. Lowell (23 Pick. 71), 70, 71, 74, 75, 79, 109, 117, 762.

- Spaulding v. Peabody (153 Mass. 129), 101, 798.
- Spaulding v. Wesson (84 Cal. 141), 832.
- Speakership of the House of Representatives, In re (15 Colo. 520), 158.
- Spear v. Robinson (29 Me. 531), 152.
- Spears v. Modoc County (101 Cal. 303), 334.
- Spears v. New York (72 N. Y. 442), 127.
- Specht v. Louisville (22 Ky. L. Rep. 699), 235.
- Spect v. Arnold (52 Cal. 455), 455.
- Speer v. Athens (85 Ga. 49), 823.
- Speer v. School Directors (50 Pa. St. 150), 104.
- Speir v. Brooklyn (139 N. Y. 6), 677, 678.
- Spencer v. Andrew (82 Iowa 14), 718.
- Spencer v. Cline (28 Ind. 51), 466. Spencer v. Merchant (125 U. S. 345), 353, 820.
- Spengler v. Trowbridge (62 Miss. 46), 799.
- Spiegel v. Gansburg (44 Ind. 418), 435, 830.
- Spies v. Illinois (123 U. S. 131), 354.
- Spitler v. Young (63 Mo. 52), 34, 276, 552, 553, 731.
- Spitzer v. Runyan (113 Iowa 619), 96.
- Spokane v. Robison (6 Wash. 547), 483, 487, 506, 544, 701.
- Spokane v. Williams (6 Wash. 376), 337.
- Spokane Falls v. Browne (3 Wash. St. 84), 824.
- Spokane Street Ry. Co. v. Spokane (5 Wash. 634), 817.
- Sprague v. Coenen (30 Wis. 209), 115.
- Spring v. Hyde Park (137 Mass. 554), 694.
- Springfield v. Connecticut River R. Co. (4 Cush. 63), 719.
- Springfield v. Edwards (84 Ill. 626), 431.

- Springfield v. Ford (40 Mo. App. 586), 490, 491, 492, 646.
- Springfield v. Green (120 Ill. 269), 843.
- Springfield v. Knott (49 Mo. App. 612), 4, 6, 842.
- Springfield v. Mathus (124 Ill. 88), 852.
- Springfield v. Robberson Ave. R. R. (69 Mo. App. 514), 887.
- Springfield v. Sale (127 Ill. 359), 852.
- Springfield v. Smith (138 Mo. 645), 607, 612, 651, 652.
- Springfield v. Starke (93 Mo. App. 70), 271, 291.
- Springfield v. Walker (42 Ohio St. 543), 113.
- Springfield v. Weaver (137 Mo. 650), 845, 848, 860, 861.
- Springfield, etc. Ins. Co. v. Keesville (148 N. Y. 46), 674, 677.
- Springfield R. R. Co. v. Springfield (85 Mo. 674), 368, 425, 743, 883.
- Sprigg v. Garrett Park (89 Md. 406), 298.
- Spring Garden Bank v. Hurlings Lumber Co. (32 W. Va. 357), 896. Spring Garden Comrs. v. Wistar (18 Pa. St. 195), 832.
- Spring Valley v. Henning (42 III. App. 159), 445, 534, 542.
- Spring Valley v. Spring Valley Coal Co. (71 Ill. App. 432), 786.
- Spring Valley Coal Co. v. People (157 Ill. 543), 609, 610.
- Spring Valley Waterworks v. Bartlett (8 Sawyer 555), 262.
- Spring Valley Waterworks v. San Francisco (82 Cal. 286), 31, 907.
- Spring Valley Waterworks v. Schottler (110 U. S. 347), 905, 906.
- Springville v. Fullmer (7 Utah 450), 798.
- Spry Lumber Co. v. Sault Savings Bank (77 Mich. 199), 668.
- Stack v. East St. Louis (85 Ill. 277), 358.
- Stadiford. In re (5 Mackey 549), 241.
- Stadler v. Detroit (13 Mich. 346), 22,

- Stadler v. Fahey (87 Ill. App. 411), 430, 446.
- Stadler v. Roth (59 Mo. 400), 213, 214.
- Staff, In re (63 Wis. 285), 527. Stafford v. Chippewa Valley Elec-
- tric R. Co. (110 Wis. 331), 443. Stamford v. Studwell (60 Conn. 85), 737.
- Standard v. Industry (55 Ill. App. 523), 46, 248, 250, 251.
- Standard Oil Co. v. Danville (199 Ill. 50), 298, 510, 740.
- Standard Underground Cable Co. v. Attorney General (46 N. J. Eq. 629).
- Standeford v. Wingate (2 Duvall Ky. Rep. 440), 366.
- Standiford, In re (5 Mackey 549), 161.
- Stange v. Dubuque (62 Iowa 303), 265.
- Stanley v. Davenport (54 Iowa 463), 678.
- Stanton v. Chicago (154 Ill. 23), 847, 849, 853.
- Starks v. State (38 Tex. Crim. Rep. 233), 597.
- Staples v. Plymouth (62 Iowa 364), 694.
- Starr v. Burlington (45 Iowa 87), 4, 248.
- Starr v. Rochester (6 Wend. 564), 562.
- State v. Able (65 Mo. 357), 299, 690.
- State v. Acuff (6 Mo. 54), 448. State v. Adams (108 Mo. 208)
- State v. Adams (108 Mo. 208), 491. State ex rel. Pittman v. Adams (44
- Mo. 570), 322. State v. Addington (77 Mo. 110),
- 351, 669, 763.
- State v. Agee (83 Ala. 110), 396, 401.
- State v. Albright (20 N. J. L. 644), 262.
- State ex rel. v. Alexander (107 Iowa 177), 163, 211.
- State ex rel. v. Aloe (152 Mo. 466), 155.
- State ex rel. Fox v. Alt (26 Mo. App. 673), 158.

- State ex rel. v. Anderson (26 Fla. 240), 47, 449.
- State v. Anderson (63 Minn. 208), 274.
- State v. Anderson (84 Mo. 524), 565.
- State v. Andrews (27 Mo. 267), 646.
- State v. Andrews (20 Tex. 230), 336.
- State v. Andrus (11 Neb. 523), 648. State v. Angelo (71 N. H. 224),
- State v. Applegarth (81 Md. 293), 394, 633, 659.
- State v. Archibald (5 N. D. 359), 183.
- State v. Armstrong (54 Minn, 457), 163, 237, 840, 845, 846.
- State v. Askins (33 La. Ann. 1253). 527.
- State ex rel. v. Associated Press (159 Mo. 410), 53.
- State v. Atlantic City (34 N. J. 1. 99), 137, 591.
- State v. Austin (114 N. C. 855). 25, 758.
- State ex rel. v. Babcock (22 Neb. 614), 111.
- State v. Bacon (40 Vt. 456), 511.State ex rel. v. Badger (90 Mo. App. 183), 161, 200, 208.
- State v. Baker (44 La. Ann. 79). 491, 505.
- State ex rel. v. Baker (74 Mo. 394). 490.
- State v. Baker (71 Mo. 475), 541. State ex rel. v. Baker (32 Mo. App. 98), 274, 320, 622, 637.
- State v. Baker (38 Wis. 71), 489. State v. Baldwin (45 Conn. 134),
- State v. Baltimore & O. R. R. Co. (3 How. 534), 67, 277
- State ex rel. v. Barbour (53 Conn. 76), 185.
- State ex rel. v. Barker (116 Iowa 96), 140, 805.
- State v. Barker (18 Vt. 195), 498. State ex rel v. Barlow (48 Mo. 17). 828, 845.
- State v. Barnet (46 N. J. L. 62), 6. State v. Barthe (41 La. Ann. 46), 764,

State ex rel. v. Baton Rouge (40 La. Ann. 209), 277.

State (Booth) v. Bayonne (56 N. J. L. 268), 181.

State v. Bayonne (54 N. J. L. 474), 842.

State v. Bayonne (54 N. J. L. 125), 169.

State v. Bayonne (35 N. J. L. 335), 4, 5, 6.

State v. Bean (21 Mo. 267), 752.

State v. Bean (91 N. C. 554), 270, 544, 622.

State v. Becker (3 S. Dak. 29), 10. State ex rel. v. Beatie (16 Mo.

App. 131), 134, 292, 299, 627, 703. State v. Bell (116 Ind. 1), 367.

State ex rel. v. Bell (119 Mo. 70), 341.

State ex rel. v. Bell (34 Ohio St. 194), 134, 894.

State v. Bell (91 Wis. 271), 609.

State ex rel. v. Belt (161 Mo. 371), 836.

State v. Bemis (45 Neb. 724), 176. State v. Beneke (9 Iowa 203), 498,

State v. Bennett (19 Neb. 191), 639, 645.

State v. Berdetta (73 Ind. 185), 716, 874.

State (Ackerman) v. Bergen (33 N. J. L. 39), 7, 233, 254, 832.

State v. Bergen County (46 N. J. Eq. 178), 707.

State v. Bergman (6 Oreg. 341), 787.

State v. Bermuda (12 La. 352), 381.

State v. Bernard (64 Mo. 260), 752.State ex rel. v. Bersch (83 Mo. App. 657), 613.

State (Hershoff) v. Beverly (45 N. J. L. 288), 228, 446, 543.

State (Hershoff) v. Beverly (43 N. J. L. 139), 469, 474, 485, 571.

State v. Bill (13 Ired. 373), 566, 571.

State v. Binder (38 Mo. 451), 49, 164, 345, 646.

State v. Birkhauser (37 Neb. 521), 831.

State v. Bishop (128 Mo. 373), 311, 539.

State ex inf. v. Bland (144 Mo. 534), 155.

State v. Blaser (36 La. Ann. 363), 774.

State v. Blauvelt (34 N. J. L. 261), 571.

State ex rel. v. Board of Education (141 Mo. 45), 607.

State v. Boardman (93 Me. 73), 296.

State v. Board of Public Works (27 Minn. 442), 121.

State (West Jersey Traction Co.) v. Board of Public Works (56 N. J. L. 431), 143, 174, 260, 439.

State v. Bockstruck (136 Mo. 335), 527, 541.

State ex rel. v. Bogard (128 Ind. 480), 367.

State v. Boll (59 Mo. 321), 702.

State ex rel. v. Bolt (151 Mo. 362), 160.

State v. Boneil (42 La. Ann. 1110), 269, 279, 284.

State ex rel v. Bonnell (119 Ind. 494), 274.

State v. Boogher (71 Mo. 631), 333, 334.

State v. Botkin (71 Iowa 87), 752. State ex rel. v. Bowerman (40 Mo. App. 576), 578,

State ex rel. v. Boyd (63 Neb. 829), 618.

State v. Bracco (103 N. C. 349), 400.

State v. Bradford (32 Vt. 50), 547.
 State v. Brigantine Borough (54 N. J. L. 476), 842.

State v. Branin (23 N. J. L. 484), 339.

State v. Bright (38 La. Ann. 1), 271.

State ex rel. v. Bringier (42 La. Ann. 1095), 279.

State v. Brittain (89 N. C. 574), 23, 790.

State (Kean) v. Bronson (35 N. J. L. 468), 263, 428.

State v. Brown (5 Harr 505), 483. State v. Brown (19 Fla. 563), 648. State v. Brown (109 N. C. 802),

554.

State v. Brown (72 Vt. 410), 506, 640.

- State v. Bruce (23 Wash. 777),
- State v. Bruckhauser (26 Minn. 301), 771.
- State v. Bruder (35 Mo. App. 480), State v. Carrigan (39 N. J. L. 35),
- State v. Bruner (17 Mo. App. 274),
- State (Parker) v. Brunswick (30 N. J. L. 395), 37,
- State v. Bryant (90 Mo. 534), 445, 447.
- State v. Bryson (44 Ohio St. 457).
- State v. Burgoyne (7 Lea 173), 665.
- State v. Burnham (15 N. H. 396), 524.
- State v. Burns (45 La. Ann. 34), 25, 772.
- State v. Butler (17 Vt. 145), 499.
- State (Marshall) v. Cadwalader (26 N. J. L. 283), 698.
- State ex rel. v. Cahaba (30 Ala. 66), 440.
- State v. Cainan (94 N. C. 880), 283, 485, 700.
- State v. Caldwell (3 La. Ann. 435),
- State v. Camden (53 N. J. L. 322), 832.
- State v. Camden (50 N. J. L. 87), 23, 25, 340.
- State ex rel. v. Campbell (120 Mo. 396), 546.
- State v. Campbell (64 N. H. 402).
- State v. Camp Sing (18 Mont. 128), 654.
- State v. Cantieny (34 Minn. 1), 226, 228, 280, 281, 450, 531, 758, 770.
- State (Tomlin) v. Cape May (63 N. J. L. 429), 269.
- State v. Capital City Dairy Co. (62 Ohio St. 350), 682.
- State ex rel. v. Carbondale School District (29 Iowa 264), 546.
- State v. Carey (4 Wash. 424), 683. State v. Carman (63 Iowa 130),
- 527. State v. Carpenter (60 Conn. 97) 29, 284, 448, 491, 754.
- State v. Carpenter (68 Wis. 165), 716.

- State ex rel, v, Carr (67 Mo. 38), 239, 242.
- State v. Carreau (45 La. Ann. 1446), 465.
- 411.
- State v. Carter (129 N. C. 560), 630. State (McClosky) v. Chamberlin (37 N. J. L. 388), 452.
- State v. Chambers (70 Mo. 625), 315.
- State v. Champlin (16 R. I. 453), 143.
- State v. Charles (16 Minn. 474). 707.
- State ex rel. Adger v. Charleston (2 Speers 719), 623.
- State ex rel. Wilkinson v. Charleston (2 Speers 623), 35, 362, 623,
- State v. Charleston (1 Mill's Const. Rep. 36), 440.
- State v. Charleston (12 Rich. Law. 480), 25, 461, 464.
- State v. Chase (3 La. Ann. 287). 285, 787.
- State v. Cincinnati (8 Ohio Cir. Ct. Rep. 523), 249, 252,
- State v. Cincinnati Gas Co. (18 Ohio St. 262), 28, 102, 259, 379, 875, 880,
- State ex rel. v. Circleville (20 Ohio St. 362), 104,
- State ex rel. v. Circuit Court (97 Wis. 1), 260.
- State v. Citizens' Bank (52 La. Ann. 1086), 617.
- State v. Clarke (69 Conn. 371), 721, 722.
- State v. Clarke (54 Mo. 17), 72, 291, 343, 345, 450, 792, 883.
- State v. Clark (28 N. H. 176), 646, 757, 760.
- State v. Clarke (25 N. J. L. 54), 343, 346.
- State v. Clay (118 N. C. 1234), 780.
- State v. Clesi (44 La. Ann. 85), 567, 569, 578,
- State ex rel. v. Cleveland (15 Ohio Cir. Ct. 517), 195, 215, 216.
- State v. Cleveland (3 R. I. 117), 269.

- State v. Clevenger (20 Mo. App. 626), 565.
- State v. Clifford (45 La. Ann. 980), 787.
- State (Smith) v. Clinton (53 N. J. L. 329), 282, 475, 477.
- State v. Close (35 Iowa 570), 686.
- State ex rel. v. Coffee (59 Mo. 59), 546.
- State v. Collins (16 R. I. 371), 727.
- State v. Columbia (27 S. C. 137), 802.
- State v. Columbia (6 S. C. 1), 612, 630, 644.
- State ex rel. Heise v. Columbia (6 Rich Law. 404), 273, 285, 787, 792.
- State v. Conkling (19 Cal. 501), 328.
- State v. Conlin (27 Vt. 318), 513, 547.
- State v. Conlon (65 Conn. 478), 294, 306.
- State v. Cooke (24 Minn. 247), 274.
- State v. Corbett (57 Minn. 345), 399.
- State ex rel. v. Corrigan St. Ry. Co. (85 Mo. 263), 317, 318, 827, 884, 900.
- State ex rel. v. County Court (128 Mo. 427), 226.
- State ex rel. v. County Court (102 Mo. 531), 225, 351.
- Mo. 531), 225, 351. State ex rel. v. County Court (11 Wis. 50), 333.
- State v. Court (36 N. J. L. 72), 648.
- State ex rel. v. Covington (29 Ohio St. 102), 225.
- State v. Cowan (29 Mo. 330), 344, 346, 671, 787, 793.
- State ex rel. v. Cowgill, etc. Milling Co. (156 Mo. 620), 6.
- State v. Cozzens (42 La. Ann. 1069), 314.
- State v. Craig (80 Me. 85), 471, 537.
- State v. Cram (84 Me. 271), 462.
- State ex rel. v. Cramer (96 Mo. 75), 309, 450.
- State (Winans) v. Crane (36 N. J. L. 394), 173.

- State v. Crenshaw (94 N. C. 877), 270, 283, 544.
- State ex rel. v. Crete (32 Neb. 568), 433.
- State v. Crosley (36 N. J. L. 425), 193.
- State v. Crummey (17 Minn. 72), 787, 792.
- State v. Cunningham (21 Iowa 433), 543.
- State ex rel. Kellogg v. Currens (111 Wis. 431), 311.
- State v. Curry (134 Ind. 133), 203.
- State v. Dakota County (41 Minn. 518), 237, 240.
- State v. Darrow (65 Minn. 419), 237, 249.
- State v. Davenport (12 Iowa 335), 610.
- State v. Davidson (50 La. Ann. 1297), 257, 765.
- State v. Davis (117 Mo. 614), 768.
- State v. Davis (108 Mo. 666), 768.
- State v. Davis (70 Mo. 467), 491.
- State ex rel. v. Davis (44 Mo. 129), 365.
- State v. De Bar (58 Mo. 395), 333, 792.
- State v. Deering (84 Wis. 585), 353, 629, 757.
- State v. Deffes (45 La. Ann. 658), 762.
- State v. Deliesseline (1 McCord 52), 165, 166.
- State ex rel. v. Denny (118 Ind. 449), 66.
- State v. Denny (118 Ind. 382), 10,
- State v. Dickie (47 Iowa 629), 167.
- State v. Dillon (Fla. June 5, 1900, 28 So. Rep. 781), 24.
- State ex rel. v. Dimond (44 Neb. 154), 441.
- State v. Dinnissee (109 Mo. 434), 445.
- State v. District Court (44 Minn. 244), 834.
- State v. District Court (41 Minn. 518), 237.
- State v. District Court (33 Minn. 295), 121, 843.

- State v. District Court (29 Minn. 62), 843.
- State ex rel. v. Dodge City, etc. Ry. Co. (53 Kan. 329), 899.
- State v. Dodge County Court (8 Neb. 124), 800.
- State ex rel. v. Dolan (93 Mo. 467), 329, 345.
- State v. Douglas (26 Wis, 428), 367.
- State ex rel. v. Dover (62 N. J. L. 138), 546.
- State v. Downing (22 Mo. App.
- 504), 398. State v. Draper (50 Mo. 353), 22.
- State ex rel. v. Draper (47 Mo. 29), 315, 329.
- State v. Dubarry (46 La. Ann. 33), 763.
- State v. Dubarry (44 La. Ann. 1117), 762.
- State v. Dudley (56 Mo. App. 450), 752.
- State v. Dugan (110 Mo. 138), 49. State v. Dulaney (43 La, Ann. 500),
- 702.
- State v. Duluth (53 Minn, 238), 238. State v. Dunbar (43 La. Ann. 836), 491.
- State ex rel. v. Dunson (71 Tex. 65), 546.
- State v. Dupaquier (46 La. Ann. 577), 767.
- State v. Duval County (23 Fla. 483), 225.
- State v. Dwyer (21 Minn. 512), 343.
- State v. Dyson (39 Mo. App. 297), 755.
- State v. Earnhardt (107 N. C. 789), 451, 770.
- State ex rel. v. East 5th St. Ry. Co. (140 Mo. 539), 880, 888, 913, 914.
- State (Delaware, L. & W. R. Co.)
 v. East Orange (41 N. J. L. 127),
 292, 313, 750.
- State (Consolidated Traction Co.) v. East Orange Tp. (61 N. J. L. 202, 713.
- State v. Edens (85 N. C. 522), 490, 496, 716.
- State ex rel. v. Edwards (136 Mo. 360), 329, 344.

- State v. Ehrmantraut (63 Minn. 104), 67.
- State (Smith) v. Elizabeth (46 N. J. L. 312), 573.
- State v. Elizabeth (37 N. J. L. 432), 12.
- State v. Elizabeth (30 N. J. L. 176), 573.
- State v. Elofson (86 Minn. 103), 632.
- State v. Emert (103 Mo. 241), 398. State v. Engle (34 N. J. L. 425),
 - 411.
- State v. Endom (23 La. Ann. 663), 633.
- State v. Epperson (4 Mo. 90), 565. State v. Evans (3 Ark. 585), 441.
- State v. Evans (161 Mo. 95), 483.
- State v. Everett (14 Minn. 439), 527.
- State ex rel. v. Farr (47 N. J. L. 208), 158.
- State ex rel. Dugan v. Farrier (47 N. J. L. 383), 153.
- State v. Fay (44 N. J. L. 474), 79. State v. F. C. Coal & Coke Co. (33 W. Va. 188), 667.
- State v. Fellows (12 La. Ann. 344), 641.
- State v. Ferguson (33 N. H. 424), 79, 271.
- State (Ahrens) v. Fiedler (43 N. J. L. 400), 242.
- State ex rel. v. Field (99 Mo. 352), 68, 341, 804, 805.
- State v. Field (17 Mo. 529), 133. State ex rel. v. Finn (8 Mo. App. 341), 225.
- State (Clark) v. Fire Department of Elizabeth (43 N. J. L. 172), 550.
- State v. Fisher (52 Mo. 174), 303.
- State v. Fisher (33 Wis. 154).
- State v. Fiske (9 R. I. 94), 131, 135, 625, 626, 714.
- State v. Fitzporter (17 Mo. App. 271), 329.
- State v. Flack (24 Mo. 378), 755.
 State ex rel. Bell Telephone Co. v.
 Flad (23 Mo. App. 185), 885.
- State ex rel. v. Fleming (147 Mo. 1), 441.
- State v. Flinch (78 Mich. 118). 643.

(The references are to pages.) State v. Flint (63 Conn. 248), 29, State v. Glavin (67 Conn. 29), 634.

506, 754, 788. State v. Glenn (54 Md. 572), 511, State ex rel. v. Forest Co. (74 515, 530, 574, 576. Wis, 610), 547. State (Paul) v. Gloucester County State v. Foster (7 N. J. L. 101), (50 N. J. L. 585), 135, 144, 787, 192. 792. State v. Fountain (14 Wash, 236), State v. Goodenow (65 Me. 30), 232, 233, 486. 538. State v. Fourcade (45 La. Ann. State v. Goodwill (33 W. Va. 179), 717), 513, 683, 762, 766, 787. 667, 779. State v. Fox (158 Ind. 126), 805. State v. Gordon (60 Mo. 383), 671. State ex rel. v. Fox (85 Mo. 61), State ex rel. v. Gosnell (Wis. 1903, 93 N. W. Rep. 542), 907. State v. Francis (26 Kan. 724), State v. Goulding (44 N. H. 284), 177. 491. State ex rel. v. Francis (95 Mo. State v. Graffmuller (26 Minn. 6), 44), 49, 133, 433, 434, 646. 486, 530, 579. State ex rel, v. Franklin (40 Kan. State v. Graves (19 Md. 351), 320. 410), 673, State ex rel. v. Gray (23 Neb. State v. Freeman (38 N. H. 426), 365), 153, 155, 157, 169. 79, 757, 759, 760. State v. Green (27 Neb. 64), 639, State ex rel. Toi v. French (17 661. Mont. 54), 312, 629, 632. State ex rel. v. Green (37 Ohio St. State v. French (109 N. C. 722), 227), 166, 167, 184, 185, 186. 611.State v. Grimes (83 Minn. 460), State v. Frost (103 Tenn, 685), 547. 512, 559, 754. State v. Fuller (96 Mo. 165), 546. State v. Grimes (49 Minn. 443), State v. Furbush (72 Me. 493), 400, 271, 755. State v. Gallagher (72 Conn. 604), State v. Gritzner (134 Mo. 512), 506. 447. State v. Gallagher (42 Minn. 449), State v. Grove (77 Wis. 448), 480. 226. State v. Groves (15 R. I. 208), State v. Galloway (5 Coldw. 326), 767. State ex rel. v. Guiney (26 Minn. 465. State v. Garibaldi (44 La. Ann. 313), 147. 809), 762. State v. Gumber (37 Wis. 298), 335. State v. Garrett (80 Iowa 589), 42. State v. Gurney (37 Me. 156), 527. State v. Gazley (5 Ohio 14), 611, State v. Gutierrez (15 La. Ann. 190), 513, 517. State v. Geise (39 Mo. App. 189), State v. Hackfath (20 Mo. App. 614), 539, 772. State v. Geneva (107 Wis. 1), 131. State v. Hale (15 Mo. 606), 527. State v. Hamilton (47 Ohio St. 52), State v. Georgia Med. Soc. 38 Ga. 608), 24. 798. State v. Hammond (40 Minn. 43), State v. Gerhardt (145 Ind. 439), 758, 905, 79, 83, 753. State v. Hammonton (38 N. J. L. State v. Geuing (1 McCord 573), 430), 114. State v. Gibbs (60 S. C. 500), 225. State ex rel. Morris v. H. & St State v. Gilman (33 W. Va. 146), J. Ry. Co. (86 Mo. 13), 433. 667. State v. H. & St. J. Ry Co. (75 Mo. State v. Gilmore (98 Mo. 206), 755. 208), 651. State v. Gisch (31 La. Ann. 544), State v. Hardy (7 Neb. 377), 25,

251, 450, 648,

764.

- State v. Harmon (60 Mo. App. 48), 756.
- State v. Harper (58 Mo. 530), 278, 792.
- State v. Harrington (68 Vt. 622), 635, 636.
- State v. Harris (50 Minn. 128), 513. State v. Harris (52 Vt. 216), 185.
- State v. Harris (52 vt. 216), 186. State v. Harrison (67 Ind. 71), 180.
- State v. Harrison (46 N. J. L. 79), 308.
- State ex rel. v. Hauser (63 Ind. 155), 137, 208.
- State v. Hawkins (44 Ohio St. 98), 366, 367.
- State v. Hay (29 Me. 457), 756.
- State v. Hayne (4 S. C. 403), 611.
- State v. Hayes (67 Iowa 27), 541.
- State v. Hayes (61 N H. 264), 78. State ex rel. v. Haynes (72 Mo. 377), 133, 143, 145.
- State ex rel. Blakeman v. Hays (49 Mo. 604), 257.
- State v. Heckler (81 Mo. 417), 541. State ex rel. v. Heege (135 Mo. 112), 226.
- State ex rel. v. Heege (39 Mo. App. 49), 578.
- State v. Heidenhain (42 La. Ann. 483), 231, 294, 688, 689.
- State ex rel v. Heidorn (74 Mo. 310), 329, 344.
- State v. Helfrid (2 Mott & McCord 233), 461, 463, 469.
- State v. Henderson (38 Ohio St. 644), 238.
- State ex rel. v. Hennepin County Dis. Court (33 Minn. 235), 191.
- State v. Hennessey (44 La. Ann. 805), 569.
- State v. Henshaw (76 Cal. 436), 464.
- State ex rel. v. Hermann (84 Mo. App. 1), 294.
- State v. Hermann (11 Mo. App. 43), 365.
- State v. Herod (29 Iowa 123), 650, 651.
- State v. Herryford (19 Mo. 377), 755.
- State v. Hiawatha (53 Kan. 477), 798.

- State ex rel. v. Higgins (125 Mo 364), 341.
- State v. Higgs (126 N. C. 1014), 30, 464, 722.
- State (Dawes) v. Hightstown (45 N. J. L. 501), 719.
- State ex rel. Cream City R. Co. v. Hilbert (72 Wis. 184), 652.
- State v. Hill (126 N. C. 1139), 360, 670, 682.
- State v. Hindman (4 Mo. App. 582), 756.
- State v. Hoboken (52 N. J. L. 88), 241.
- State (Bayer) v. Hoboken (44 N. J. L. 131), 252.
- State (Chamberlain) v. Hoboken (38 N. J. L. 110), 251, 450.
- State (Benson) v. Hoboken (33 N. J. L. 280), 622, 634.
- State v. Hoffman (50 Mo. App. 585), 398.
- State v. Hoffman (35 Ohio St. 435), 805.
- State v. Hohn (50 La. Ann. 432), 563.
- State (Cedar Rapids) v. Holcomb (68 Iowa 107), 704.
- State ex rel. v. Holladay (67 Mo. 64), 9.
- State v. Holt (90 N. C. 749), 527. State ex rel. v. Holt Co. Ct. (39
- State ex rel. v. Holt Co. Ct. (39 Mo. 521), 646.
- State v. Hope (100 Mo. 347), 351. State v. Hord (122 N. C. 1092), 704, 705.
- State ex rel. v. Hostetter (137 Mo. 636), 444, 448.
- State v. Houghton (6 La. Ann. 783), 623.
- State v. Hoyt (2 Oreg. 246), 183.
- State v. Hudson (13 Mo. App. 61), 646.
- State v. Hudson (37 N. J. L. 254), 114.
- State v. Hudson (29 N. J. L. 475), 241, 249.
- State (Ogden) v. Hudson (29 N. J. L. 104), 830.
- State ex rel. v. Hughes (104 Mo. 459), 436.
- State v. Hughes (72 N. C. 25), 729.

- State v. Hunter (106 N. C. 796), 295.
- State v. Hutchinson (39 N. J. Eq. 218), 707.
- State ex rel. Indianapolis v. Indianapolis Union Ry. Co. (Ind. 1903, 66 N. E. Rep. 163), 904.
- State v. Intoxicating Liquors (54 Me. 564), 471.
- State v. Itzcovitch (49 La. Ann. 366), 71, 774.
- State v. Jackson (39 Mo, 420), 755. State v. Jacksonville St. R. R. (29 Fla. 590), 882, 898, 899.
- State v. Jacobs (38 Mo. 379), 657. State v. Jaeger (63 Mo. 403), 329, 447.
- State v. Jamison (23 Mo. 103), 646. State ex rel. v. Jenkins (25 Mo.
- App. 484), 546.
- State ex rel. v. Jennings (57 Ohio St. 415), 367, 368.
- State (Kennelly) v. Jersey City (57 N. J. L. 293), 125, 290, 439, 720.
- State v. Jersey City (54 N. J. L. 49), 828.
- State ex rel. Schermerhorn v. Jersey City (53 N. J. L. 112), 169.
- State v. Jersey City (52 N. J. L. 490), 832.
- State v. Jersey City (52 N. J. L. 65), 888.
- State (Hudson Telephone Co.) v. Jersey City (49 N. J. L. 303), 723.
- State (Pennsylvania R. R.) v. Jersey City (47 N. J. L. 286), 42, 297.
- State (Long) v. Jersey City (37 N. J. L. 348), 296, 746.
- State v. Jersey City (35 N. J. L. 404), 145, 829.
- State (Gregory) v. Jersey City (34 N. J. L. 429), 87, 189, 233, 254.
- State (Gregory) v. Jersey City (34 N. J. L. 390), 263, 429.
- State v. Jersey City (34 N. J. L. 31), 263, 429.
- State v. Jersey City (30 N. J. L. 148), 238.
- State (Howeth) v. Jersey City (30 N. J. L. 93), 241.

- State v. Jersey City (29 N. J. L. 170), 25, 41, 429, 571, 686, 687.
- State (Malone) v. Jersey City (28 N. J. L. 500), 832.
- State v. Jersey City (27 N. J. L. 536), 192, 829.
- State (Van Vorst) v. Jersey City (27 N. J. L. 493), 11, 197, 841.
- State (Townsend) v. Jersey City (26 N. J. L. 444), 255.
- State (Durant) v. Jersey City (25 N. J. L. 309), 145, 146, 179, 180; 238, 800, 829, 830.
- State (Mann) v. Jersey City (24 N. J. L. 662), 832.
- N. J. L. 662), 832. State v. Johns (124 Mo. 379), 538.
- State v. Johnson (17 Ark. 407), 352, 456.
- State v. Johnson (41 Minn. 111), 732.
- State ex rel. v. Johnson (123 Mo. 43), 22.
- State v. Johnson (114 N. C. 846), 736.
- State v. Jones (18 Tex. 874), 803. State v. Jordon (39 Iowa 387), 557.
- State ex rel. Walker v. Judge (39 La. Ann. 132), 669.
- State ex rel. v. Judge (37 La. Ann. 583), 467.
- State ex rel. v. Judges, etc. (11 Wis. 50), 468.
- State v. Judges of District Court 51 Minn. 539), 833, 834.
- State v. Julow (129 Mo. 163), 778. State v. Justice (24 N. J. L. 413), 193.
- State v. Kantler (33 Minn. 69), 147, 316, 451, 648.
- State v. Karstendiek (La., 39 L. R. A. 520), 752.
- State v. Kaster (35 Iowa 221), 704. State v. Kaufman (51 Iowa 578),
- 527. State v. Kearney (25 Neb. 262), 738.
- State v. Keenan (57 Conn. 286), 478.
- State v. Keith (94 N. C. 933), 784, 790.
- State v. Kempf (69 Wis. 470), 561.

- State v. Kemple (27 Mo. App. 392), 507.
- State ex rel. v. Kennan (25 Wash. 621), 512, 577.
- State v. Kennon (7 Ohio St. 546), 7, 10.
- State v. Kent (65 N. C. 311), 331. State v. Kesslering (12 Mo. 595), 492.
- State ex rel. v. Kiichli (53 Minn. 147), 158, 183.
- State v. Kinne (41 N. H. 238), 280, 531.
- State v. King (37 Iowa 462), 487, 499, 504, 543, 568, 590, 593, 597.
- State v. King (21 La. Ann. 201), 641.
- State ex rel. v. King (136 Mo. 309), 127.
- State v. King (86 N. C. 603), 539. State ex rel. Harty v. Kirk (46 Conn. 395), 147, 159, 175, 176.
- State v. Kirkley (29 Md. 85), 49, 442.
- State v. Knowles (16 Fla. 577), 53. State ex rel. v. Kramer (150 Mo. 89), 163.
- State v. Labatut (39 La. Ann. 513), 344.
- State ex rel. v. Laclede Gaslight Co. (102 Mo. 472), 102, 352, 909, 913.
- State v. La Crosse (107 Wis. 654),
- State v. Lafferty (5 Harr. 491), 483.State (Arnett) v. Lambertville (N. J. L. 1886, 6 Atl. Rep. 432), 828.
- State (Hunt) v. Lambertville (45 N. J. L. 279), 12, 122, 842.
- State v. Langston (88 N. C. 692), 23, 790.
- State ex rel. Whitely v. Lansing (27 Mich. 131), 385.
- State v. Larger (45 Mo. 510), 527. State v. Larkins (44 S. C. 362), 518.
- State v. Laverack (34 N. J. L. 201), 762.
- State ex rel. v. Lawrence (38 Mo. 535), 440.
- State v. Leatherman (38 Ark. 81), 546
- State v. Leaver (62 Wis. 387), 716, 718.

- State v. Lederer (52 N. J. Eq. 675), 699.
- State v. Ledford (3 Mo. 102), 792. State v. Lee (29 Minn. 445), 787, 792. 794.
- State v. Leiber (11 Iowa 407), 583. State ex rel. v. Levens (32 Mo. App. 520), 577.
- State v. Lewis (5 Mo. App. 465), 332, 752.
- State v. Lichtenstein (44 W. Va. 99), 401.
- State ex inf. v. Lindell Ry. Co. (151 Mo. 162), 418, 884.
- State v. Lindsay (34 Ark. 372), 24. State ex rel. v. Linn (44 Mo. 504), 67.
- State v. Liverpool, etc. Ins. Co. (40 La, Ann. 463), 631.
- State v. Lochte (45 La. Ann. 1405), 271, 466.
- State v. Lockwood (43 Wis. 403), 465.
- State v. Long Branch Comrs. (54 N. J. L. 484), 249.
- State (Leland) v. Long Branch Com'rs (42 N. J. L. 375), 282, 439.
- State v. Loomis (115 Mo. 307), 311, 778, 864.
- State v. Louisville, N. A. & C. R. Co. (86 Ind. 114), 716, 887.
- State (Nicoulin) v. Lowery (49 N. J. L. 391), 706.
- State v. Luce (9 Houst. 396), 97, 684, 698.
- State v. Ludwig (21 Minn. 202), 285, 787, 792.
- State ex rel. v. Lyons (31 Iowa 432), 441.
- State ex rel. Stark v. McArthur (13 Wis. 383), 463, 470.
- State v. McBride (4 Mo. 303), 169. State v. McCance (110 Mo. 398), 539, 541.
- State v. McCoy (116 N. C. 1059), 25.
- State v. McCulla (16 R. I. 196). 545, 707, 790.
- State v. McGinnis (38 Mo. App. 15), 541.
- State ex rel. v. McGrath 91 Mo. 386), 862.
- State v. McGrath (73 Mo. 181), 541.

State v. McKee (20 Or. 120), 199. State ex rel. v. McMahon (69 Minn. 265), 575, 706.

State v. McMahon (14 R. I. 285), 455.

State v. McNally (48 La. Ann. 1450), 232, 780, 784.

State v. McNinch (87 N. C. 567), 758.

State v. Mack (41 La. Ann. 1079), 466.

State ex rel. v. Macon County (41 Mo. 453), 329.

State v. Madison Council (15 Wis. 30), 145.

State ex rel. v. Madison Street Ry. Co. (72 Wis. 612), 880.

State v. Mahner (43 La. Ann. 496), 627, 681, 702.

State v. Main (69 Conn. 123), 665.

State v. Mainey (65 Ind. 404), 803. State v. Manley (107 Mo. 364), 539.

State v. Mannessier (32 La. Ann. 1308), 271.

State v. Mansfield (41 Mo. 470), 528.

State ex rel. v. Martin (27 Neb. 441), 115.

State ex rel. v. Martindale (47 Kan. 147), 779.

State ex rel. v. Mason (155 Mo. 486), 159, 254.

State ex rel. Hawes v. Mason (153 Mo. 23), 10, 607.

State v. Mason (3 Lea 649), 788, 795.

State v. Massey (103 N. C. 356), 328, 332.

State v. Mathews (44 Mo. 523), 225, 226.

State v. Mathis (21 Ind. 277), 874. State ex rel. v. May (106 Mo. 488), 86.

State ex rel. v. Maynard (14 Ill. 419), 468.

State ex rel. v. Mead (71 Mo. 266), 159, 190, 225, 226, 243, 703.

State ex rel Bownes v Meehan (45 N. J. L. 189), 153.

State ex rel. v. Meier (143 Mo. 439), 160.

State v. Merrill (37 Me. 329), 6, 671, 713, 776.

State v. Merrit (35 Conn. 314), 716, 717.

State v. Merritt (83 N. C. 677), 485, 490.

State v. Merry (3 Mo. 278), 345.

State v. Metcalf (65 Mo. App. 681), 754.

State ex rel. v. Meyers (80 Mo. 601, 646.

State v. Miller (41 La. Ann. 53), 744.

State ex rel. v. Miller (100 Mo. 439), 226, 315.

State ex rel. v. Miller (66 Mo. 328), 67.

State v. Miller (45 Mo. 495), 226. State (Gorum) v. Mills (24 N. J. L. 177), 343.

State ex rel v. Milwaukee (25 Wis. 122), 609.

State ex rel. v Milwaukee Co. Super. Ct. (105 Wis. 651), 262, 880.

State v. Minneapolis & St. L. Ry. Co. (39 Minn. 219), 200.

State ex rel. v. Minnesota Thresher Mfg. Co. (40 Minn. 213), 879.

State ex rel. v. M. K. & T. R. R. Co. (164 Mo. 208), 83, 112.

State ex rel. v. Mo. Pac. R. R. (92 Mo. 137), 351.

State ex rel. v. Mo. Pac. Ry. Co. (71 Mo. App. 385), 727.

State v. Mobile (5 Port 279), 762. State v. Mohr (55 Mo. App. 329), 755.

State v. Moody (24 Mo. 560), 527. State v. Moore (107 Mo. 78), 49. State v. Moore (113 N. C. 697), 631.

State v. Moores (55 Neb. 480), 66, 805.

State v. Morris (47 La. Ann. 1660), 295, 358, 705.

State v. Morris (47 La. Ann. 1660), 544.

State (Vanatta) v. Morristown (34 N. J. L. 445), 249, 260, 439, 829, 850.

State v. Morristown (33 N. J. L. 57), 340, 343, 346.

State v. Mosby (53 Mo. App. 571), 754, 755.

- State v. Moss (2 Jones Law 66), 512, 519, 525, 526.
- State ex rel v. Mote (48 Neb. 683), 441.
- State v. Mott (61 Md. 297), 31, 79, 80, 698.
- State v. Mott (111 Wis. 19), 156, 163.
- State ex rel Truesdale v. Moultrieville (1 Rice Law 158), 286, 502.
- State v. Muir (164 Mo. 610), 794. State v. Mumford (73 Mo. 647), 757.
- State ex rel v. Municipal Court (89 Wis. 358), 520.
- State ex rel v. Murphy (134 Mo. 548), 71, 129, 133, 724, 742, 886.
- State ex rel Laclede Gas Light Co. v. Murphy (130 Mo. 10), 724, 884.
- State ex rel Underground Service Co. v. Murphy (34 L. R. A. 369), 723
- State v. Namais (49 La. Ann. 618),
- State v. Nashville (83 Tenn. 697), 21, 26.
- State v. Natal (39 La. Ann. 439), 353, 513, 517.
- State v. Natal (39 La. Ann. 439), 513, 517.
- State v. Neel (48 Ark. 283), 576. State v. Neidt (N. J. Eq. 1890,
- 19 Alt. Rep. 318, 682, 699. State v. Nelson (66 Minn, 166),
- 767. State v. Nelson (19 Mo. 393),
- 755. State v. Newark (54 N. J. L. 102),
- 893. State v. Newark (54 N. J. L. 62),
- 808. State (Volk) v. Newark (47 N. J.
- L. 117), 8, 22, 25, 132. State (Trowbridge) v Newark (46
- N. J. L. 140), 450. State (Agens) v. Newark (37 N.
- J. L. 415), 819, 820. State v. Newark (34 N. J. L. 264),
- 707. State v. Newark (34 N. J. L. 236),
- State v. Newark (31 N. J. L. 360), 829.

- State (Doyle) v. Newark (30 N. J. L. 303), 191, 255, 439.
- State v. Newark (25 N. J. L. 399), 161, 240.
- State ex rel v. Newark (57 Ohio St. 430), 441.
- State ex rel v. Newman (96 Wis. 258), 450, 520, 754, 788.
- State v. New Brunswick (30 N. J. L. 395), 850.
- State ex rel v. New Orleans & C. R. Co. (37 La. Ann. 589), 19, 371.
- State v. New Orleans (32 La. Ann. 493), 385.
- State ex rel v. New Whatcom (3 Wash. 7), 225.
- State v. New York (10 N. Y. Super. Ct. 119), 913.
- State v. Noble (20 La. Ann. 325), 513.
- State v. Noblesville (157 Ind. 31), 46, 247, 250.
- State v. Nohl (113 Wis. 15), 232. State ex rel v. Noonan (59 Mo. App. 524), 398, 424, 657.
- State v. Norman (44 Mo. App. 302), 756.
- State v. Northern Bell M., etc., Co. (12 Nev. 89), 492.
- State v. Noyes (30 N. H. 279), 25, 671, 756.
- State v. O'Brian (68 Mo. 153), 153.
- State ex rel v. O'Brien (89 Mo. 631), 608.
- State v. Ochsner (9 Mo. App. 216), 756.
- State v. Oddle (42 Mo. 210), 582, 584, 588.
- State v. Oleson (26 Minn. 507), 787.
- State ex rel v. Omaha (14 Neb. 265), 716.
- State v. Omaha & C. B. Ry. Co. (113 Iowa 30), 3, 16, 249, 252, 894, 911.
- State ex rel v. Omaha & C. B. Ry. & B. Co. (91 Iowa 517), 899.
- State v. O'Neil (49 La. Ann. 1171), 269, 735.
- State (North Baptist Church) v. Orange (54 N. J. L. 111), 253, 861.

State (Morgan) v. Orange (50 N. J. & R. Co. (46 La. Ann. 1031), L. 389), 403. 762. State (Woodruff) v. Orange (32 N. State ex rel v. Perkins (139 Mo. J. L. 49), 851, 852, 106), 112. State v. Orr (68 Conn. 101), 705, State v. Perkins (24 N. J. L. 409), 469. 706. State v. Orr (61 Ohio St. 384), State ex rel v. Perpetual Ins. Co. 166, 170. (8 Mo. 330), 440. State v. Perth Amboy (51 N. J. State v. Overton (24 N. J. L. 435), 13, 32, 296. L. 406), 493. State ex rel v. Owsley (122 Mo. State v. Peters (67 Ohio St. 494), 68), 340, 607, 609, 782, 469. State v. Painfield (38 N. J. L. State ex rel v. Phillips (102 Mo. 95), 850. 664), 214. State v. Painter (67 Mo. 84), 538. State v. Pierce (65 Iowa 85), 43. State v. Pamperin (42 Minn. 320), State v. Pierce (35 Wis. 93), 13. 757. State ex rel v. Pinkerman (63 State v. Parker (26 Vt. 357), 49. Conn. 176), 163, 173. State v. Paris Ry. Co. (55 Tex. State v. Pitts (58 Mo. 556), 538. 76), 600. State (Flanagan) v. Plainfield (44 N. J. L. 118), 501, 557. State v. Parsons (124 Mo. 436), State (Boice) v. Plainfield (38 N. 398, 543, State (Greely) v. Passaic (42 N. J. L. 95), 219, 249, 850, 866. J. L. 429), 477, 487, 512, 518, State v. Platt (2 S. C. 150), 209. State v. Plunkett (18 N. J. L. 5), 542. State v. Patamia (34 La. Ann. 750), 787, 793. 271. State v. Pollard (6 R. I. 290), 25, State (Youngster) v. Paterson (40 336, 338, 790. State v. Pond (93 Mo. 606), 49. N. J. L. 244), 829. State (Danforth) v. Paterson (34 133, 299, 351. N. J. L. 163), 132, 262, 263, 429. State v. Portage (12 Wis. 562), State v. Paterson, etc., R. R. Co. 813. (45 N. J. L. 310), 79. State v. Porter (113 Ind. 79), 166. State v. Powell (100 N. C. 525), State ex rel v. Paterson (35 N. J. L. 190), 169, 174. 630, 654. State v. Patrick (65 Mo. State v. Powell (97 N. C. 417), App. 478, 525. 653), 133. State v. Payne (4 Mo. 377), 344, State v. Pratt (59 Vt. 590), 401. State v. Prescott (27 Vt. 194), 515. State v. Preston (Idaho 1894. 38 State v. Payson (37 Me. 361), 704. State v. Payssan (47 La. Ann. Pac. Rep. 694), 506, 555, 786, 1029), 289, 705. State v. Priester (43 Minn. 373), State ex rel Storts v. Peabody (63 168, 172, 646. Mo. App. 378), 465. State ex rel Vastine v. Probate State v. Peel Splint Coal Co. (36 Court (38 Mo. 529), 329. W. Va. 802), 768, 779. State v. Proctor (90 Mo. 334), 333, 334, 873. State v. Pender (66 N. C. 313),

664), 682. State (Del. & Alt. Tel. & Tel. Co.) v. Pensauken Tp. (67 N. J. L. 91), 231, 233, 720.

State v. Pendergrass (106 N. C.

State v. People's Slaughterhouse

Mo. 296), 433, 434.

453), 368.

State ex rel v. Public Schools (134

State ex inf. v. Rackliffe (164 Mo.

- State v. Railroad Commissioners (37 N. J. L. 228), 67.
- State ex rel v. Ramsey (48 Minn. 236), 310, 311.
- State v. Ramsey County District Court (38 Minn. 295), 835.
- State v. Ramsey Co. Dist. Ct. (33 Minn. 164), 901.
- State v. Rankin (11 S. Dak. 144), 400.
- State ex rel v. Ranson (73 Mo. 78), 245, 336.
- State v. Ray (131 N. C. 814), 357, 760.
- State ex rel v. Read (50 La. Ann. 445), 526.
- State v. Real Estate Banks (5 Ark. 595), 879.
- State ex rel v. Village of Reads (76 Minn, 69), 331.
- State v. Rebassa (9 La. Ann. 305), 630.
- State v. Reckards (21 Minn. 47), 496, 506.
- State v. Redmon (43 Minn. 250), 626.
- State v. Reis (38 Minn. 371), 797, 826.
- State ex rel v. Renick (157 Mo. 292), 52, 558, 560.
- State v. Rice (97 N. C. 421), 283.
- State v. Richards (32 W. Va. 348), 405.
- State v. Richardson (34 Minn. 115), 489, 493.
- State v. Rielly (4 Mo. 392), 538. State v. Riley (49 La. Ann. 1617), 449, 544.
- State v. Robbins (54 N. J. L. 566), 440.
- State v. Robertson (45 La. Ann. 954), 71, 682, 740.
- State v. Robinson (42 Minn. 107), 642.
- State v. Robitshek (60 Minn. 123), 482, 794.
- State v. Roby (142 Ind. 168), 665. State v. Roche (37 Mo. App. 480), 539, 772.
- State v. Ross (49 Mo. 416), 320, 333, 334.
- State ex rel v. Ross (136 Mo. 259), 578.

- State v. Rothschild (19 Mo. App. 137), 756.
- State v. Rouch (47 Ohio St. 478), 564.
- State v. Rowley (12 Conn. 101), 524.
- State v. Rucker (24 Mo. 557), 653 State v. Ruff (30 La. Ann. 497), 278, 482.
- State ex rel v. Ruhe (24 Nevada 251), 512, 515.
- State ex rel v. Rusk (55 Wis. 465), 81,
- State v. Russell (88 Mo. 648), 507.
 State v. Russell (17 Mo. App. 16), 756.
- State (Meday) v. Rutherford (52 N. J. L. 499), 834, 841.
- State ex rel v. St. Joseph (37 Mo. 270), 49.
- State ex rel Belt v. St. Louis (161 Mo. 371), 225.
- State ex rel v. St. Louis (158 Mo. 505), 127, 812.
- State ex rel v. St. Louis (169 Mo. 31), 230, 578.
- State ex rel v. St. Louis (56 Mo. 277), 828, 845, 853.
- State ex rel v. St. Louis Board of Health (16 Mo. App. 8), 537, 553, 698.
- State ex rel Subway Co. v. St. Louis (145 Mo. 551), 376, 723, 725.
- State ex rel v. St. Louis County (34 Mo. 546), 67, 607.
- State v. St. Louis County Dist. Ct. (61 Minn. 542), 823.
- State ex rel v. St. Louis Court of Appeals (99 Mo. 216), 577, 578. State ex rel Rutledge v. St. Louis
- School Board (131 Mo. 505), 433. State ex rel v. St. Louis & San Francisco Ry. Co. (117 Mo. 1), 340.
- State v. St. Paul (32 Minn. 329), 25, 763.
- State v. Sarradal (46 La. 700), 763.
- State v. Savannah (1 T. U. P. Charl. 235), 480, 523.
- State v. Scaggs (33 Mo. 22), 755.

- State v. Schemmer (42 La. Ann. 1166), 669, 708.
- State v. Schlenker (112 Iowa 642), 539, 767.
- State v. Schmidt (41 La. Ann. 27), 764.
- State ex rel v. Schoenig (72 Minn. 528), 452.
- State ex rel v. School Board (131 Mo. 505), 430, 433.
- State v. Scott (98 Tenn. 254), 401.
- State v. Scougal (3 S. D. 55), 682. State v. Schuchardt (42 La. Ann.
- 49), 734, 737. State v. Schuchmann (133 Mo.
- 111), 445, 613. State ex rel v. Schweickardt (109
- Mo. 496), 304, 646, 672, 805. State v. Seavey (22 Neb. 454), 66,
- State v. Segel (60 Minn. 507), 773. State ex rel St. Louis v. Seibert (123 Mo. 424), 683.
- State v. Sellner (17 Mo. App. 39), 756.
- State v. Severance (Me., 2 New Eng. Rep. 425), 471.
- State ex rel v. Severance (55 Mo. 378), 329, 340.
- State ex rel v. Severance (49 Mo. 401), 110, 446.
- State v. Sevier (117 Ind. 338), 43, 758.
- State ex rel Karr v. Shelby Co. Taxing Dist. (16 Lea. 240), 575, 788, 795.
- State v. Sheriff (48 Minn. 236), 710.
- State v. Sherrard (117 N. C. 716), 771.
- State v. Shortell (93 Mo. 123), 541. State v. Shroeder (51 Iowa 197), 674
- State v. Sickmann (65 Mo. App. 499), 309, 414, 659.
- State v. Silva (130 Mo. 440), 538. State ex rel v. Simmons Hdw. Co. (109 Mo. 118), 351.
- State v. Simonds (3 Mo. 414), 66, 344, 346, 794.
- State v. Sinks (42 Ohio St. 345),
- State v. Slaughter (70 Mo. 484), 382.

- State ex rel v. Slover (134 Mo. 10, 607), 329, 344.
- State v. Sly (4 Oreg. 277), 787, 795.
- State v. Small (31 Mo. 197), 646. State v. Smith (67 Conn. 541), 24, 76, 451, 614, 616.
- State v. Smith (8 Blackf. 489), 522.
- State v. Smith (31 Iowa 493), 660. State ex rel Parker v. Smith (22 Minn. 218), 148, 176, 178, 183, 252.
- State ex rel v. Smith (150 Mo. 75), 81.
- State ex rel v. Smith (101 Mo. 174), 572.
- State ex rel v. Smith (89 Mo. 408), 338.
- State v. Smith (44 Ohio St. 348), 805.
- State v. Smith (Or. 1890, 25 Pac. Rep. 389), 199.
- State v. Smith (10 R. I. 258), 541. State v. Smith (3 Heisk. 465), 43, 758.
- State v. Smith (72 Vt. 140), 640.
- State v. Smith (52 Wis. 134), 478. State v. Smithson (106 Mo. 149), 398, 405.
- State v. Smyth (14 R. I. 100), 767.
- State v. Snoddy (128 Mo. 523), 398.
- State v. Snyder (44 Mo. App. 429), 539.
- State v. Society, etc. (42 N. J. L. 504), 717.
- State v. Soragan (40 Vt. 450), 501, 591
- State v. South (136 Mo. 673), 445.
 State ex rel v. Southern Ry. Co. (100 Mo. 59), 578.
- State v. Spaude (37 Minn. 322), 340.
- State v. Speyer (67 Vt. 502), 693. State v. Starkey (49 Minn. 503), 224, 265, 735.
- State v. Steamship Constitution (42 Cal. 578), 422.
- State v. Stearns (31 N. H. 106), 480, 532.
- State v. Stephens (4 Tex. 137), 611.

- State v. Stevenson (109 N. C. 730), 403.
- State v. Stone (46 La. Ann. 147), 767.
- State ex rel v. Stone (120 Mo. 428), 160.
- State ex rel v. Stone (25 Mo. 555),
- State ex rel v. Stratton (136 Mo. 423), 329, 344.
- State v. Summerfield (107 N. C. 895), 682, 713.
- State v. Superior Court (105 Wis. 651), 257, 260.
- State v. Sutton (100 N. C. 474), 332.
- State v. Swearingen (12 Ga. 23), 120.
- State v. Sweeney (93 Mo. 38), 448. State v. Swindell (146 Ind. 527), .3, 337.
- State v. Taff (37 Conn. 392), 150. State v. Taft (118 N. C. 1190), 687, 695.
- State ex rel v. Tappan (29 Wis. 664), 104, 106.
- State v. Taylor (29 Ind. 517), 707.
- State v. Taylor (107 Tenn. 455). 93, 890.
- State v. Taylor (21 Wash. 672). 329.
- State v. Tenant (110 N. C. 609), 295, 357, 452, 738, 739.
- State v. Terrell (73 Conn. 407), 788
- State v. Thomas (118 N. C. 1221), 357.
- State v. Thomaston & Rockland (74 Me. 198), 802,
- State v. Thornton (37 Mo. 360), 792, 793.
- State (Clarke) v. Thornton (49 N. J. L. 349), 8.
- State v. Threadgill (76 N. C. 17), 466, 589.
- State v. Thurston (92 Mo. 325), 315.
- State ex rel Mitchell v. Tolan (33 N. J. L. 195), 153.
- State v. Topeka (36 Kan. 76), 25, 353, 512, 513, 516, 733.
- State v. Tosney (26 Mich. 262), 582.

- State ex rel v. Tracy (94 Mo. 217), 433, 657.
- State v. Traders' Bank (41 La. Ann. 329), 633.
- State (Wilson) v. Trenton (61 N. J. L. 599), 866.
- State (Wilson) v. Trenton (60 N. J. L. 394), 866.
- State (Trenton Horse R. Co.) v. Trenton (53 N. J. L. 132), 292, 299, 690, 747.
- State (Riley) v. Trenton (51 N. J. L. 498), 135, 144, 513, 787, 792.
- State (Hankinson) v. Trenton (51 N. J. L. 495), 144, 509, 533.
- State (Montgomery) v. Trenton (36 N. J. L. 79), 263, 428, 880, 882, 888, 890.
- State v. Tryon (39 Conn. 183). 4, 17.
- State v. Tsni Ho (47 La. Ann. 50), 569.
- State v. Tweedy (115 N. C. 704), 731.
- State v. Tyrrell (73 Conn. 407), 506.
- State v. Tyson (111 N. C. 687), 768.
- State v. Ulm (7 Ohio N. P. 659), 787.
- State v. Union (33 N. J. L. 350), 866.
- State (Pope) v. Union (32 N. J. L. 343), 200.
- State v. Union Cent. Life Ins. Co. (Idaho 1902, 67 Pac. Rep 647), 607.
- State v. Vail (57 Iowa 103), 564. State v. Vail (53 Iowa 550), 172, 201, 205.
- State ex rel v. Valle (41 Mo. 29), 365.
- State v. Van Buskirk (40 N. J. L. 463), 145.
- State ex rel v. Van Every (75 Mo. 530), 610.
- State v. Van Matre (49 Mo. 268), 528.
- State v. Vanosdal (131 Ind. 388), 166, 180.
- State v. VanSachs (45 La. Ann. 1416), 773.
- State v. Van Winkle (1 Dutch. 73), 206.

- State v. Vic De Bar (58 Mo. 395), 18.
- State ex rel v. Wabash, St. L. & P. Ry. Co. (83 Mo. 144), 751.
- State ex rel Beek v. Wagener (77 Minn. 483), 404.
- State ex rel v. Walbridge (119 Mo. 383), 18, 25, 78, 83, 87, 112, 117, 278, 328, 329, 342, 344, 345, 672, 787.
- State ex rel v. Walsh (69 Mo. 408), 365.
- State v. Wapies (12 La. Ann. 343), 641.
- State v. Ward (9 Heisk. 100), 113.
 State (Staates) v. Washington (45 N. J. L. 318), 179, 274, 288, 450, 761.
- State (Staates) v. Washington (44 N. J. L. 605), 180, 191, 234, 255, 282, 440, 638, 639, 761
- 282, 440, 638, 639, 761. State ex rel v. Weatherby (45 Mo. 17), 877.
- State v. Webber (107 N. C. 962), 72, 76, 79, 295, 450, 752.
- State v. Weber (111 Mo. 204), 541.
- State v. Welch (36 Conn. 215), 24, 451, 788, 792, 793.
- State v. Welch (21 Minn. 22), 507. State v. Wells (46 Iowa 662), 228,
- 365, 471, 530, 535, 537.
- State v. Welton (55 Mo. 288), 398. State v. Wentworth (65 Me. 234),
- 541. State v. West (34 Mo. 424), 657.
- State ex rel v. Western Irrigating Co. (40 Kan. 96), 879.
- State ex inf. v. West. Side Street Ry. Co. (146 Mo. 155), 894.
- State v. Wheeler (33 Neb. 563), 661.
- State v. Wheeler (44 N. J. L. 88), 707.
- State v. Wheelock (95 Iowa 577), 404.
- State ex rel v. Whitaker (48 La. Ann. 527), 279.
- State v. Whittaker (33 Mo. 457), 657.
- State v. Whitaker (114 N. C. 818), 525, 578.
- State ex rel v. Whitcomb (55 Ill. 172), 441.

- State v. White (33 La. Ann. 1218), 527.
- State v. White (64 N. H. 48), 628, 729.
- State v. White (76 N. C. 15), 466.State ex rel v. Whitehead (67 N. J. L. 405), 163, 173.
- State v. Whitney (41 Neb. 613), 546.
- State v. Wiggin (64 N. H. 508), 403.
- State v. Wilcox (42 Conn. 364), 648.
- State ex rel v. Wilcox (45 Mo. 458), 49, 65.
- State v. Winkelmeier (35 Mo 103), 49, 646.
- State v. Wilkesville (20 Ohio St. 288), 164, 165.
- State v. Williams (30 Me. 484), 472.
- State v. Williams (25 Me. 561), 150.
- State v. Williams (44 Mo. App. 302), 756.
- State v. Williams (35 Mo. App. 541), 445.
- State v. Williams (40 S. C. 373), 515, 518.
- State ex rel v. Williams (11 S. C. 288), 17, 518, 754, 787.
- State v. Williard (39 Mo. App. 251), 646.
- State v. Willingham (9 Wyo. 290),
- State ex rel v. Willis (66 Mo. 131), 333, 334.
- State v. Willis (37 Mo. 192), 657. State v. Wilson (43 N. H. 415),
- State v. Wilson (106 N. C. 718),
- State v. Wish (15 Neb. 448), 335. State v. Wister (62 Mo. 592), 278, 753, 792.
- State ex rel v. Withrow (108 Mo. 1), 578.
- State v. Wood (94 N. E. 855), 465.
- State v. Woodward (23 Vt. 92), 92, 93.
- State v. Wordin (56 Conn. 216), 24, 694.
- State v. Worth (95 N. C. 615), 283,

State v. Wray (72 N. C. 253), 541. State ex rel v. Yates (19 Mont. 239), 163, 167.

State v. Yopp (97 N. C. 477), 296, 665, 666, 668, 728,

State v. Young (17 Kan. 414), 24, 343.

State ex rel v. Young (29 Minn. 474), 49, 133, 385.

State v. Zeigler (32 N. J. L. 262), 79, 83, 134, 282, 468, 475, 508.

State v. Zophy (14 S. Dak. 119), 402.

State v. Zurich (49 La. Ann. 447), 738.

State Board of Education v. Aberdeen (56 Miss, 518), 339.

State Board of Health v. Roy (22 R. I. 538), 516.

State Center v. Barenstein (66 Iowa 249), 135, 294, 626.

State Freight Tax Case (15 Wall. 232), 395, 406, 408.

State Tax on Railway Gross Receipts (15 Wall, 284), 408, 412.

State Hospital v. Flaherty (134 Cal. 315), 334.

Stater v. Riley (49 La. Ann. 1617), 756.

Staude v. Board of Election Com'rs (61 Cal. 313), 340.

Steamboat Northern Indiana v. Milliken (7 Ohio St. 383), 468.

Steam Navigation Co. v. Morrison (13 Com. Bench N. S. 581), 56.

Steamship Co. v. Port Wardens (6 Wall. 31), 39, 417.

Stearns County v. St. Cloud, M. & A. R. Co. (36 Minn, 425), 719. Stebbins v. Mayer (38 Kan. 573),

229, 276.

Stebbins v. Merritt (10 Cush. 27), 200.

Steckert v. East Saginaw (22 Mich. 104), 173, 188, 204, 206.

Steele v. Burkhardt (104 Mass. 59), 604, 605.

-Steele v. River Forest (141 III. 302), 853, 855, 869, 870.

Steffin v. St. Louis (135 Mo. 44), 368.

Steffen v. Fox (124 Mo. 630), 828, 851, 870, 871.

Steffy v. Monroe City (135 Ind: 466), 289, 757.

Stehmeyer v. Charleston (53 S. C. 259), 665.

Stein v. Mobile (49 Ala. 362), 611.Steines v. Franklin County (48 Mo. 167), 126, 675.

Steinlein v. Halstead (52 Wis. 289), 828.

Steinmuller v. Kansas City (3 Kan. App. 45), 831.

Steinmeyer v. St. Louis (3 Mo. App. 256), 692.

Stephan v. Daniels (27 Ohio St. 527), 836, 839.

Stephani v. Brown (40 Ill. 428). 716.

Stephens v. Ballou (27 Kan. 594), 333.

Stephens v. People ex rel (89 Ill. 337), 547.

Stephenson v. Mo. Pac. Ry. Co. (68 Mo. App. 642), 888, 891.

Sterling v. Camden (65 N. J. L. 190), 451.

Sterling v. Galt (117 Ill. 11), 848, 855.

Sternberg v. State (36 Neb. 307), 895, 911.

Stetson v. Faxon (19 Pick. 147), 63.

Stetson v. Kempton (13 Mass. 272), 71, 73, 75, 104.

Steuart v. Baltimore (7 Md. 500), 525.

Stevens v. Chicago (48 III. 498), 532.

Stevens v. Com. (6 Met. 241), 499. Stevens v. Dimond (6 N. H. 330), 51, 493.

Stevens v. Kansas City (146 Mo. 460), 478, 522, 565.

Stevens v. Merchantville (62 N. J. L. 167), 896.

Stevens v. Muskegon (111 Mich. 72), 915.

Stevens v. St. Mary's T. School (144 Ill. 336), 260, 431.

Stever v. McConnell (10 Ohio Dec. 573), 450.

Stevenson v. Bay City (26 Mich. 44), 15, 46, 160, 206, 208, 212, 245, 592, 600.

- Stevenson v. Joy (152 Mass. 45), 457.
- Stewart v. Clinton (79 Mo. 603), 115, 581, 598, 600, 675, 828, 845.
- Stewart v. Council Bluffs (58 Iowa 642), 195.
- Stewart v. Hood (10 Ala. 600), 531,
- Stewart v. Kehrer (115 Ga. 184), 623, 629.
- Stewart v. Otoe County (2 Neb. 177), 113.
- Stewart v. Stringer (41 Mo. 400), 481
- Stier v. Oskaloosa (41 Iowa 353), 582.
- Stifel v. McManus (74 Mo. App. 558), 848, 851.
- Stifel v. Southern Cooperage Co. (38 Mo. App. 340), 131, 132.
- Stiles v. Jones (3 Yeates 491), 610.
- Still v. Lansingburgh (16 Barb. 107), 92.
- Stillwater v. Moor (Okla, 1893, 33 Pac. Rep. 1024), 249.
- Stinson v. Browning (L. R. 1 C. P. 321), 44.
- Stockard v. Morgan (185 U. S. 27), 400.
- Stockdale v. School Dis, (47 Mich. 226), 194.
- Stockton, ex parte (33 Fed. Rep. 95), 400.
- Stockton v. Powell (29 Fla. 1), 178.
- Stockton v. Skinner (53 Cal. 85), 855.
- Stoddard v. Gilmann (22 Vt. 568), 150, 194, 320.
- Stoddard v. Johnson (75 Ind. 20), 177.
- Stokes v. New York City (14 Wend. 87), 567, 769.
- Wend. 31), 301, 103. Stone v. Bank of Commerce (174 U. S. 412), 374.
- Stone v. Cambridge (6 Cush. 270), 855.
- Stone v. Graves (8 Mo. 149), 474. Stone v. Hamilton (8 Cush. 592),
- 151. Stone v. Mississippi (101 U. S.
- Stone v. Mississippi (101 U. S. 814), 321, 419, 665.

- Stone v. School Dist. (8 Cush, 592), 148.
- Stone v. Small (54 Vt. 498), 8,
- Stone v. State (12 Mo. 400), 653. Stone v. Wisconsin (94 U. S. 181),
- Storm v. Odell (2 Wend. 287), 570. Story v. Bayonne (35 N. J. L. 335), 842.
- Story v. New York Elevated R. Co. (90 N. Y. 122), 96.
- Stoutenburgh v. Hennick (129 U. S. 141), 66, 395, 400, 622.
- Stoughton v. Atherton (12 Met. 105), 148, 151, 212, 214.
- Stowe v. Wyse (7 Conn. 214), 175. Strahl, ex parte (16 Iowa 369), 155.
- Stratford v. Montgomery (110 Ala. 619), 401.
- Stratman, ex parte (39 Cal. 517),
- Stratton v. Lowell (181 Mass. 511), 207.
- Straub v. Pittsburgh (138 Pa. St. 356), 238.
- Strauder v. West Virginia (100 U. S. 303), 354.
- Strauss v. Cincinnati (24 Wkly. Law Bul. 422), 839.
- Strauss v. Pontiac (40 III. 301), 36, 123, 646, 672.
- Strauss v. Waycross (97 Ga. 475), 784.
- Street v. Francis (3 Ohio 277), 562.
- Street v. Verney Electrical Supply Co. (Ind. 1903, 61 L. R. A. 154), 864.
- Street Ry. Co. of Grand Rapids v. West Side Street Ry. Co. (48 Mich. 433), 916.
- Street Opening & Improvement Board, in re (133 N. Y. 436), 830.
- Street Opening Board, in re (82 Hun. 580), 830.
- Stretch v. Hoboken (47 N. J. L. 268), 835.
- Striker v. Kelly (7 Hill 9), 187, 188, 846.
- Strohm v. Iowa City (47 Iowa 42), 169.

- Stromburg v. Earick (6 B. Mon. 578), 538.
- Strong v. Brooklyn (68 N. Y. 1), 93.
- Strong v. District of Columbia (4 Mackey 242), 145.
- Strosser v. Ft. Wayne (100 Ind. 443), 140.
- Stroud v. Consumers' Water Co. (56 N. J. L. 422), 173, 440.
- Strowbridge v. Portland (8 Oreg. 67), 839, 841.
- Stryker v. New York (19 Johns. 179), 674.
- Stuart v. Havens (17 Neb. 211), 717.
- Stuart v. Palmer (74 N. Y. 183), 444.
- Stuhr v. Hoboken (47 N. J. L. 147), 48, 248, 252.
- Stull v. De Mattos (23 Wash. 71), 631, 653.
- Stutsman v. McVicar (111 Iowa 40), 237, 242.
- Stuyvesant v. New York, etc. (7 Cow. 588), 224, 257, 356, 490.
- Stuyvesant v. Pearsall (15 Barb. 244), 895.
- Suell v. Belleville (30 Up. Can. Q. B. 81), 442.
- Sullivan v. Leadville (11 Colo. 483), 187, 210.
- Sullivan v. Mo. Pac. Ry. Co. (117
- Mo. 214), 748. Sullivan v. Pausch (5 Ohio Cir. Ct. Rep. 196), 186, 187.
- Sullivan v. People (15 Ill. 233), 332.
- Sullivan v. Phillips (110 Ind. 320), 118.
- Summerville v. Pressley (33 S. C. 56), 231, 671, 689, 698,
- Sumter v. Deschamps (4 S. C. 297), 83.
- Supervisors v. Gorrell (20 Gratt. 484), 577.
- Supervisors of Schuyler Co. v. People ex rel (25 Ill. 181), 186, 190, 203.
- Surber v. McClintic (10 W. Va. 236), 774.
- Sutton v. McConnell (46 Wis. 269), 478, 528, 537.

- Swain v. Comstock (18 Wis. 463), 582.
- Swain v. Fulmer (135 Ind. 8), 829.
- Swan v. Colville (19 R. I. 161), 810.
- Swann, ex parte (96 Mo. 44), 49, 576.
- Swann v. Buck (40 Miss. 268), 385. Swann v. Cumberland (8 Gill. 150), 183.
- Swarth v. People (109 III. 621), 626, 637, 638, 647.
- Swartz v. Page (13 Mo. 603), 92.Sweeney v. K. C. Cable Ry. Co. (150 Mo. 385), 749.
- Sweet v. Wabash (41 Ind. 7), 647.
 Swenson v. Lexington (69 Mo. 157), 891.
- Swigert, in re (119 Ill. 83), 81.
- Swingley v. Haynes (22 III. 214), 482.
- Swift v. Klein (163 III. 269), 36, 298
- Swift v. People (162 III. 534), 135. 703.
- Swift v. Topeka (43 Kan. 671), 442, 538, 727, 728.
- Swift v. Wayne Circuit Judges (64 Mich. 479), 569.
- Swindell v. State ex rel Maxey 143 Ind. 153), 171, 189, 314, 337.
- Swineford v. Franklin County (73 Mo. 279), 876.
- Sylvester Coal Co. v. St. Louis (130 Mo. 323), 436, 477, 768.

T.

- Taber v. Grafmiller (109 Ind. 206), 856.
- Taber v. New Bedford (177 Mass. 197), 639.
- Taber v. New Bedford (135 Mass. 162), 808.
- Tacoma v. Lillis (4 Wash, 797), 8.
- Tacoma Gas & Electric Light Co. v. Tacoma (14 Wash. 288), 102, 342.
- Tacoma, etc., Co. v. Tacoma (14 Wash. 700), 908.
- Tainter v. Worcester (123 Mass. 311), 677, 798.

- Taintor v. Morristown (33 N. J. L. 57), 812.
- Talbot Co. v. Queen Anne Co. (50 Md. 245), 806.
- Talbutt v. State (39 Tex. Crim. App. 64), 400.
- Talcott v. Buffalo (125 N. Y. 280), 259, 260.
- Talmage v. Fire Department of New York (24 Wend. 235), 550,
- Tampa v. Salomonson (35 Fla. 446), 232, 449.
- Tamaqua, etc. Co. v. Inter-County Street Ry. Co. (167 Pa. St. 91), 895.
- Tanner v. Albion (5 Hill 121), 756. Tarkio v. Cook (120 Mo. 1), 185, 224, 232, 284, 425, 570, 597, 672, 756, 761.
- Tash v. Adams (10 Cush. 252), 103.
- Tate v. M. K. & T. Ry. Co. (64 Mo. 149), 891.
- Tatham v. Philadelphia (11 Phil. 276), 103.
- Taunton v. Taylor (116 Mass. 254), 697.
- Tax Collector v. Dendinger (38 La, Ann. 261), 76.
- Taylor, ex parte (87 Cal. 91), 719. Taylor v. Americus (39 Ga. 59),
- 36, 534, 571, 572. Taylor v. Boyd (62 Tex. 533), 823.
- Taylor v. Carondelet (22 Mo. 105), 17, 257, 273, 276.
- Taylor v. Goodwin (42 Q. B. Div. 228), 727.
- Taylor v. Griswold (14 N. J. L. 222), 22, 27, 292.
- Taylor v. Henry (2 Pick. 397), 179, 210, 212, 214.
- Taylor v. L. S. & M. S. R. R. Co. (45 Mich. 74), 54, 57, 62.
- Taylor v. Lambertville (43 N. J. Eq. 107), 3, 842.
- Taylor v. McFadden (84 Iowa 262), 118, 243, 609, 610, 838.
- Taylor v. Owensboro (98 Ky. 271), 23, 285, 544, 786, 789, 793.
- Taylor v. Palmer (31 Cal. 241), 237, 241, 251, 846.
- Taylor v. Pine Bluff (34 Ark. 603), 83, 576, 768.
- Taylor v. Porter (4 Hill 140), 777.

- Taylor v. Reynolds (92 Cal. 573), 520.
- Taylor v. St. Louis (14 Mo. 20), 675, 839.
- Taylor v. State (35 Wis. 298), 284. Taylor v. Tacoma (8 Wash. 174), 8.
- Taylor v. Union Traction Co. (184 Pa. St. 465), 727, 728.
- Taylor, Cleveland & Co. v. Pine Bluff (34 Ark. 603), 655.
- Teass v. St. Albans (68 W. Va. 1), 721.
- Teegarden v. Racine (56 Wis. 545), 118.
- Teft v. Size (10 III. 432), 246, 594. Telegraph Co. v. Texas (105 U. S. 460), 408.
- Telephone Co. v. Oshkosh (62 Wis. 32), 75.
- Tell v. Fonda (4 Johns. 304), 498. Temperance Hall Assn. v. Giles (33 N. J. L. 260), 717.
- Temple v. Sumner (51 Mass. 13), 658.
- Templeton v. Tekamah (32 Neb. 542), 639, 661.
- Ten Eyck v. Delaware & Raritan Canal Co. (18 N. J. L. 200), 53.
- Ten Eyek v. Pontiac R. R. etc. Co. (74 Mich. 226), 164.
- Tennant v. Crocker (85 Mich. 328), 119 168, 202, 846.
- Tenny v. Lenz (16 Wis. 566), 640, 733.
- Terre Haute v. Kersey (Ind. 1902, 64 N. E. Rep. 469), 630, 643.
- Terre Haute v. Lake (43 Ind. 480), 50, 320, 337, 581.
- Terre Haute v. Terre Haute Waterworks Co. (94 Ind. 305), 91.
- Terre Haute v. Turner (36 Ind. 522), 719.
- Terre Haute, etc., R. R. v. Mc-Corkle (140 Ind. 613), 533.
- Terre Haute & I. R. Co. v. Voelker (129 Ill. 540), 238, 595, 599.
- Terrell, ex parte (40 Tex. Cr. App. 28), 613.
- Terry v. State (22 Ohio Cir. Ct. 16), 527.
- Tesh v Com. (4 Dana 522), 463, 464.
- Teter v. Clayton (71 Ind. 237), 332.

- Texas Banking & Ins. Co. v. State (42 Tex. 636), 631.
- Texas & N. O. R. R. v. Syfan (91 Tex. 562), 526.
- Textor v. Baltimore & Ohio R. R. Co. (59 Md. 63), 750.
- Thamm, ex parte (10 Mo. App. 595), 560.
- Thatcher v. Toledo (19 Ohio Cir. Ct. Rep. 311), 189.
- The Binghamton Bridge (3 Wall. 51), 306, 378.
- The Canadian Atlantic R. W. Co. v. Ottawa (8 Ont. Rep. 183), 181.
- Theilan v. Porter (14 Lea. 622), 706.
- Theisen v. McDavid (34 Fla. 440), 513, 520, 759, 786.
- The Laundry License Case (22 Fed. Rep. 701), 616, 634.
- The Phillip Semmer Glass Co. v. Nassau Show Case Co. (28 Misc. 577), 469.
- Third Muncipality of New Orleans v. Blanc (1 La. Ann. 385), 731.
- Third Municipality of New Orleans v. Ursuline Nuns (2 La. Ann. 611), 128.
- Themanson v. Kearney (35 Neb. 881), 834.
- Thomas, ex parte (71 Cal. 204), 401, 402.
- Thomas, in re (53 Kan. 659), 228, 786.
- Thomas v. Ashland (12 Ohio St. 124), 519, 576.
- Thomas v. Citizens' Horse R. R. Co. (104 Ill. 462), 176.
- Thomas v. Gain (35 Mich. 155), 444.
- Thomas v. Grand Junction (13 Colo. App. 80), 49, 224, 227.
- Thomas v. Hot Springs (34 Ark. 553), 79, 356.
- Thomas v. Hunt (134 Mo. 392), 890, 891.
- Thomas v. Mason (39 W. Va. 526), 693.
- Thomas v. Mead (36 Mo. 232), 577.
- Thomas v. Mt. Vernon (9 Ohio 290), 471.

- Thomas v. Richmond (12 Wall. 349), 23, 72.
- Thomas v. Snead (99 Va. 613), 613, 657.
- Thomas v. State (5 How. 20), 463. Thomas v. State (6 Mo. 457), 508.
- Thomason v. Ashworth (73 Cal. 73), 69, 329, 340, 342.
- Thomason v. Ruggles (69 Cal. 465), 805.
- Thompson, in re (117 Mo. 83), 576, 772.
- Thompson v. Alameda County Suprs. (111 Cal. 553), 895.
- Thompson v. Camp Meeting Assn. (55 N. J. L. 507), 630.
- Thompson v. Carroll (22 How. 422), 21, 23.
- Thompson v. Citizens' St. Ry. (152 Ind. 461), 32, 352.
- Thompson v. Dodge (58 Minn. 555), 727.
- Thompson v. Evans (49 Ill. App. 289), 738.
- Thompson v. Highland Park (187 Ill. 265), 224, 329.
- Thompson v. Hoge (30 Cal. 179), 846.
- Thompson v. Jackson (93 Iowa 376), 472.
- Thompson v. Lee County (3 Wall. 327), 72, 74, 186.
- Thompson v. Milwaukee (69 Wis. 492), 225, 226.
- Thompson v. Mt. Vernon (11 Ohio St. 688), 26.
- Thompson v. Pittston (59 Me. 545), 106.
- Thompson v. Richmond (12 Wall 349), 21.
- Thompson v. Schermerhorn (6 N. Y. 92), 83, 134, 809.
- Thompson v. Schermerhorn (9 Barb. 152), 808.
- Thompson v. State (45 Ind. 495), 541.
- Thompson v. State (17 Tex. App. 253), 404.
- Thompson v. Summer (9 Wash. 310), 838, 847.
- Thompson-Houston Electric Co. v.

- Newton (42 Fed. Rep. 723), 117, 798, 837.
- Thomson v. Boonville (61 Mo. 282), 4, 5, 115, 133, 236, 237, 808.
- Thomson v. People (184 Ill. 17), 326.
- Thorn v. Atlanta (77 Ga. 661), 650. Thornhill v. Stephany (66 N. J. L. 171), 255.
- Thornton, ex parte (12 Fed. Rep. 538), 402, 632.
- Thornton v. Campton (18 N. H. 20), 207.
- Thornton v. The National Exchange Bank (71 Mo. 221), 90.
- Thornton v. Sturgis (38 Mich. 639), 247, 250, 253.
- Thorpe v. Rutland & Burlington R. R. Co. (27 Vt. 140), 666.
- Thrift v. Elizabeth City (122 N. C. 31), 308, 902.
- Thurston v. St. Joseph (51 Mo. 510), 708, 799, 890.
- Tibbetts v. West & S. T. Street R. Co. (153 Ill. 147), 895.
- Tiedke v. Saginaw (43 Mich. 64), 499.
- Tie Loy, in re (26 Fed. Rep. 611), 294, 312.
- Tiernan v. Rinker (102 U. S. 123),
- 402. Tierney v. Brown (65 Miss. 563),
- 177, 179. Tierney v. Dodge (9 Minn. 166), 562, 569, 570.
- Tifft v. Buffalo (65 Barb. 460), 428.
- Tift v. Buffalo (82 N. Y. 204), 867. Tift v. Jones (77 Ga. 181), 601.
- Tilleny v. Knoblauch (73 Minn. 108), 467.
- Tillman v. Otter (93 Ky. 600), 178. Tims v. State (26 Ala. 165), 333,
- 516. Tingue v. Port Chester (101 N. Y. 294), 900.
- Tinkham v. Greer (11 Kan. 299),
- Tippecanoe County Comrs. v. Chisson (7 Ind. 688), 476, 482.
- son (7 Ind. 688), 476, 482. Tipton v. Norman (72 Mo. 380),
- 6, 245, 250, 270, 294, 597. Tipton v. State (2 Yerg. 542), 758.
- Tisdale v. Minonk (46 Ill. 9), 247, 251, 545, 546, 567.

- Tissot v. Great Southern T. & T. Co. (39 La. Ann. 996), 682.
- Title Guarantee, etc., Co. v. Chicago (162 Ill. 505), 859.
- Tocci v. New York (25 N. Y. Supp. 1089), 806.
- Toledo v. Edens (59 Iowa 352), 36, 37, 283, 349, 674.
- Toledo v Lake Shore & Michigan Southern Ry. Co. (2 Ohio Cir. Ct. Dec. 450), 368, 845.
- Toledo Consolidating St. Ry. Co. v. Toledo Elec. St. Ry. Co. (6 Ohio Cir. Ct. Rep. 362), 596.
- Toledo P. & W. Ry. Co. v. Chenoa (43 III. 209), 270.
- Tombaugh v. Grogg (146 Ind. 99), 176.
- Tomlin v. Cape May (63 N. J. L. 429) 134, 282, 765.
- Tomlinson v. Jessup (15 Wall 454), 323.
- Tonnage Tax Cases (12 Wall. 204), 39.
- Tonawanda v. Lyon (181 U. S. 389), 821.
- Topeka v. Boutwell (53 Kan. 20), 561, 780.
- Topeka v. Huntoon (46 Kan. 634), 174.
- Topeka v. Raynor (61 Kan. 10), 224.
- Topliff v. Chicago (196 Ill. 215), 851.
- Toppan v. Young (9 Daly 357), 128.
- Torbert v. Lynch (67 Ind. 474), 279.
- Torpedo Co. v. Clarendon (19 Fed. Rep. 231), 437.
- Torr v. Corcoran (115 Ind. 188), 177.
- Torrent v. Muskegon (47 Mich. 115), 797, 838.
- Torrey v. Millbury (21 Pick. 64), 99, 150, 152.
- Tower v. Moore (52 Mo. 118), 528. Tower v. Tower (18 Pick. 262), 640.
- Town of Barton v. Hamilton (18 Ontario Rep. 199), 36.
- Towns v. Tallahassee (11 Fla. 130), 638.

- Townsend v. Hoadley (12 Conn. 541), 488, 736.
- Townsend v. Hoyle (20 Conn. 1), 223.
- Townsend v. Jersey City (26 N. J. L. 444), 817.
- Township of Nissouri v. Horseman (16 Up. Can. Q. B. 583), 180.
- Tracey v. People (6 Colo. 151), 3, 13, 187, 202, 204, 592, 593.
- Tracy v. Williams (4 Conn. 107), 492.
- Trading Stamp Co. v. Memphis (101 Tenn. 181), 260, 262.
- Train v. Boston Disinfecting Co. (144 Mass. 523), 668, 691, 693.
- Transportation Co. v. Chicago (99. U. S. 635), 880.
- Transportation Co. v. Parkersburg (107 U. S. 691), 415, 416, 438.
- Transportation Co. v. Wheeling (99 U. S. 273), 409, 415.
- Traphagen v. Jersey City (52 N. J. L. 65), 305.
- Traphagen v. Jersey City (29 N. J. Eq. 206) 875.
- Travers, ex parte (3 La. Ann. 693), 563.
- Treasurer v. Wygall (46 Tex. 447), 383.
- Trenton v. Clayton (50 Mo. App. 535), 83, 626.
- Trenton v. Coyle (107 Mo. 193), 4, 5, 236, 237, 828, 845.
- Trenton v. Devorss (70 Mo. App. 8), 491.
- Trenton Horse Ry. Co. v. Trenton (53 N. J. L. 132), 590.
- Trezvant v. State (Tex. Cr. App. 1892, 20 S. W. Rep. 582), 641.
- Tribune Association v. New York (48 Barb. 240), 385.
- Trigally v. Memphis (6 Coldw. 382), 26, 270, 516, 670.
- 382), 26, 270, 516, 670. Trimble v. Chicago (168 III, 567), 319, 849.
- Trinity Church v. Higgins (4 Rob. 1), 839.
- Troy v. Atchison & N. R. R. Co. (11 Kan. 519), 212, 596, 600.
- Troy v. Cheshire R. Co. (23 N. H. 83), 719.

- Troy v. Winters (4 Thomp. & C. 256), 553, 735, 739.
- Troy v. Winters (2 Hun. 63), 734. Truchelut v. Charleston (1 Nott.
- & M. 227), 250, 252, 265, 465. Truesdale v. Rochester (33 Hun.
- 574), 241. Truman v. San Francisco (110 Cal.
- 128), 610.
- Trumbull v. White (5 Hill 46), 611.
- Trustees of Union College, in re (129 N. Y. 308), 869.
- Trustees v. People (87 III. 303), 301.
- Trustees, etc., v. Erie (31 Pa. St. 515), 185, 245, 347.
- Trustees Presby. Ch. v. State Board, etc. (55 N. J. L. 436), 894.
- Tuck v. Waldron (31 Ark. 462), 79, 757.
- Tuckahoe Canal Co. v. Railroad Co. (11 Leigh. 42), 304.
- Tucker v. Aiken (7 N. H. 113), 152.
- Tucker v. Iredell Co. Justices (13 Iredell 434), 193, 194.
- Tudor v. Chicago & South Side Rapid Transit R. Co. (154 Ill. 129), 17.
- Tuerman, in re (48 Fed. 167), 401. Tufts v. Charlestown (98 Mass. 583), 811.
- Tugman v. Chicago (78 Ill. 405), 21, 292, 310, 699.
- Tulare v. Hevren (126 Cal. 226), 584,
- Tulloss v. Sedan (31 Kan. 165), 611.
- Tunkhannock Borough, in re (3 Pa. Co. Ct. Rep. 480), 246.
- Turley v. Logan County (17 Ill. 151), 213.
- Thurlow Medical Co. v. Salem (67 N. J. L. 111), 135.
- Turner v. Detroit (104 Mich. 326), 134.
- Turner v. Maryland (107 U. S. 38), 768.
- Tuskaloosa v. Halezstein (134 Ala. 636), 656.
- Tuskaloosa v. Wright (2 Porter 230), 207.

Tuttle, ex parte (91 Cal. 589), 756.

Tuttle v. State (4 Conn. 68), 737. Tuttle v. Weston (59 Wis. 151), 115, 149, 151.

Twelfth Street Market v. Philadelphia, etc., Ry. Co. (142 Pa. St. 580), 761.

Twilley v. Perkins (77 Md. 252), 728.

Tylee v. County of Waterloo (9 Up. Can. Q. B. 588), 222.

Tyler v. Columbus (6 Ohio Cir. Ct. Rep. 224), 845.

Tyler v. Lawson (30 N. J. L. 120), 488, 503.

Tyra v. Com. (2 Metc. 1), 528.

Tyroler v. Gummersbach (28 Misc. 151), 469.

Tyson v. Halifax Tp. School District (51 Pa. St. 9), 105.

Tyson v. Postlethwaite (13 III. 728), 329.

U.

Udall v. Brooklyn (19 Johns 175), 674.

Uffert v. Vogt (65 N. J. L. 377), 22.

Ulman v. Baltimore (72 Md. 587),

Ulrich v. St. Louis (112 Mo. 138), 270, 561,

Underwood, in re (30 Mich. 502), 575.

Underwood v. Green (42 N. Y. 140), 705.

Union Depot Co. v. St. Louis (76 Mo. 393), 894, 895, 903.

Union Depot Co v. St. Louis (8

Mo. App. 412), 887. Union Depot Railway Co. v. Smith

(16 Colo. 361), 22. Union Depot Ry. Co. v. Southern

R. R. Co. (105 Mo. 562), 17, 345.

Union Elevator Co. v. K. C. S. B. Ry. Co. (135 Mo. 353), 890.

Union Pac. Ry. Co. v. Cheyenne (113 U. S. 516), 340.

Union Pac. R. R. Co. v. McNally (54 Neb. 112), 248, 251.

Union Pac. R. Co. v. Montgomery (49 Neb. 429), 46, 248, 251.

Union Pac. R. Co. v. Ruzicka (Neb. 1902, 91 N. W. Rep. 543), 589, 599.

Union Pac. R. Co. v. Ryan (2 Wyo. 391), 117.

Union Ry. Co. v. Cambridge (11 Allen 287), 715.

Union Refrigerator Transit Co. v. Lynch (177 U. S. 149), 409.

Union Trust Co. v. Richmond City R. Co. (154 Ind. 291), 897.

Union Trust Co. v. Trumbull (137 Ill. 146), 327.

Unionville v. Martin (95 Mo. App. 28), 116, 124, 133, 192, 581.

United Brethren Church v. Van Dusen (37 Wis. 54), 172.

United Hebrew Assn. v. Benshimol (130 Mass. 325), 335.

United Railway & E. Co. v. Hayes (92 Md. 490), 337.

U. S. v. American Waterworks Co. (37 Fed. Rep. 747), 907.

U. S. v. Ballin (144 U. S. 1), 167.U. S. v. B. & O. R. R. Co. (17 Wall. 322), 67.

U. S. v. Chouteau (102 U. S. 603), 478.

U. S. v. Claffin (97 U. S. 546), 339.United States v. Conway (Hemp. 313), 372.

United States v. Cruikshank (92 U. S. 542), 410.

U. S. v. Des Moines N. & R. Co. (142 U. S. 510), 260.

U. S. v. Gates (148 U. S. 134), 779.

U. S. v. Green (19 D. C. 230), 511.

United States v. Hart (Peters C. C. 390), 418.

United States v. Holly (3 Cranch. 656), 788, 792.

U. S. v. Jefferson Co. (5 Dill. 310), 371.

United States v. Martin (94 U. S. 400), 779.

U. S. v. Maurice (2 Brock. 96), 9.
United States v. New Orleans (98
U. S. 381), 370, 607, 609.

U. S. v. Perkins (116 U. S. 483), 7.

United States v. Philbrick (120 U. S. 52), 331, 332.

U. S. v. Shanks (15 Minn. 369), 577.

United States v. Tynen (11 Wall. 88), 328, 334, 339.

United States v. Union Pac. R. Co. (98 U. S. 569), 382.

U. S. v. Wells (2 Cranch C. C. 45), 788.

United States Distilling Co. v. Chicago (112 Ill. 19), 635.

United States Illuminating Co. v. Grant (55 Hun. 222), 722.

United States Mortgage Co. v. Gross (93 Ill. 483), 265, 266.

Updegraff v. Crans (47 Pa. St. 103), 154, 155.

Upington v. Oviatt (24 Ohio St. 232), 190, 198, 245, 592, 830.

Upper Hanover Road (44 Pa. St. 277), 253.

Uridias v. Morrill (22 Cal. 473), 461, 463, 464, 468.

Urquhart v. Ogdensburgh (97 N. Y. 238), 549.

v.

Vail v. K. C. C. & S. Ry. (28 Mo. App. 372), 731.

Vail v. Owen (19 Barb. 22), 258. Valle v. Ziegler (84 Mo. 214), 430. Valparaiso v. Gardner (97 Ind. 1),

121, 140, 260, 431. Valverde v. Shuttuck (19 Colo. 104), 141.

Van Alstine v. People (37 Mich. 523), 46, 48, 221, 247, 250.

Van Antwerp, in re (56 N. Y. 261), 805.

Van Baalen v. People (40 Mich. 258), 635, 654, 774.

Van Brunt v. Flatbush (128 N. Y. 50), 831.

Van Buren v. Wells (53 Ark. 368), 24, 360, 552, 590, 593, 786, 792,

794. Van Buskirk v. Newark (26 Ohio St. 37), 574.

Vance v. Hadfield (22 N. Y. St. 858), 43, 770.

Vance v. Little Rock (30 Ark. 435), 24.

Vance v. Vance (108 U. S. 514), 382.

Vancouver v. Wintler (8 Wash. 378), 233, 234.

Van Denburgh v. Greenbush (66 N. Y. 1), 332.

Vanderbeck v. Hendry (34 N. J. L. 467), 718.

Vanderbeck v. Jersey City (44 N. J. L. 626), 830.

Vanderbilt v. Adams (7 Cow. 349), 356.

Vanderslice v. Philadelphia (103 Pa. St. 102), 680.

Van de Vere v. Kansas City (107 Mo. 83), 680, 686, 697.

Vandewater v. New York (2 Sandf. Sup. Ct. 258), 38.

Vandine, in re (6 Pick. 187), 33, 35, 297, 299, 303, 488, 655, 705, 706.

Van Doran v. New York (9 Paige 388), 807.

Van Dyke v. Cincinnati (1 Disney 532), 62, 587, 720.

Van'e v. Evanston (150 III. 616), 850.

Van Hastrup v. Madison City (1 Wall. 291), 110.

Van Hoffman v. Quincy (4 Wall. 535), 381, 382.

Van Hook v. Selma (70 Ala. 361), 298, 590, 611, 624, 634.

Van Horn v. People (46 Mich. 183), 640, 733.

Van Meter v. People (60 Ill. 168), 522.

Vann v. Pipkin (77 N. C. 408), 366.

Van Nest v. New York (113 N. Y. 652), 808.

Vansant v. Harlem Stage Co. (59 Md. 330), 637.

Van Sicklen v. Burlington (27 Vt. 70), 99.

Van Swartow v. Com. (24 Pa. St. 131), 486, 513, 516, 559.

Van Tine v. Nims (3 Abb. Pr. 39), 196.

Van Vert v. Brown (47 Ohio St. 477), 564.

Van Wormer v. Mayor, etc. (15 Wend. 262), 688.

- Varden v. Mount (78 Ky. 86), 273, 274, 732.
- Vashon & Tp. of Hawkesbury, in re (30 Up. Can Com. Pleas Rep. • 194), 173.
- Vason v. Augusta (38 Ga. 542), 22, 126, 366, 464, 466, 514, 706, 784.
- Vassault v. Auston (36 Cal. 691), 467, 559.
- Vason v. South Carolina R. R. Co. (42 Ga. 631), 747.
- Vaughn v. Scade (30 Mo. 600), 512.
- Vaughn v. Thompson (15 Ill. 39), 482.
- Veazie v. China (50 Me. 518), 105, 125.
- Veazie v. Mayo (45 Me. 560), 894, 895.
- Veneman v. Jones (118 Ind. 41), 714.
- Venine v. Archibald (3 Colo. 163), 528.
- Verdin v. St. Louis (131 Mo. 26), 81, 111, 450, 830, 854, 862, 865, 866
- Verona, Appeal of Borough of (108 Pa. St. 83), 246.
- Verree v. Hughes (11 N. J. L. 91), 389.
- Vicksburg v. Briggs (102 Mich. 551), 771.
- Vicksburg v. Briggs (85 Mich. 502), 486, 505.
- Vicksburg v. Tobin (100 U. S. 430), 416.
- Vicksburg, S. & P. R. R. Co. v. Monroe (48 La. Ann. 1102), 232, 425, 720.
- Vidal v. Girard's Execu. (2 How. 127), 90.
- Villavaso v. Barthet (39 La. Ann. 247), 257, 499, 451, 700.
- Vincennes v. Citizens' Gas Light Co. (132 Ind. 114), 121, 379.
- Vincent v. Nantucket (12 Cush. 103), 75.
- Vincent v. Pacific Grove (102 Cal. 405), 252, 595,
- Vines v. State (67 Ala. 73), 402, 452.
- Vionet v. First Municipality (4 La. Ann. 42), 97, 672, 823.

- Virginia v. Smith (1 Cranch. C. C. 47), 36.
- Virgo v. Toronto (22 Can. Sup. Ct. 447), 766.
- Von Baumback v. Bade (9 Wis. 559), 390.
- Von der Leith v. State (60 N. J. L. 46), 327.
- Von Schmidt v. Widber (105 Cal. 151), 88.
- Von Steen v. Beatrice (36 Neb. 421), 831.
- Voorhees, in re (32 N. J. L. 141), 522.
- Vosse v. Memphis (9 Lea. 294), 763.

W.

- Wabash R. R. Co. v. Defiance (52 Ohio St. 262), 802, 817.
- Wabash Ry. Co. v. Hughes (38 Ill. 174), 203.
- Wabash, St. Louis & Pac. Ry. Co.
- v. Illinois (118 U. S. 557), 410. Waco v. Powell (32 Tex. 258), 731.
- Waco v. Prather (90 Tex. 80) 840, 841.
- Waddingham v. St. Louis (14 Mo. 190), 38.
- Wade v. Newbern (77 N. C. 460), 88, 761.
- Wade v. Nunnelly (19 Tex. Civ. App. 256), 437.
- Wade v. Oakmont (165 Pa. St. 479), 798.
- Wade v. Richmond (18 Gratt. 583), 349.
- Wadleigh v. Gilman (12 Me. 403), 734, 735, 737.
- Wadsworth v. Maysville (24 Ky. Law. Rep. 312), 355.
- Waggoner v. South Gorin (88 Mo. App. 25), 693.
- Wagner v. Garrett (118 Ind. 114), 490, 646.
- Wagner v. Rock Island (146 Ill. 139), 438.
- Wahle v. Reinbach (76 Ill. 322), 706.
- Waite v. Garston Local Board of Health (L. R. 3 Q. B. 5), 292.

- Wakefield v. Phelps (37 N. H. 295), 336.
- Wakeman v. Wilbur (147 N. Y. 657), 717.
- Walden v. Dudley (49 Mo. 419), 608.
- Waldo v. Wallace (12 Ind. 569), 465, 786, 794.
- Waldraven v. Memphis (4 Coldw. 431), 367.
- Walker v. Aurora (140 Ill. 402), 853.
- Walker v. Burlington (56 Vt. 131), 610.
- Walker v. Chicago (202 Ill. 531), 852, 857.
- Walker v. Chicago R. I. & P. R. R. Co. (71 Iowa 658), 741.
- Walker v. Cooke (163 Mass. 401), 467.
- Walker v. Evansville (33 Ind. 393), 7.
- Walker v. Jameson (140 Ind. 591), 670, 687, 691, 705.
- Walker v. Kansas City (99 Mo. 647), 897.
- Walker v. Morgan Park (175 Ill. 570), 425.
- Walker v. New Orleans (31 La. Ann. 828), 636, 643, 644.
- Walker v. People (170 Ill. 410), 451.
- Walker v. Rogan (1 Wis. 597), 165.
- Walker v. Springfield (94 Ill. 364), 621, 660, 661.
- Walker v. Sauvinet (92 U. S. 90), 517.
- Walker v. Towle (156 Ind. 639), 634, 733.
- Walker v. Whitehead (16 Wall. 314), 372, 381, 385.
- Wall, ex parte (48 Cal. 279), 49, 66, 133.
- Wallace v. Richmond (94 Va. 204), 668.
- Walla Walla v. Walla Walla Water Co. (172 U. S. 1), 19, -308, 352, 377.
- Waller v. Everett (52 Mo. 57), 328, 329, 344.
- Walling v. Michigan (116 U. S. 446), 402, 405.

- Waln v. Philadelphia (99 Pa. St. 330), 6, 236, 238, 241, 244, 249.
- Walnut Tp. v. Rankin (70 Iowa 65), 113.
- Walsh v. Johnston (18 R. I. 88), 183.
- Walsh v. Mo. Pac. Ry. Co. (102 Mo. 582), 745.
- Walsh v. Union (13 Oreg. 589), 771, 785.
- Walter, in re (83 N. Y. 538), 832.
- Walter, in re (75 N. Y. 354), 843.
- Walter, in re (84 Hun. 457), 694. Walters v. Duke (31 La. Ann. 668), 629.
- Walton v. Augusta (104 Ga. 757), 396, 398, 655.
- Walton v. Canon City (13 Colo. App. 77), 476, 530.
- Walworth Bank v. F. L. & T. Co. (16 Wis. 629), 172.
- Wan Yin, in re (22 Fed. Rep. 701), 617, 636.
- Wapella v. Davis (39 III. App. 592), 596, 597.
- Ward v. Greenville (8 Baxt. 228), 761.
- Ward v. Little Rock (41 Ark. 526), 686.
- Ward v. Maryland (12 Wall. 418), 402, 618.
- Ward v. Murphysboro (77 Ill. App. 549), 736, 738.
- Ward v. People (13 III. 635), 562.Ward v. Washington (4 Cranch. C. C. 232), 698.
- Warden of St. Peter's E. Ch. v. Washington (109 N. C. 21), 437.
- Ware v. Rutherford (55 N. J. L. 450), 834.
- Waring v. Mobile (24 Ala. 701), 338.
- Warner v. Knox (50 Wis. 429), 828.
- Warner v. Mower (11 Vt. 385), 179.
- Warner v. Porter (2 Doug. 358), 569.
- Warnock v. Lafayette (4 La. Ann. 419), 164, 169.
- Warren v. Barber A. P. Co. (115 Mo. 572), 822, 866.
- Warren v. Charleston (2 Gray 84), 452.

- Warren v. Greer (117 Pa. St. 207), 356, 658.
- Warren v. Henly (31 Iowa 31), 811, 823, 901.
- Warren v. Hunter (1 Phila. 414), 684.
- Warren v. Lyons City (22 Iowa 351), 93, 94.
- Warren v. People (3 Parker Cr. Rep. 544), 523.
- Warren v. Wausau (66 Wis. 206), 831.
- Warren County v. Patterson (56 Ill. 111), 91.
- Warrensburg v. McHugh (122 Mo. 649), 646.
- Warsop v. Hastings (22 Minn. 437), 248, 371, 437.
- Wartman v. Philadelphia (33 Pa. St. 202), 762, 764.
- Warwick v. New York (28 Barb. 210), 260.
- Wasem v. Cincinnati (2 Cin. Supr. Ct. 84), 252, 253.
- Washburn v. Chicago (202 III. 210), 853.
- Washburn v. Chicago (198 III. 506), 829, 858.
- Washington, George, ex parte (10 Mo. App. 495), 506.
- Washington v. Eaton (4 Cranch. C. C. 352), 770.
- Washington v. Fisher (43 N. J. L. 377), 803.
- Washington v. Frank (46 N. C. 436), 485.
- Washington v. Frank (1 Jones 436), 529, 537.
- Washington v. Hammond (76 N. C. 33), 785, 790.
- Washington v. Lynch (5 Cranch. C. C. 498), 485, 733.
- Washington v. Meigs (8 Dist. of Columbia 53), 733.
- Washington v. Meigs (1 McArther 53), 640.
- Washington v. Nashville (1 Swan. 177), 810, 819, 824.
- Washington v. Wheat (1 Cranch. C. C. 410), 537.
- Washington v. Wheaton (29 Fed. Cas. No. 17, 239), 642.

- Washington Ice Co. v. Chicago (147 Ill. 327), 835, 851.
- Washington Electric Vehicle Transportation Co. v. District of Columbia (19 App. D. C. 462), 643.
- Washington, etc., R. Co. v. Alexandria (98 Va. 344), 750.
- Washingtonian Home v. Chicago (157 Ill. 414), 54.
- Wasmer v. D. L. & W. R. R. Co. (80 N. Y. 212), 604.
- Wasson v. McCook (80 Mo. App. 483), 749.
- Water Com'rs of Springfield v. People (137 Ill. 660), 346.
- Waterloo v. Union Mill Co. (72 Iowa 437), 719.
- Waterloo W. Mfg. v. Shanahan (128 N. Y. 345), 260.
- Waters v. Gilbert (2 Cush. 27), 208, 211.
- Waters v. Leech (3 Ark. 110), 301, 672.
- Waters v. Townsend (65 Ark. 613), 693.
- Waters-Pierce Oil Co. v. New Iberia (47 La. Ann. 863), 304, 354, 688, 740.
- Watertown v. Cowen (4 Paige 510), 719.
- Watertown v. Sawyer (109 Mass. 320), 736.
- Water Valley v. Davis (73 Miss. 521), 562.
- Waterworks Co. v. Atlantic (39 N. J. Eq. 367), 97.
- Watkins v. Griffith (59 Ark. 344), 831.
- Watkins v. Hillerman (73 Hun. 317), 221, 247.
- Watkins v. Milwaukee (55 Wis. 335), 692.
- Watson v. Chicago (115 III. 78), 827, 844.
- Watson v. Plainfield (60 N. J. L. 260), 572.
- Watson v. Robertson Ave. Ry. Co. (69 Mo. App. 548), 876, 892.
- Watson v. Thomson (116 Ga. 546), 760.
- Watt v. Jones (60 Kan. 201), 582.

- Watts v. Scott (1 Dev. 291), 488. Watuppa Reservoir Co. v. Fall River (147 Mass. 548), 4.
- Watuppa Reservoir Co. v. Mackenzie (132 Mass. 71), 708.
- Waukesha Hygeia M. S. v. Waukesha (83 Wis. 475), 48.
- Waupun v. Moore (34 Wis. 450), 439.
- Wayne Co. v. Detroit (17 Mich. 390), 787.
- Weaver v. Devendorf (3 Denio. 117), 259.
- Weaver v. Mt. Vernon (6 Ohio 436), 255, 450.
- Weaver v. State (89 Ga. 639), 629, 658.
- Webb v. Albertson (4 Barb. 51), 31.
- Webb v. Board (116 Mich. 516), 675.
- Webb v. Demopolis (95 Ala. 116), 716, 799.
- Webb City, etc., Waterworks Co. v. Webb City (78 Mo. App. 422), 98, 99.
- Webber v. Chicago (148 III. 313), 81, 445, 659.
- Weber v. Gill (98 Col. 462), 841. Webber v. Virginia (103 U. S. 344), 400.
- Weber v. Johnson (37 Mo. App. 601), 25, 225, 227, 833.
- Webster v. Fargo (181 U. S. 394), 822.
- Webster v. Lansing (47 Mich. 192), 579.
- Webster v. People (98 Ill. 343), 609.
- Webster v. People (14 III. 365), 486.
- Webster v. Rose (6 Heisk. 93), 372.
- Webster v. Town of Harwinton (32 Conn. 131), 73.
- Weckler v. Chicago (61 III. 142), 843.
- Weeks v. Forman (16 N. J. L. 237), 115, 461, 468.
- Weeks v. Galveston (21 Tex. Civ. App. 102), 90.
- Weid v. People (149 III. 257), 827.

- Weightman v. Clark (103 U. S. 256), 84.
- Weil v. Ricord (24 N. J. Eq. 169), 695, 698.
- Weil v. Schultz (33 How. Pr. 7), 699.
- Weill v. Kenfield (54 Cal. 111), 189.
- Weith v. Wilmington (68 N. C. 24), 25, 206.
- Welch v. Bowen (103 Ind. 252),
- Welch v. Hotchkiss (39 Conn.
- 140), 612, 738. Welch v. Mastin (Mo. App. 1903,
- 71 S. W. Rep. 1090), 588.
 Welch v. Ste. Genevieve (1 Dil-
- lon C. C. 130), 140, 153, 160.
- Welch v. Stowell (2 Doug. 332), 668, 752.
- Welker v. Potter (18 Ohio St. 85), 219, 836.
- Welker v. Toledo (18 Ohio St. 452), 386.
- Weller v. Chicago, M. & St. P. R. R. Co. (164 Mo. 180), 586, 748, 749.
- Welles v. Battelle (11 Mass. 477), 214, 216.
- Wells v. Atlanta (43 Ga. 67), 807. Wells v. Burbank (17 N. H. 393),
- Wells v. Burnham (20 Wis. 112), 828.
- Wells v. McLaughlin (17 Ohio 99), 803.
- Wells v. Mo. Pac. R. R. (110 Mo. 286), 351.
- Wells v. Rahway River Co. (19 N. J. Eq. 402), 166.
- Wells v. Weston (22 Mo. 384), 35, 36, 643.
- Welsh v. Beaver Falls (186 Pa. St. 578), 377.
- Welsh v. St. Louis (73 Mo. 71), 63.
- Welton v. Missouri (91 U. S. 275), 393, 400.
- Wendler v. People's House Furnishing Co. (165 Mo. 527), 60, 586, 602, 740.
- Werth v. Springfield (78 Mo. 107), 581, 828, 845, 892.

- Wertheimer v. Boonville (29 Mo. 254), 562, 576.
- Wertheimer v. Howard (30 Mo. 420), 474.
- Wesson v. Collins (72 Miss. 844), 446.
- West v. Bancroft (32 Vt. 367), 875.
- West v. Columbus (20 Kan. 633), 233, 487, 495, 503, 583.
- West v. Mt. Sterling (23 Ky. Law Rep. 1670), 658.
- West v. New York (10 Paige 539), 437, 576.
- Westberg v. Kansas City (64 Mo. 493), 365.
- Westbrook v. Deering (63 Me. 231), 74, 106.
- West Chicago Comrs. v. Western Union Tel. Co. (103 Ill. 33), 803.
- West Chicago Masonic Assn. v. Cohn (192 Ill. 210), 456.
- West Chicago Park Comrs. v. Farber (171 III. 146), 855.
- West Chicago St. R. R. Co. v. People (155 Ill. 299), 849.
- Westcott v. Middleton (43 N. J. Eq. 478), 684.
- Western & A. R. R. v. King (70 Ga. 261), 601.
- Western & A. R. Co. v. Young (83 Ga. 512), 134.
- Western & A. R. R. Co. v. Young 81 Ga. 397), 601, 744, 750.
- Western Paving & Supply Co. v. Citizens' Street R. Co. (128 Ind. 525), 896, 900.
- Western Sav. Fund Soc. v. Philadelphia (31 Pa. St. 175), 130, 308, 352, 369, 742, 805.
- Western Union Tel. Co. v. Fremont (39 Neb. 692), 399, 659.
- W. U. Tel Co. v. Guernsey & Scudder E. Light Co. (46 Mo. App. 120), 885, 892, 893.
- W. U. Tel. Co. v. Massachusetts (125 U. S. 530), 407, 408.
- W. U. Tel. Co. v. Mayer (28 Ohio St. 521), 399.
- Western U. Tel Co. v. New York (23 Fed. Rep. 552), 418.

- W. U. Tel. Co. v. Pendleton (122 U. S. 347), 410, 418.
- Western Union Tel. Co. v. Philadelphia (Pa. 1888, 12 Atl. Rep. 144), 636.
- W. U. Tel Co. v. Richmond (26 Gratt. 1), 399, 659.
- W. U. Tel Co. v. State (55 Tex. 314), 399.
- W. U. Tel. Co. v. Taggart (163 U. S. 1), 408.
- Westfield v. Coventry (71 Vt. 175), 75.
- Westfield Borough v. Tioga County (150 Pa. St. 152), 873.
- Westgate v. Carr (43 III. 450), 500, 786, 793.
- West Jersey Traction Co. v. Shivers (58 N. J. L. 124), 893, 895.
- Westliche Post Assn. v. Allen (26 Mo. App. 181), 893.
- Westminister v. Bernardston (8 Mass. 104), 150.
- West Mo. Land Co. v. K. C. & S. B. R. R. (161 Mo. 595), 547.
- Weston v. Sampson (8 Cush. 347), 4.
- Weston v. Syracuse (158 N. Y. 274), 259, 368, 430.
- West Pittston v. Dymond (8 Kulp. 12), 569, 631.
- Westport v. Kansas City (103 Mo. 141), 346.
- Westport v. Mulholland (159 Mo. 86), 714.
- West River Bridge Co. v. Dix (6 How. 507), 306.
- Wetherell v. Devine (116 Ill. 631), 128, 609.
- Wethington v. Owensboro (21 Ky. Law Rep. 960), 326, 338.
- Wetmore v. Campbell (2 Sandf. 341), 827.
- Wetmore v. Story (22 Barb. 414), 108, 180, 181, 182, 235.
- Wettengel v. Denver (20 Colo 552), 529, 730.
- Wetumpka v. Wetumpka Whari Co. (63 Ala. 611), 55.
- Wewell v. Cincinnati (45 Ohio St. 407), 837.
- Whalen v. Keith (35 Mo. 87), 710.

- Whalin, Appeal of (16 Pitts. Leg. Journ. 113), 140.
- Whalin v. Macomb (76 Ill. 49), 128, 231, 245, 592.
- Wheeling v. Black (25 W. Va. 266), 583.
- Wheeler v. Boone (108 Iowa 235), 727.
- Wheeler v. Com. (98 Ky. 59), 183. Wheeler v. People (153 Ill. 480), 849.
- Wheeler v. Philadelphia (Pa. 23 Leg. Int. 75), 260.
- Wheeler v. Plymouth (116 Ind. 158), 676.
- Wheeler v. Roberts (7 Cow. 536), 332.
- Whipple v. McIntyre (69 Mo. App. 397), 704.
- Whitcomb v. Springfield (2 Ohio Cir. Dec. 138), 698.
- White, ex parte (67 Cal. 102), 773, White, in re (43 Fed. Rep. 913), 402.
- White, in re (43 Minn. 250), 636. White v. Bayonne (49 N. J. L. 311), 25.
- White v. Fleming (114 Ind. 560), 176.
- White v. Kent (11 Ohio St. 550), 304, 483, 653, 719, 761.
- White v. Mayor, etc. (2 Swan. 364), 45.
- White v. Meadville (177 Pa. St. 643), 377.
- White v. Neptune City (56 N. J. L. 222), 477, 480, 485, 572, 573.
- White v. Redfern (L. R. 5 Q. B. Div. 15), 762.
- White v. Saginaw (67 Mich. 33), 839.
- White v. St. Louis & S. F. Ry. Co. (44 Mo. App. 540), 745.
- White v. Tallman (26 N. J. L. 67), 9, 86, 273, 275, 282.
- White v. Washington (2 Cranch. 337), 485.
- Whitehall v. Meaux (8 Ill. App. 182), 498.
- Whiteside v. People (26 Wend. 634), 174, 176.

- Whitfield v. Carrollton (50 Mo App. 98), 680.
- Whitfield v. Longest (6 Iredel, 268), 33, 34, 276, 552, 732.
- Whiting v. Doob (152 Ind. 157), 506, 727, 790.
- Whiting v. Mt. Pleasant (11 Iowa 482), 225.
- Whitlock v. West (26 Conn. 406), 276, 443, 444, 732.
- Whitmier v. Buffalo (118 Fed. Rep. 773), 725.
- Whitney v. Blanchard (2 Gray 208), 327.
- Whitney v. Hudson (69 Mich. 189), 162, 168, 169, 184, 194, 202, 861.
- Whitney v. New Haven (58 Conn. 450), 143, 177, 195, 437.
- Whitney v. New York (28 Barb. 233), 262.
- Whitney v. New York (6 Abb. N. C. 329), 129.
- Whitney v. Pittsburgh (147 Pa. St. 351), 867.
- Whitney v. Port Huron (88 Mich. 268), 240.
- Whitney v. Van Buskirk (40 N. J. L. 463), 192.
- Whitsett v. Union Depot & R. Co. (10 Colo. 243), 814.
- Whitson v. Franklin (34 Ind. 392), 40, 496, 497, 553, 744.
- Whitten v. Covington (43 Ga. 421), 648.
- Whittier v. Varney (10 N. H. 291), 213.
- Whitton v. State (37 Miss. 379), 541.
- Whitwell, ex parte (98 Cal. 73), 683, 697.
- Whyte v. Nashville (2 Swan. 364), 131, 808.
- Wichita & W. R. Co. v. Fechheimer (36 Kan. 45), 886.
- Wier's Appeal (74 Pa. St. 320), 741.
- Wiggin v. Freewill Baptist (8 Met. 301), 175.
- Wiggin v. New York (9 Paige 16), 118, 245, 846.

- Wiggins v. Chicago (68 III. 372), 465, 479, 482, 550, 555, 557, 567, 635, 638, 654.
- Wiggins v. St. Louis (135 Mo. 558), 64.
- Wiggins Ferry Co. v. East St. Louis (107 U. S. 365), 409, 415, 659.
- Wiggins Ferry Co. v. East St. Louis (102 III. 560), 615.
- Wight v. Davidson (181 U. S. 371), 822.
- Wightman v. State (10 Ohio 452), 513, 547, 787, 792.
- Wilbur v. Springfield (123 Ill. 395), 843.
- Wilbur v. Tobey (16 Pick. 177), 716.
- Wilcox v. Hemming (58 Wis. 144), 274, 276, 450, 732.
- Wilcox v. Rodman (46 Mo. 322), 365, 367.
- Wildner v. Ferguson (42 Minn. 112), 81.
- Wiles v. Hoss (114 Ind. 371), 810.
- Wiley v. Owens (39 Ind. 429), 617, 647.
- Wiley v. Seattle (7 Wash. 576), 531.
- Wiley v. Silliman (62 III. 170), 267.
- Wilhelm v. Defiance (58 Ohio St. 56), 822.
- Wilkie v. Chicago (188 III. 444), 437, 612, 617, 620.
- 437, 612, 617, 620. Wilkie v. Hall (15 Conn. 32), 215.
- Wilkes Barre v. Garebed (9 Kulp. 273), 770.
- Wilkin v. Houston (48 Kan. 584), 832.
- Wilkins v. Waynesboro (116 Ga. 359), 244.
- Wilkinson v. Leland (2 Peters 627), 777.
- Willard v. Killingsworth (8 Conn. 247), 74, 150, 151, 152, 358.
- Willard v. Newburyport (12 Pick. 227), 71, 74, 75, 108.
- Willcocks, ex parte (7 Cow. 402), 165.

- Williams' Appeal (72 Pa. St. 214), 371, 385, 389.
- Williams, ex parte (31 Tex. Cr. App. 262), 630, 641.
- Williams v. Augusta (111 Ga. 849), 466.
- Williams v. Augusta (4 Ga. 509), 79, 477, 514, 740.
- Williams v. Brace (5 Conn. 190), 165.
- Williams v. Bruffy (96 U. S. 176), 370.
- Williams v. Corcoran (46 Cal. 553), 818.
 - Williams v. Davidson (43 Tex. 1), 21, 69, 72.
- Williams v. Eggleston (170 U. S. 304), 67, 820, 882.
- Williams v. Ellis (5 Q. B. Div. 175), 645.
- Williams v. Gloucester (148 Mass. 256), 185.
- Williams v. Hinton (1 Ala. 297), 510.
- Williams v. Lunenburg School District (21 Pick. 75), 149, 152, 164.
- Williams v. McDonald (58 Cal. 527), 846.
- Williams v. Mutual Gas Co. (52 Mich. 499), 897.
- Williams v. Plank Road Co. (21 Mo. 580), 892.
- Williams v. State (18 Ohio St. 46), 557.
- Williams v. Warsaw (60 Ind. 457), 506, 537, 786.
- Williams v. Weaver (94 N. C. 134), 383.
- Williams v. West Point (68 Ga. 816), 625, 647.
- Williams v. Williard (23 Vt. 369), 31, 219.
- Williamson v. Com. (4 B. Mon. 146), 461, 475, 487, 574.
- Williamson v. Keokuk (44 Iowa 88), 225.
- Williamsport v. Com. (90 Pa. St. 498), 84, 85.
- Williamsport v. Com. (84 Pa. St. 487), 111, 800.

- Williamsport v. Hughes (21 Pa. Super. Ct. Rep. 443), 866.
- Williamsport v. Kent (14 Ind. 306), 610.
- Williamsport v. Wenner (172 Pa. St. 173), 633.
- Willis Ave., in re (56 Mich. 244), 824.
- Willis v. Legris (45 Ill. 289), 274, 275.
- Willis v. Miller (29 Fed. Rep. 239), 386.
- Willow Springs v. Withaupt (61 Mo. App. 275), 32, 298, 352, 739.
- Wills v. Boonville (28 Mo. 543), 466.
- Wilmington v. Davis (63 N. C. 582), 468.
- Wilmington v. Macks (86 N. C. 88), 618, 640.
- Wilmington v. Roby (8 Ired. 250), 35.
- Wilmington Bank v. Wollaston (3 Harr. 90), 13.
- Wilmington & Weldon R. R. v. Alsbrook (146 U. S. 279), 374.
- Wilson, in re (32 Minn. 145), 133, 569, 571, 627, 648.
- Wilson, ex parte (14 Tex. Crim. App. 592), 791.
- Wilson v. Allegheny (79 Pa. St. 272), 825.
- Wilson v. Beyers (5 Wash. 303), 731.
- Wilson v. Cunningham (3 Cal. 241), 882.
- Wilson v. Eureka (173 U. S. 32), 360.
- Wilson v. McKenna (52 III. 43), 467.
- Wilson v. Marsh (13 N. J. Eq. 289), 389.
- Wilson v. New York, N. H. & H. R. Co. (18 R. I. 598), 442.
- Wilson v. Philippi (39 W. Va. 75), 810.
- Wilson v. Phænix Powder Mfg. Co. (40 W. Va. 413), 741.
- Wilson v. Southern Ry. Co. (64 S. C. 162), 601.
- Wilson v. Trenton (61 N. J. L. 599), 862.

- Wilson v. Trenton (56 N. J. L. 469), 252.
- Wilt v. Redkey (Ind. App. 1902, 64 N. E. Rep. 228), 9.
- Wiltse v. State (8 Heisk. 544), 656.
- Winants v. Bayonne (44 N. J. L. 114), 79, 649.
- Winchester v. Corinna (55 Me. 9), 75.
- Winchester v. Redmond (93 Va. 711), 72, 75, 86, 114.
- Winnsboro v. Smart (11 Rich, Law 551), 765.
- Winona v. Burke (23 Minn. 254), 494, 582, 591.
- Winooski v. Gokey (49 Vt. 282), 269, 270, 491, 493, 510, 582, 616.
- Winslow v. Bloomington (24 Ill. App. 647), 699.
- Winslow v. People (117 III. 152), 389.
- Winter v. Kinney (1 N. Y. 365), 131.
- Winter v. Thristlewood (101 III. 450), 156.
- Winterport Water Co. v. Winterport (94 Me. 215), 74.
- Winthrop v. Farrar (11 Allen 398), 698.
- Wirt v. McEnery (21 Fed. 233), 170.
- Wisconsin Central R. R. v. Ashland County (81 Wis. 1), 184.
- Wisner v. People (156 Ill. 180), 849.
- Wistar v. Addicks (9 Phila, 145).
- Wistar v. Philadelphia (111 Pa. St. 604), 858.
- Wistar v. Philadelphia (80 Pa. St. 505), 819, 858.
- Wither v. State ex rel Posey (36 Ala. 252), 509.
- Witheril v. Mosher (9 Hun. 412), 99.
- Withers v. Coyles (36 Ala. 320), 772.
- Withers v. State ex rel (36 Ala. 252), 509.
- Withington v. Harvard (8 Cush. 66), 194.

- Witkouski v. Witkouski (16 La. Ann. 232), 332.
- Wolf, ex parte (14 Neb. 24), 178, 179, 316, 326, 328, 761.
- Wolf v. Lansing (53 Mich. 367), 646.
- Wolf v. Keokuk (48 Iowa 129), 582.
- Wolff v. Campbell (110 Mo. 114), 111.
- Wolters, ex parte (65 Cal. 269), 361.
- Wolters v. St. Louis (132 Mo. 1), 892.
- Wong v. Astoria (13 Oreg. 538), 466, 513, 516, 520, 752, 787, 792, 795.
- Wong Hane, in re (108 Cal. 680), 355, 533.
- Wong Yang Quy, in re (6 Sawy. 442). 697.
- Wood v. Brooklyn (14 Barb. 425), 24, 25, 435, 477, 484.
- Wood v. Election Court (58 Cal. 561), 339.
- Wood v. Jefferson County Bank (9 Cow. 194), 206.
- Wood v. Kansas City (162 Mo. 303), 24.
- Wood v. McGrath (150 Pa. St. 451), 832,
- Wood v. Mears (12 Ind. 515), 338, 716.
- Wood v. Quimby (20 R. I. 482), 820.
- Wood v. San Francisco (4 Cal. 190), 888.
- Wood v. Seattle (23 Wash. 1), 248, 249, 257, 258, 306, 897, 915.
- Wood v. Simons (110 Mass. 116), 209.
- Wood v. Wood (14 Rich, 148), 372.
- Woodall v. Lynchburg (100 Va. 318), 611, 612.
- Woodbridge v. Cambridge (114 Mass. 483), 807.
- Woodbury v. Brown (101 Tenn. 707), 547.
- Woodlawn v. Cain (135 Ala. 369), 244.

- Woodlawn Cemetery Assn. v. Everett (118 Mass. 354), 695.
- Woodruff v. Elizabeth (30 N. J. L. 176), 831.
- Woodruff v. N. Y. & N. E. R. R. Co. (59 Conn. 63), 172.
- Woodruff v. Parham (8 Wall, 123), 400.
- Woodruff v. Stewart (63 Ala. 206), 156, 184, 239, 240, 532, 545.
- Woodruff v. Trapnall (10 How. 190), 371.
- Woods v. Chicago (135 III. 582), 847, 851.
- Woods v. Kansas City (58 Mo. App. 272), 676.
- Woods v. Prineville (19 Oreg. 108), 532, 584.
- Woodson v. Skinner (22 Mo. 13), 92.
- Woodward v. Boscobel (84 Wis. 226), 810.
- Wooster v. Mullins (64 Conn. 340), 163.
- Worcester v. Georgia (6 Pet. 515), 261.
- Worchester v. Norwich Ry. Co. (109 Mass. 103), 317.
- Work v. State (2 Ohio St. 296), 515.
- Worrell v. State (12 Ala. 732). 448.
- Works v. Lockport (28 Hun. 9), 831.
- Worthington v. Boston (152 U. S. 695), 861.
- Worthington v. Covington (6 Ky. Law Rep. 237), 236, 812, 845.
- Worthington v. London G. & A. Co. (164 N. Y. 81), 469.
- Wragg v. Penn. Tp. (94 Ill. 11), 17, 786, 793, 794.
- Wreford v. People (14 Mich. 41), 687, 699.
- Wright, in re (29 Hun. 357), 575, 728.
- Wright v. Bishop (88 III. 302), 431.
- Wright v. Boston (9 Cush. 233), 839.
- Wright v. Chicago (60 Ill. 312), 808.

Wright v. C. & N. W. Ry. Co. (27 III. App. 200), 538.

Wright v. Chicago, etc., R. R. Co. (7 Ill. App. 438), 17, 60, 446, 454, 740.

Wright v. Defrees (8 Ind. 298), 257.

Wright v. Forrestal (65 Wis. 341), 187, 202, 233, 252, 841, 844, 845.

Wright v. Hill (54 Ga. 645), 640. Wright v. Mallen & M. Ry. Co. (4 Allen 283), 602, 603.

Wright v. Nagle (101 U. S. 791), 317.

Wright v. People (87 Ill. 582), 610. Wright v. Victoria (4 Tex. 375), 83, 95, 96.

Wrought Iron Range Co. v. Carver (118 N. C. 328), 405.

Wrought Iron Range Co. v. Johnson (84 Ga. 754), 401.

Wunder v. McLean (134 Pa. St. 334), 457.

Wyandotte Electric Light Co. v. Wyandotte (124 Mich. 43), 885, 904, 912.

Wyatt v. Benson (4 Abb. Pr. 182), 90.

Wygant, ex parte (39 Oreg. 429), 687, 696.

Wygant v. McLauchlan (Oreg. 1901, 64 Pac. Rep. 867), 42, 687.

Wykoff v. Healy (57 Minn. 14), 450.

Wyley v. Wilson (44 Vt. 404), 152.

Wyman v. Mitchell (1 Cowen 316), 388.

Wynehamer v. People (13 N. Y. 378), 517, 522.

Wyoming v. Wilkesbarre W. S. Ry. Co. (8 Luz. Leg. Reg. 113), 241.

Y.

Yale College v. New Haven (57 Conn. 1), 810.

Yanish v. St. Paul (50 Minn. 518), 835.

Yankton v. Douglas (8 S. Dak. 440), 788.

Yardley v. Borough (22 Pa. Co. Ct. Rep. 179), 225.

Yarnell v. Los Angeles (87 Cai. 603), 431.

Yates v. Batavia (79 Ill. 500), 437, 576.

Yates v. Milwaukee (12 Wis. 673), 768.

Yates v. Milwaukee (10 Wall. 497), 291, 685, 686, 689.

Yates v. Warrenton (84 Va. 337), 717, 720.

Yesler v. Seattle (1 Wash. St. 308), 227, 593, 837, 838.

Yick Wo, in re (68 Cal. 294), 361, 442, 773.

Yick Wo v. Hopkins (118 U. S. 356), 294, 296, 311, 312, 354, 361, 649, 672, 681, 864.

York v. Forscht (23 Pa. St. 391), 114.

Yonkers Board of Health v. Copcutt (140 N. Y. 12), 143, 250, 707.

Yonkers Excise Comrs. v. Glennon (21 Hun. 244), 488.

Young, Petition of (11 Pa. Co. Ct. Rep. 209), 143.

Young v. Flower (3 Misc. Rep. 34), 693.

Young v. Kansas City (27 Mo. App. 101), 81, 810, 853.

Young v. People (155 Ill. 247), 849.

Young v. Rushsylvania (8 Ohio Cir. Ct. Rep. 75), 145, 177.

Young v. St. Louis (47 Mo. 492), 7, 202, 223.

Young v. Thomas (17 Fla. 169), 640.

Younglove, in re (80 Hun. 246), 204.

Young & McShea A. Co. v. Atlantic City (60 N. J. L. 125), 282.

Ysleta v. Babbitt (8 Tex. Civ. App. 432), 798.

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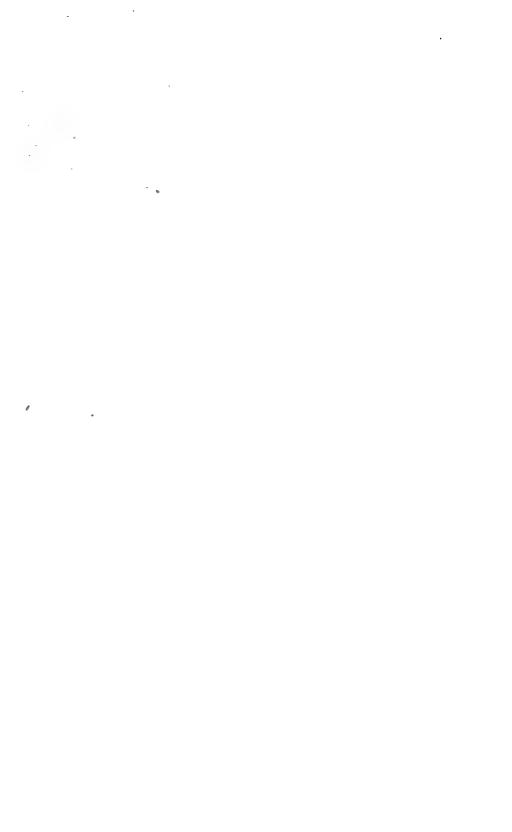
Zabriskie v. H. & N. Y. Ry. Co. (18 N. J. Eq. 178), 322,

Zalesky v. Cedar Rapids (Iowa 1902, 92 N. W. Rep. 657), 812, 840.

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- Zane v. Rosenberry (153 Pa. St. 38), 157.
- Zanesville v. Muskingum Co. (5 Ohio St. 590), 346.
- Zanone v. Mound City (103 III. 552), 21, 313.
- Zanone v. Mound City (11 Ill. App. 334), 549, 554, 631.
- Zborowski, in re (68 N. Y. 88), 804. Zelle v. McHenry (51 Iowa 572), 513, 517.
- Zeiler v. Central Ry. Co. (84 Md. 304), 165, 169, 171, 189.
- Zeller v. Crawfordsville (90 Ind. 262), 791.
- Ziegler v. People (156 Ill. 133), 849.

- Zigler v. Menges (121 Ind. 99), 707.
- Zimmerman v. Saam (6 Pa. Co. Ct. Rep. 318), 736.
- Zitske v. Goldberg (38 Wis. 216), 463.
- Zorger v. Greensburgh (60 Ind. 1), 442, 448.
- Zottman v. San Francisco (20 Cal. 96), 115.
- Zumault v. K. C. & I. Air Line (71 Mo. App. 670), 296, 744, 745.
- Zumstein v. Mullen (67 Ohio St. 382), 142.
- Zylestra v. Charleston (1 Bay 382), 284, 464, 577, 698



A TREATISE

ON THE

LAW OF MUNICIPAL ORDINANCES.

CHAPTER I.

OF GENERAL NATURE AND REQUISITES OF VALID MUNICIPAL ORDINANCES.

- § 1. Ordinance defined.
 - 2. Difference between ordinance and resolution.
 - Illustrations as to when ordinance necessary.
 - Same—creating offices and situations.
 - 5. When action may be taken by resolution—illustrations.
 - How ordinances differ from regulations, orders, resolutions, etc.
 - 7. How ordinances differ from
 - rules of procedure.
 8. Classification of ordinances.
 - 9. Same-general and special.
 - 10. Same—penal and non-penal—general and special.
 - Ordinance may combine contractual and police regulations.
 - 12. Force and effect of ordinances.
 - 13. Do ordinances differ as to force and effect from charter or statute?
 - 14. Requisites of a valid ordinance stated.
 - 15. Ordinances must conform to charter.

1

- § 16. Ordinances must not be inconsistent with the general laws of the state.
 - 17. Same exception.
 - 18. Ordinances must harmonize with the public policy and common law of the state.
 - 19. Ordinances must be enacted in good faith.
 - 20. Ordinances must be definite and certain.
 - 21. Ordinances of cities of same class may vary.
 - Notice to be taken of ordinances.
 - 23. Who bound by ordinances.
 - 24. Ordinances operative upon property within the corporate limits.
 - 25. Same—rule as applied to licenses.
 - Territorial operation of ordinances.
 - 27. Places within municipal jurisdiction.
 - Same wharves private property.
 - 29. Same—regulating speed of trains.
 - 30. Judicial limitation of operation of ordinances.

1

- 31. Ordinances operating in public or particular places only.
- 32. Ordinances applying to part of city valid.
- 33. Same—improvement ordinance.
- 34. When ordinances take effect.
- 35. Same-illustrative cases.
- 36. Same—contingency.
- 37. Expiration and suspension of ordinances.
- § 1. Ordinance defined. Local laws of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform and permanent rules of conduct, relating to the corporate affairs of the municipality, are, in this country, generally designated as ordinances. "By-laws" or "byelaws" was the original designation. In England and in a few states such local laws are so named, the prefix "by" or "bye" signifying the place of habitation or local community with defined limits.

'A BY-LAW is a rule obligatory over a particular district. Any rule of a permanent character reasonably definite and consistent with the charter and general laws is a by-law. Per Parke, B. in Gosling v. Veley, 19 L. J. (N. S.) Q. B. 111; Hopkins v. Swansea, 4 M. & W. 620.

The word originally meant a law made in and for a "by" or "burh" (i.e., any fortified town or vill); regulations issued by the local authority for the regulation of a borough. But the word has now attained a wider significance, and includes all orders, ordinances, regulations, rules and statutes made by any authority subordinate to Parliament. 2 Encyc. of the Laws of England, 315.

"All regulations made by a corporate body, and intended not only to bind themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called a by-law." Per Lindley, L. J. in London Assn., etc., v. London & India Docks Joint Com., 3 Ch. (1892), p. 252.

"By" was the Scandinavian word

for town, and a by-law was hence a town law. 1 Thompson, Corp. § 938.

In the shires, where the Danes acquired a firm foothold, the township was often called a "by," and it had the power of enacting its own "by-laws," or town-laws, as New England townships have today. J. Fiske, Amer. Pol. Ideas, p. 46.

BY-LAW IN NEW ENGLAND.-The term by-law "has a peculiar and limited signification; being used to designate the orders and regulations, which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own action and concerns, and the rights and duties of its members amongst themselves. This has been somewhat extended in the case of municipal and other quasi corporations; but a broad distinction has always been made between the authority of a corporation to make by-laws and the general power of making laws." Per Shaw, C. J. in Com. v. Turner, 1 Cush. (Mass.), 493, 496,

Ordinance means "a local law,

The words "by-laws" and "ordinances" are often used interchangeably in statutes and charters, as that upon "the passage of any by-law or ordinance," the yeas and nays shall be called and recorded.²

Occasionally the general term ordinance is used in a broad sense, so as to embrace municipal charters and statutes relating to the government of the municipality. However, such use is inaccurate, for ordinances are not, in the constitutional sense, public laws, but mere local regulations or by-laws, operating in a particular locality."

prescribing a general and permanent rule." Per Elliott, J. in Citizens' Gas and M. Co. v. Elwood, 114 Ind., 332, 336; 16 N. E. Rep., 624.

"An ordinance is the law of the inhabitants of the municipality." Mason v. Shawneetown, 77 Ill., 533, 537.

For other definitions, see Oakland v. Oakland Water F. Co., 118 Cal., 160; State v. Swindell, 146 Ind., 527; 45 N. E. Rep., 700; 58 Am. St. Rep., 375; State v. Omaha, etc., R. R. Co., 113 Iowa, 30; 84 N. W. Rep., 983; Farnsworth v. Pawtucket, 13 R. I., 82; Kepner v. Com., 40 Pa. St., 124; Robinson v. Franklin, 1 Humph. (Tenn.), 156; 34 Am. Dec., 625.

² Tracey v. People, 6 Colo., 151. 153; 4 Am. & Eng. Corp. Cas., 373; National Bank of Commerce v. Grenada, 44 Fed. Rep., 262; Bills v. Goshen, 117 Ind., 221, 225; 20 N. E. Rep., 115; Taylor v. Lambertville, 43 N. J. Eq., 107, 112; 10 Atl. Rep., 809.

3 McInerney v. Denver, 17 Colo., 302; 29 Pac. Rep., 516.

VARIOUS USES OF THE TERM ORDINANCE.

Ordinance of Parliament, a temporary act of parliament.

Ordinance of the Forest, an English statute relating to the forest.

Ordinance of the Saladin Tithe,

an English law of 1188, levying a particular tax, and one of the earliest attempts to tax personal property.

Self-denying Ordinance, an early English ordinance passed in 1645, requiring members of parliament holding military or civil office to vacate such positions at the expiration of forty days.

Northwest Ordinance, or the ordinance of 1787, being the law for the territorial government of the Northwestern territory. People, ex rel., v. Thompson, 155 Ill., 451, 473; Dixon v. People, 168 Ill., 179; 39 L. R. A., 116; Allen County Comrs. v. Simons (Ind.), 13 L. R. A., 512.

Ordinance of Nullification, an ordinance passed by a state convention of South Carolina, November 24, 1832, declaring void certain acts of the Congress levying duties and imposts on imports and threatening withdrawal of the state from the Union in case of attempt to enforce such acts except in the courts of that state. This ordinance was repealed by the state convention March 16, 1833.

Ordinance of Secession. — The term ordinance was applied to the various acts of secession adopted by the Confederate states. In this relation it was used in the sense of organic provisions, although in the main they were mere enact-

§ 2. Difference between ordinance and resolution. As the terms are ordinarily used in charters, there is a distinction between an ordinance and a resolution. The corporation cannot accomplish by an order or resolution that which, under its charter, can be done only by an ordinance. Whether the particular thing should be done by ordinance or resolution depends upon the proper construction of the charter and the forms observed in doing the act. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a temporary character only. It may be stated as a general rule that, matters upon which the municipal corporation desires to legislate must be put in the form of an ordinance, while all acts that are done in its ministerial capacity and for a temporary purpose may be put in the form of resolutions.

Municipal charters generally prescribe that an ordinance

ments by the legislatures of these several states, but in some instances the people were supposed to have given their consent.

Colony Ordinance of 1647, a law by the Massachusetts Colony under which the legislature has the right to appropriate, or to grant to a city or town the right to appropriate, the waters of great ponds for domestic purposes, for the extinguishment of fires, and other like municipal or public The ordinance is still in force in a modified form. Watuppa Reservoir Co. v. Fall River, 147 Mass., 548, 556; 18 N. E. Rep., 465. Notes as to, 5 L. R. A., 179, and 13 L. R. A., 255.

Massachusetts colony ordinance of 1041, fixing the right of property upon salt water. Barker v. Bates, 13 Pick. (Mass.), 255; Mayhew v. Norton, 17 Pick. (Mass.), 357, 359; Weston v. Sampson, 8 Cush. (Mass.), 347.

4 California — Pimental v. San Francisco, 21 Cal., 351.

Colorado — Central v. Sears, 2 Colo., 588.

Connecticut — State v. Tryon, 39 Conn., 183.

Georgia — Bearden v. Madison, 73 Ga., 184.

Illinois — People v. Crotty, 93 Ill., 180.

Indiana—Anderson v. O'Connor, 98 Ind., 168.

Iowa — Starr v. Burlington, 45 Iowa, 87.

Kansas — Newman v. Emporia, 32 Kan., 456; 4 Pac. Rep., 815.

Missouri — Nevada; to use, v. Eddy, 123 Mo., 546; 27 S. W. Rep., 471; Trenton v. Coyle, 107 Mo., 193: 17 S. W. Rep., 643; Thompson v. Boonville, 61 Mo., 282; Springfield v. Knott, 49 Mo. App., 612; Cape Girardeau v. Fougeu, 30 Mo. App., 551.

New Jersey—Paterson v. Barnet, 46 N. J. L., 62, 66; Hunt v. Lambertville, 45 N. J. L., 279; State v. Bayonne, 35 N. J. L., 335.

Texas—Brand v. San Antonio (Tex. Civ. App., 1896), 37 S. W. Rep., 340.

Washington—Burmeister v. Howard, 1 Wash. Ty., 207.

5 Alma v. Guaranty Savings Bank,19 U. S. App., 622, per Thayer, J.;

must be signed by the mayor, unless passed over his veto, while, ordinarily, a resolution need not be, as the passage of the latter is usually not a legislative act.⁶

Where the mayor is a constituent part of the legislative power his approval of all legislative acts is necessary to their validity.⁷

Blanchard v. Bissell, 11 Ohio St., 96, 103; State v. Bayonne, 35 N. J. L., 335; Grimmell v. Des Moines, 57 Iowa, 144.

"A municipality may only legislate through the passage of an ordinance and not by the passage of mere resolutions." People ex rel. v. Mount, 186 Ill., 560, 571; 58 N. E. Rep., 360.

Acts of legislation which prescribe a permanent rule of conduct of government and which are to have a continuing force and effect must be established by ordinance. C. & N. Pac. R. R. v. Chicago, 174 Ill., 439; 51 N. E. Rep., 596; Altamont v. B. & O. S. W. R. R., 184 Ill., 47; 56 N. E. Rep., 340; Baltimore & O. S. W. Ry. Co. v. Altamont, 84 Ill. App., 274, 277; Nazworthy v. Sullivan, 55 Ill. App., 51; C. & N. P. R. R. Co. v. Chicago, 174 Ill., 455.

A resolution is designed to reach special and individual cases, 1 Thompson, Corp., § 937.

"An order forbidding fireworks in the streets is an ordinance, one appropriating money for celebrating a holiday is a resolution." Century Dict. & Cyc., tit. "Ordinance."

"Every LEGISLATIVE ACT * * * shall be by ordinance." Charter of Consolidated City and County of San Francisco, art. 11, sec. 8; Paterson v. Barnet, 46 N. J. L., 62, 66; Chicago v. McCoy, 136 Ill., 344, 351.

A charter provision "that it shall not be necessary for any order or resolution of either branch, or to which the concurrence of both branches of the council may be required, to be presented to the mayor for his approval, but the same shall be binding for all purposes, the councils may transact business by order or resolution; and every such order or resolution shall be filed in the archives of the city, and shall be evidence for the purposes therein contained," does not authorize legislation by order or resolution, but merely refers to such current business as may be properly done by order or resolution. Shaub v. Lancaster City, 156 Pa. St., 362, 365; 26 Atl. Rep., 1067; 21 L. R. A., 691.

⁶ Burlington v. Dennison, 42 N. J. L., 165; disapproving Kepner v. Commonwealth, 40 Pa. St., 124, saying that it is contrary to all other adjudged cases, and can only be sustained on the peculiar and ambiguous phraseology of the charter of the city of Harrisburg. People ex rel. v. Mount, 186 Ill., 560, 574; 58 N. E. Rep., 360.

⁷C. R. I. and P. R. R. Co. v. Council Bluffs, 109 Iowa, 425; 80 N. W. Rep., 564; Saxton v. Beach, 50 Mo., 488; Saxton v. St. Joseph, 60 Mo., 153; Thompson v. Boonville, 61 Mo., 282; Irvin v. Devors, 65 Mo., 625; Trenton v. Coyle, 107 Mo., 193; 17 S. W. Rep., 643; Crutchfield v. Warrensburg, 30 Mo. App., 456.

A general ordinance cannot lega!ly provide that legislative power
may be exercised by resolution, for

Where the resolution is passed with all the formality of an ordinance, it thereby becomes a legislative act, and it is immaterial whether called an ordinance or resolution.⁸

§ 3. Illustrations as to when ordinance necessary. Under particular charter provisions, ordinances have been held necessary in performing the following legislative acts: Providing for the issuing of bonds for the construction of sewers; ordering the grading a street; changing grade of street; test improvements; reconstruction of street; altering the

an ordinance cannot change the charter. Cape Girardeau v. Fougeu, 30 Mo. App., 551.

A resolution may be ratified by an ordinance. State *ex rel.* v. Cowgill, etc., Milling Co., 156 Mo., 620; 57 S. W. Rep., 1008.

Where a charter requires every resolution affecting the interests of the city to be presented to the mayor for his approval a resolution authorizing the removal of night soil from the city must be presented to the mayor for his signature. Dey v. Jersey City, 19 N. J. Eq., 412, 416.

* California—Pollock v. San Diego, 118 Cal., 593; Gas Co. v. San Francisco, 6 Cal., 190.

Kentucky—Gleason v. Barnett, 22 Ky. Law Rep., 1660; 61 S. W. Rep., 20.

Indiana—Crawfordsville v. Braden, 130 Ind., 149; 30 Am. St. Rep.,

Louisiana—First Municipality v. Cutting, 4 La. Ann., 336.

Missouri—Tipton v. Norman, 72 Mo., 380; Springfield v. Knott, 49 Mo. App., 612; Manufacturing Co. v. Schell City, 21 Mo. App., 175.

Nebraska—McGavock v. Omaha, 40 Neb., 64.

New Jersey—Green v. Cape May, 41 N. J. L., 45.

New York—Drake v. Railroad Co., 7 Barb. (N. Y.), 508.

Texas—San Antonio v. Micklejohn, 89 Tex., 79.

Wisconsin—Green Bay v. Brauns, 50 Wis., 204.

United States—Atchison v.Board of Education, 148 U. S., 591; Crebs v. Lebanon, 98 Fed. Rep., 549; Alma v. Guaranty Sav. Bank, 19 U. S. App., 622; Roberts v. Paducah, 95 Fed. Rep., 62.

A resolution not approved by the mayor has not the effect of an ordinance. Central v. Sears, 2 Colo., 588; Crutchfield v. Warrensburg, 30 Mo. App., 456; Waln v. Philadelphia, 99 Pa. St., 330, 337.

A joint resolution of councils, directing the opening of a street laid down on one of the public plans of the city, held in Pennsylvania to be of same force as an ordinance for that purpose. Sower v. Philadelphia, 35 Pa. St., 231, 236.

A by-law may be enacted in the form of a resolution. Thompson Corp., § 936.

State v. Barnet, 46 N. J. L., 62.
 Clay v. Mexico, 92 Mo. App.,
 State v. Bayonne, 35 N. J. L.,
 335

¹¹ Kroffe v. Springfield, 86 Mo. App., 530.

¹² Indianapolis v. Miller, 27 Ind.,
 394; Nevada to use v. Eddy, 123
 Mo., 546; 27 S. W. Rep., 471.

Ritterskamp v. Stifel, 59 Mo.
 App., 510; Farrell v. Rammelkamp,
 Mo. App., 425.

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width of a sidewalk;¹⁴ making contracts for the employment of legal counsel;¹⁵ appointing a commissioner to assess damages;¹⁶ fixing the permanent compensation of municipal officers;¹⁷ changing salaries fixed by ordinance;¹⁸ changing ward lines;¹⁰ amending or repealing an ordinance;²⁰ and exercising the power of licensing.²¹

§ 4. Same—creating offices and situations. Under some charters every office or situation under the municipal government or its departments must be created by ordinance, except where the charter itself or some legislative act applicable, creates the office or position.²²

Ordinarily the officer possesses no constitutional or charter prerogative to appoint subordinates, independent of the action of the legislative authority, and by all authorized legislation relating thereto he must be governed, not only in making the appointment but in all that is incident to the exercise of the power.²³

Generally the power to create offices and situations is vested in the council or governing legislative body,²⁴ and, of course,

- ¹⁴ Cross v. Morristown, 18 N. J. Eq., 305.
 - 15 Bryan v. Page, 51 Tex., 532.
 16 State v. Bergen, 33 N. J. L.,
- 39, 72.
- ¹⁷ Central v. Sears, 2 Colo., 588; Walker v. Evansville, 33 Ind., 393; Brazil v. McBride, 69 Ind., 244; Smith v. Com., 41 Pa. St., 335.
- 18 Hisey v. Charleston, 62 Mo. App., 381.
- ¹⁹ McCulley v. Elizabeth, 66 N.
 J. L., 555; 49 Atl. Rep., 686; Cascaden v. Waterloo, 106 Iowa, 673;
 77 N. W. Rep., 333.
- ²⁰ Cascaden v. Waterloo, 106Iowa, 673; 77 N. W. Rep., 333;Young v. St. Louis, 47 Mo., 492.

"An ordinance cannot be amended, suspended or repealed by a resolution. The acts which amend, modify or repeal a law should be of equal dignity with the act which enacts or establishes the law. A resolution or order is not a law, but merely the form in

- which the legislative body expresses an opinion." People ex rel. v. Mount, 186 Ill., 560, 578, 579; 58 N. E. Rep., 360; Jones v. McAlpine, 64 Ala., 511.
- ²¹ This is a subject which, in its nature, requires legislation of a permanent character and of continuing force and effect. The fact that the license, under the general law, can only extend for a limited time, as, for example, one year, can not change the rule. People ex rel. v. Mount, 186 Ill., 560; 58 N. E. Rep., 360.
- ²² See State v. Kennon, 7 Ohio St., 546.
- 23 See U. S. v. Perkins, 116 U. S.,483, affirming 20 Ct. of Cl., 438.
- ²⁴ Somerville v. Wood, 129 Ala.,
 369; 30 So. Rep., 280; Anderson v.
 Camden, 58 N. J. L., 515; 33 Atl.
 Rep., 846.

Where the charter authorizes the city council to fix the compensa-

the charter method in this respect, as well as the mode therein prescribed for the election or appointment of officers and persons to public positions, must be observed.²⁵ An office or position which must continue to exist until abolished by ordinance can only be created by the exercise of a power essentially legislative—a power which the council or governing legislative body alone possesses under the charter, which cannot, as pointed out elsewhere,²⁶ be delegated. It has been held that "the legislature cannot commit to the discretion of others the important function of creating public offices in unlimited or indefinite number—offices which the power creating them is incompetent to abolish." But day laborers, of course, are not included, and under some charters this class of employes is the only exception. Sometimes ordinary clerical assist-

tion of its members this may be done by ordinance although no provision for compensation existed at the election of the councilmen. Tacoma v. Lillis, 4 Wash., 797; 18 L. R. A., 372; 31 Pac. Rep., 321.

When salary cannot be fixed by ordinance under particular provisions. Taylor v. Tacoma, 8 Wash., 174; 35 Pac. Rep., 584.

The board of supervisors "when authorized to do so by ordinance," may appoint additional clerks. Charter San Francisco, Art. II, Ch. 1, § 4; Statutes and Amend. to Codes of Cal. (1899), pg. 244.

²⁵ Illinois—Launtz v. People, 113 Ill., 137; People v. Weber, 89 Ill., 347; Home Ins. Co. v. Tierney, 47 Ill. App., 600.

Massachusetts—Com. v. Allen, 128 Mass., 308; Saunders v. Lawrence, 141 Mass., 380; 5 N. E. Rep., 840.

Maine—Bearce v. Fassett, 34 Me., 575.

Michigan—Baker v. Port Huron, 62 Mich., 327; 28 N. W., 913.

New Jersey—State (Clarke) v. Thornton, 49 N. J. L., 349; § Atl., 509.

Ohio-State v. Bryson, 44 Ohio St., 457; 8 N. E. Rep., 470.

Tennessee—Lawrence v. Ingersoll, 88 Tenn., 52, 62; 6 L. R. A., 308; 17 Am. St. Rep., 870; 12 S. W. Rep., 422.

Vermont—Stone v. Small, 54 Vt., 498.

Ordinance creating office, as city scavenger need not specify manner in which his work shall be done. Ouray v. Corson (Colo. 1900), 59 Pac. Rep., 876.

Vote required in creating under particular charter. Kirkham v. Russell, 76 Va., 956, 959.

Where the law requires a resolution employing a clerk to be signed by the mayor, failure nullified the act. People v. Schroeder, 12 Hun (N. Y.), 413.

Where power to appoint is vested by charter in the council, an ordinance is void which confers such power on the mayor and council. State (Volk) v. Newark, 47 N. J. L., 117. See § 15 post.

26 Sec. 86 et seq. post.

²⁷ Ford v. Harbor Commissioner, 81 Cal., 19, 37.

28 Municipal Code of St. Louis, p. 385, sec. 98.

ants and other miscellaneous employes may be appointed without the creation by ordinance of the positions which they occupy. However, this question must be determined by the provisions of the particular charter.²⁹

The wise and salutary rule, rigidly enforced by the courts, which forbids the payment of a salary or compensation to the officer unless the law so expressly provides and title is secured in accordance with law,³⁰ and which denies extra compensation, without express legal provision being made therefor,³¹

²⁰ Sometimes council may elect or appoint. Achley's Case, 4 Abb. Pr. (N. Y.), 35; Com. v. Pittsburgh, 14 Pa. St., 177, 182; Kirkham v. Russell, 76 Va., 956.

Can not appoint officer, as pound keeper, unless expressly authorized by charter. White v. Tallman, 26 N. J. L., 67.

The appointment of an agent of fortifications by the Secretary of war, there being no act of Congress conferring that power upon that officer, is irregular. U. S. v. Maurice, 2 Brock. (U. S.), 96.

Town trustee may employ broker, to sell bonds. Reed v. Orleans, 1 Ind. App., 25; 27 N. E. Rep., 109. Likewise, city comptroller. New York v. Sands, 105 N. Y., 210; 11 N. E. Rep., 820. Compare Armstrong v. Ft. Edwards, 84 Hun (N. Y.), 261; 32 N. Y. Supp., 433; People v. Smithville, 85 Hun (N. Y.), 114; 32 N. Y. Supp., 668.

Agent may be employed, without formal ordinance, by-law or resolution, unless so required by law. Wilt v. Redkey (Ind. App., 1902); 64 N. E. Rep., 228.

Without express charter or ordinance authority neither the mayor nor city solicitor can employ an attorney. Fletcher v. Lowell, 15 Gray (81 Mass.), 103. So, to employ an attorney, the president of a village must have express authority, Mark v. West Troy, 69

Hun (N. Y.), 442; 23 N. Y. Supp., 422

³⁰ Fatal defects in the election or appointment of the officer may deprive him of compensation. Rothrock v. School District, 133 Pa. St., 487; 19 Atl. Rep., 483; Phelon v. Granville, 140 Mass., 386; 5 N. E., 269; Commonwealth v. Allen, 128 Mass., 308.

It has been held that an officer can not recover compensation for services rendered under a statute held unconstitutional. Meagher v. County, 5 Nev., 244; Central v. Sears, 2 Colo., 588; Lancaster v. Fulton (Pa.), 24 W. N. C., 401; Smith v. Commonwealth, 41 Pa. St., 335.

No implied promise or liability to pay officers will arise. Riley v. K. C., 31 Mo. App., 439; Garnier v. St. Louis, 37 Mo., 554. For a public officer is not entitled to compensation by virtue of a contract express or implied. The right of compensation can only exist, if at all, as a creation of law and as an incident to the office. Givens v. Daviess County, 107 Mo., 603, 608, 609; 17 S. W. Rep., 998.

³¹ Extra Compensation Denied. Carroll v. St. Louis, 12 Mo., 444. Chamberlain v. Kansas City, 125 Mo., 430; 28 S. W. Rep., 745; State ex rel. v. Holladay, 67 Mo., 64; Lemoine v. St. Louis, 120 Mo., 419; 25 S. W. Rep., 537. is often applied to deputies, assistants and subordinates in the nunicipal service.

The ordinance may confer authority upon the officer to appoint such additional help as may be required for the efficient working of his department, or, as may be necessary, where the character of such help is specified by naming in terms the positions, and designating the compensation for each situation. Such ordinance does not constitute a delegation of legislative power. The ordinance itself creates the situation, and whether it be technically an office or a mere place, the officer by filling it simply supplies an incumbent or person (as in his judgment the demands of the public service may require) for a position already created by legal authority.³² An office or position may exist without an incumbent.³³

Sometimes the legislative power to provide situations under the city government and to create new officers does not of itself include the power to appoint,³⁴ but oftentimes the power of appointment is an exclusive prerogative of the mayor in case of an officer, or of an officer in case of an assistant or subordinate. This rule results from express charter or legislative provisions applicable,³⁵ and is an exception to the

The fact that the salary is inadequate does not change the rule. A promise to pay the officer extra fees beyond that established by law will not bind the corporation. Decatur v. Vermillion, 77 Ill., 315; Heslep v. Sacramento, 2 Cal., 580.

³² State ex rel. v. Mason, 153 Mo., 23; 54 S. W. Rep., 524, in application of rule to policemen, provided by state statute.

An act conferring on county commissioners the power to authorize the employment of additional help in certain offices does not constitute a delegation of legislative power. Nelson v. Troy, 11 Wash., 435; 39 Pac. Rep., 974. So, a statute conferring on the attorney general the authority to appoint some reputable attorney for the performance of certain duties appertaining to the office of the attorney general, with like effect

as if done by the officer, does not confer the power to create a new office. State v. Becker, 3 S. Dak., 29; 51 N. W. Rep., 1018. So, a statute which provides that whenever the county attorney of any county shall be unable or shall neglect or refuse to enforce the provisions of certain laws in his county, the attorney general "may appoint as many assistants as he shall see fit," to enforce such laws, has been sustained. In re Gilson, 34 Kan., 641; 9 Pac. Rep., 763.

33 People v. Stratton, 28 Cal., 382.

34 State v. Denny, 118 Ind., 382;
21 N. E. Rep., 252; Evansville v. State, 118 Ind., 426;
21 N. E. Rep., 267; State v. Kennon, 7 Ohio St., 546;
Davis v. State, 7 Md., 151;
31 Am. Dec., 331.

35 Municipal Code of St. Louis, p. 384, sec. 97.

rule sometimes laid down that, where a public office is of legislative creation the legislature can modify, control or abolish it, and within these powers is embraced the right to change the mode of appointment to office.³⁶

§ 5. When action may be taken by resolution—Illustrations. The general rule is that, where a charter commits the decision of the matter to the council or legislative body alone, and is silent as to the mode of its exercise, ordinarily the decision may be evidenced by resolution.³⁷ But it does not necessarily follow that, because the charter does not, in express terms, require an act to be done by an ordinance it may, therefore, be effected by a mere resolution. On the contrary, where the requirement that the corporate act should be done by ordinance is implied by necessary inference (as where it is a clear legislative act), a resolution is not sufficient, but an ordinance is indispensable.³⁸

Under particular charter provisions, resolutions have been held sufficient in the following instances: For the purchase of fire department apparatus;³⁹ construction of a sewer;⁴⁰ ac-

³⁶ Davis v. State, 7 Md., 151; 61 Am. Dec., 331.

37 Eichenlaub v. St. Joseph, 113 Mo., 395, 402; 21 S. W. Rep., 8; Halsey v. Rapid Transit Co., 54 N. J. L., 102; 20 Atl. Rep., 859; Butler v. Passaic, 44 N. J. L., 171; Green v. Cape May, 41 N. J. L., 45; State v. Jersey City, 27 N. J. L., 493; Pollok v. San Diego, 118 Cal., 593: 50 Pac., 769; Crawfordsville v. Braden, 130 Ind., 149; 28 N. E. Rep., 849; Burlington v. Dennison, 42 N. J. L., 165; Bigelow v. Perth Amboy, 25 N. J. L., 297; Kepner v. Commonwealth, 40 Pa. St., 124; Lincoln St. Ry. Co. v. Lincoln, 61 Neb., 109; 84 N. W. Rep., 802; Chicago, etc., R. R. Co. v. Chicago, 124 Ill., 439; Chicago v. McKechney, 91 Ill. App., 442.

Where a state constitution requires the legislature to approve or reject a municipal charter as a whole, without power of alteration, held approval may be by joint resolution and need not be by

bill, signed by the governor. Brooks v. Fisher, 79 Cal., 173; 21 Pac. Rep., 652.

A resolution will be sufficient for the performance of a ministerial act. Quincy v. C., B. & Q. Railroad Co., 92 Ill., 21. Mayor need not approve resolution, when. Burlington v. Dennison, 42 N. J. L., 165.

38 People ex rel. v. Mount, 186
Ill., 560, 573; 58 N. E. Rep., 560;
Atchison Board of Education v.
DeKay, 148 U. S., 591, 599; Newman v. Emporia, 32 Kan., 456; 4
Pac. Rep., 815.

Where the charter requires a resolution to be adopted by a majority vote such vote must be given to render the resolution legal. Cascaden v. Waterloo, 106 Iowa, 673; 77 N. W. Rep., 333.

³⁹ Green v. Cape May, 41 N. J. L., 45.

40 State v. Jersey City, 27 N. J. L., 493. ceptance of a dedication;⁴¹ prescribing salary of officer;⁴² fixing the amount of a license previously authorized to be imposed;⁴³ fixing a license fee from time to time, under general ordinance;⁴⁴ ordering street improvements;⁴⁵ directing city agents to make named contracts and to appoint municipal agents;⁴⁶ confirming prior corporate acts;⁴⁷ directing conveyance of property;⁴⁸ and for waiving time of performance of contract.⁴⁹

The question whether the particular act is to be taken by ordinance or resolution is considered in appropriate places throughout this work.

§ 6. How ordinances differ from regulations, orders, resolutions, etc. Sometimes the word ordinance is used interchangeably with by-laws, resolutions, regulations, orders, etc. 50 But there is a distinction in these words in ordinary usage.

Regulation is the most general of them all, meaning a rule of order prescribed by a superior or competent authority, relating to the actions of those under its control; a governing direction; precept; law (as police regulation); any rule for the ordering of affairs, public or private. In this sense it becomes the generic term from which all others are defined, specified or differentiated. More specifically, a regulation is a rule prescribed by a municipality, corporation or society for the conduct of third persons dealing with it, as distinguished from a by-law or ordinance.⁵¹

By-law, as above stated, was the original designation for ordinance, is the word employed in the English law, and to a

- 41 State v. Elizabeth, 37 N. J. L , $422.\,$
- 42 Green Bay v. Brauns, 50 Wis., 204.
- 43 Burlington v. Insurance Co., 31 Iowa, 102.
- 44 Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark., 370; 19 S. W. Rep., 1053.
- 45 Commissioners v. Silvers, 22 Ind., 491; Indianapolis v. Imberry, 17 Ind., 175; Delphi v. Evans, 36 Ind., 90; Buckley v. Tacoma, 9 Wash., 253.
- 46 Alton v. Mulledy 21 Ill., 76; Egan v. Chicago, 5 Ill. App., 70.
- ⁴⁷ San Francisco Gas Co. v. San Francisco, 6 Cal., 190.

- ⁴⁸ Morgan v. Johnson, 106 Fed. Rep., 452; 45 C. C. A., 421.
- ⁴⁹ Hubbard v. Norton, 28 Ohio St., 116.
- ⁵⁰ State (Hunt) v. Lambertville, 45 N. J. L., 279, 282; Alma v. Guaranty S. Bank, 19 U. S. App., 622; Lincoln v. Sun Vapor Light Co., 19 U. S. App., 431.

"Every legislative act of the municipal assembly shall be by ordinance or resolution." Charter Greater New York, ch. 1, § 39; Laws of N. Y. (1897), p. 14.

⁵¹ Century Dict. & Cyc., tit., "Regulation;" Compton v. Van Volkenburg, 34 N. J. L., 134; State

limited extent, in this country. But the term is also applied to standing rules, adopted by public or private corporations, societies, or associations, relating to their own internal organization and the conduct of their officers and members.⁵²

Ordinance, although sometimes used in a broad sense so as to include all forms of regulations by civil authority, even acts of Parliament, in this country is usually confined to legislation of municipal corporation. The term is sometimes applied to all sorts of rules and by-laws of the municipality.⁵³

Resolution is said to be only a less solemn or less usual form of an ordinance. "It is an ordinance still if it is anything intended to regulate any of the affairs of the corporation."

Ordinance, then, according to the Supreme Court of Pennsylvania, is the generic term for all acts of council affecting the affairs of the corporation, and no distinction can be made between them founded on the difference of degree in which they affect those affairs.⁵⁴

Order. Sometimes the word resolution or order to enter into contracts is used in a restricted sense.⁵⁵ Thus an order of the council that certain street work be done was held, under a particular charter, not to be an ordinance respecting the necessity of following the charter style and form and publication.⁵⁶

v. Overton, 24 N. J. L., 441; 61 Am. Dec., 671; Morris, etc., R. R. v. Ayres, 29 N. J. L., 393; 80 Am. Dec., 215; Wilmington Bank v. Wollaston, 3 Harr. (Del.), 90.

⁵² By-law and regulation distinguished by Judge Thompson, 1 Thompson, Corp., § 937.

By-law defined.—Kirkpatrick v. United Presbyterian Ch., 63 Iowa, 372; Flint v. Pierce, 99 Mass., 68; 96 Am. Dec., 691; Drake v. Hudson River Co., 7 Barb. (N. Y.), 539.

53 "Ordinary usage shows this, and it may be found illustrated in Willcock on Corporations, 73;" Kepner v. Commonwealth, 40 Pa. St., 124, 129, 130.

54 Kepner v. Commonwealth, 40Pa. St., 124, 130.

55 Tracy v. People, 6 Colo., 151,

153; 4 Am. & Eng. Corp. Cas., 373.
Napa v. Easterby, 76 Cal., 222,
228; 18 Pac. Rep., 253; People v. Linden, 107 Cal., 94; 40 Pac. Rep.,
115; People v. Counts, 89 Cal., 15;
26 Pac. Rep., 612.

Differences as to "ordinances," "resolutions" and "orders" as to publication. Fairchild v. St. Paul, 46 Minn., 540; 49 N. W. Rep., 325; Elmendorf v. New York, 25 Wend. (N. Y.), 693.

"ORDER" defined. Tinkham v. Greer, 11 Kan., 299; People v. Williams, 64 Cal., 87; 27 Pac. Rep., 939.

"Order" of board of health. New York Health Dept. v. Knoll, 70 N. Y., 530.

Order to be published, when. State v. Pierce, 35 Wis., 93.

- § 7. How ordinances differ from rules of procedure. Rules of procedure or rules of council are mere rules of practice of the council or governing legislative body itself in its deliberations, passed by virtue of an authority inherent in all associated functionaries, and implied when not expressly given; and establishing the forms under which it acts in the process of passing ordinances, and expressing the corporate will in all matters within the scope of its legitimate powers. These rules cannot be considered ordinances, but are merely forms of procedure for passing ordinances, and exercising the powers of the corporation.⁵⁷
- § 8. Classification of ordinances. Ordinances may be classified under four general heads:

First, ordinances enacted by virtue of the police power, prescribing penalties for specified commissions and omissions, which may be designated as *police ordinances*.⁵⁸

Second, ordinances granting franchises, special privileges, etc., which may be termed franchise or contract ordinances.⁵⁰

Third, ordinances providing for public work, usually called improvement ordinances. Of this kind, there are three general classes, namely, (1) those providing for public improvements to be paid for by special assessment or special taxation (sometimes termed), levied on property assumed to be benefited because of the improvement; (2) those directing the abatement of specified public nuisances at the expense of the property owner, either by special assessment, or destruction of the property; and (3) those ordering public work at the expense of the general municipal revenue.⁶⁰

Fourth, ordinances (1) of a permanent character, made for the guidance and regulation of municipal officers and business, and (2) those of a temporary nature, enacted for specific purposes, which authorize and direct particular officers to do certain things, as to purchase, sell, lease, etc., property, borrow money, make contracts, and, generally, to do anything within the range of municipal competence, where the execution of the given power is not elsewhere vested. These may be termed administrative ordinances.

⁵⁷ Kepner v. Commonwealth, 40 Pa. St., 124, 130. Rules are less binding, may be ignored, etc. See section 115 post.

⁵⁸ Chapter XIV.

⁵⁰ Chapter XVII.

⁶⁰ Chapter XVI.

- § 9. Same—general and special. As regards their operation, ordinances are spoken of as general and special. All ordinances of a general nature having an obligatory force on the community and upon the administration of the municipal government may be denominated general. Those granting franchises and special privileges to persons or corporations, providing for public work and improvement, as entablishing sewer districts, ordering the construction of sewers, streets and sidewalks, fixing the grade of streets, authorizing the city to borrow money, empowering officials to do certain things, as the leasing of property, the laying of water distribution pipes, etc., are usually special. In view of the language of certain charter provisions and the construction adopted respecting repeals, this distinction is important. 61
- § 10. Same penal and non-penal general and special. Relating to the time of taking effect or publication after passage, ordinances are sometimes classified as penal and nonpenal, and as general and special. Thus under a charter providing that ordinances imposing penalties or forfeiture shall not take effect until ten days after their adoption, an ordinance providing for the construction of a sidewalk and authorizing a special assessment to pay for the same is not such an ordinance. 62 So, under a charter providing that, "no ordinance subjecting any person to fine or imprisonment shall take effect until it shall have been published for at least one week in a newspaper published in said city," an ordinance authorizing the controller to negotiate and dispose of city bonds need not be so published.63 In one case an ordinance providing fire limits within a comparatively small portion of territory was held to be a general ordinance respecting the time of taking effect.64 "By-laws of a general or permanent nature," as used

61 Where a section of a general ordinance refers exclusively to one subject, such section is not for that reason a special ordinance. Lemoine v. St. Louis, 5 Mo. App., 583.

Under some charters, a general ordinance must be repealed by express terms. Lemoine v. St. Louis, 72 Mo., 404, 1 c. 406. See § 204, post.

62 Illinois Central R. R. Co. v. People, 161 Ill., 244; 43 N. E. Rep., 1107

Penal. Oak Grove v. Juneau, 66 Wis., 534; 29 N. W. Rep., 644.

63 Stevenson v. Bay City, 26 Mich., 44, 49.

64 Reynolds v. Harris, 27 Weekly Law Bul. (Ohio), 229.

in the Iowa Code relating to publication, includes a city ordinance granting a franchise.⁶⁵

Respecting the mode of procedure in passage, ordinances may be general or special. Thus it has been held that a resolution awarding a contract is not of a "general or permanent nature," within the meaning of a charter provision requiring a two-thirds vote. But a franchise ordinance granting the right to construct and operate a street railway, 67 one relating to impounding animals found running at large, 68 or one regulating the license and sale of liquor, 69 is an ordinance of a general or permanent nature within the meaning of charter provisions requiring reading on three different days.

Ordinance may combine contractual and police regulations. It is no objection to an ordinance that it combines contractual and police regulations. Thus an ordinance granting a railway company a right to construct a railroad upon a public landing under condition forbidding the use of the track during specified hours, combines contractual as well as police provisions, but is not void, for that reason. "In so far as the ordinance granted the right or franchise to construct and operate a railway upon the public ground, it became, when accepted, a contract; but the provision by which the use of the track was prohibited during the time was, in its nature and effect, a municipal police regulation, operating in the interest of public safety. 70 This police provision having been enacted pursuant to clear legislative authority, the fact that it is found in an ordinance which also contains contract provisions does not change the result or affect the essential character of the power exercised; and this police provision, being thus specially authorized and duly enacted, unquestionably

As to when ordinances take effect, see section 34, post.

65 State v. Omaha & C. B. Ry. & B. Co., 113 Iowa, 30; 84 N. W. Rep., 983

Ordinance providing for loan is of general nature. National Bank of Commerce v. Grenada, 44 Fed. Rep., 262, overruling 41 Fed. Rep., 87.

66 Cincinnati v. Bickett, 26 Ohio St., 49.

67 Smith v. Columbus, L. & S. Ry. Co., 8 Ohio N. P. Rep., 1.

68 McGraw v. Whitson, 69 Iowa, 348.

⁶⁹ Brown v. Lutz, 36 Neb., 527;54 N. W. Rep., 860.

70 McDonald v. Toledo Consolidated R. R. Co., 43 U. S. App., 79;
20 C. C. A., 322; 74 Fed. Rep., 104;
Hayes v. R. R. Co., 111 U. S., 228;
Joy v. St. Louis, 138 U. S., 1, 42.

has, within the corporate limits, the force of a law enacted by the legislature of the state."⁷¹

§ 12. Force and effect of ordinances. Valid ordinances of municipal corporations are as binding on the corporators and the inhabitants of the place as the general laws of the state upon the citizens at large. The members of the council or governing legislative body, duly assembled for the performance of their legitimate functions, when acting within the confines of their delegated authority, constitute "a miniature general assembly," and the law-making power of the state gives their ordinances the force of laws passed by the legislature of the state. The municipal ordinances and the state statutes are from a common source of authority. One class presents it in a delegated, and the other in a direct form, "but it is the power

7! Pittsburg, C. & St. L. Ry. Co.v. Hood, 94 Fed. Rep., 618.

72 FORCE AND EFFECT OF ORDINANCES.

California—Ordinance to be construed as if its terms had been incorporated in the statute. San Luis Obispo v. Fitzgerald, 126 Cal., 279; Murphy v. San Luis Obispo, 119 Cal., 624; Johnson v. Simonton, 43 Cal., 242.

Connecticut—State v. Tyron, 39 Conn., 183.

Georgia—Bearden v. Madison, 73 Ga., 184, 186; Perdue v. Ellis, 18 Ga., 586.

Illinois—Tudor v. Chicago and South Side Rapid Transit R. Co., 154 Ill., 129 (locating railroad); Wragg v. Penn Tp., 94 Ill., 11; 34 Am. Rep., 199 (stock at large); Wright v. Chicago, etc., R. Co., 7 Ill. App., 438, 446.

Indiana—Indianapolis v. Indianapolis Gas Light Coke Co., 66 Ind., 396 (authorizing contract).

Michigan—Detroit v. Ft. Wayne and Belle Isle Ry. Co., 95 Mich., 456; 35 Am. St. Rep., 580 (regulating street railways).

Minnesota — Bott v. Pratt, 33 Minn., 323; 53 Am. Rep., 47 (prohibiting leaving horse unhitched).

Missouri—Jackson v. Grand Avenue Ry. Co., 118 Mo., 199, 218, 219; 24 S. W. Rep., 192; Union Depot Ry. Co. v. S. Ry. Co., 105 Mo., 562, 575; 16 S. W. Rep., 920; St. Louis v. Foster, 52 Mo., 513.

New Jersey—Bradshaw v. Camden, 39 N. J. L., 416, 419, per Van Syckel, J.

New York — Carthage v. Frederick, 122 N. Y., 268, 271; 19 Am. St. Rep., 490 (removal of snow and ice from sidewalk); Griffin 'v. Gloversville, 73 N. Y. St., 684; 67 App. Div., 403; Gloversville v. Howell, 70 N. Y., 287; Roderick v. Whitson, 51 Hun. (N. Y.), 620.

South Carolina—State ex rel. v. Williams, 11 S. C., 288 (forbidding bawdy houses).

Vermont — St. Johnsbury v. Thompson, 59 Vt., 300, 305, by-laws have force of special laws of the legislature (regulating victualing shops).

73 Per Scott, J., in Taylor v. Carondelet, 22 Mo., 105,

of the state which speaks in both."74 "The passage of an ordinance is, of course, a legislative act."75

\$13. Do ordinances differ as to force and effect from charter or statute? In an early Ohio case it is said that the making of ordinances and by-laws by a town corporation is not the exercise of legislative power in the sense as exercised

De Barr, 58 Mo., 395, l. c., 397.

75 Per Sherwood, J., in Moore v. Cape Girardeau, 103 Mo., l. c. 476; St. Louis v. Mfrs. Saving Bank, 49 Mo., 574.

"When an ordinance is passed * * * it is in force by the authority of the state, and is to be interpreted and executed as if it had been passed by the general assembly." Per Gamble, J., in St. Louis v. Boffinger, 19 Mo., 13, l. c.

"An ordinance has the same force and effect of a law passed by the legislature." Mason v. Shawneetown, 77 Ill., 533, 537. Lord Abinger said: "The by-law has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an act of parliament has upon the subjects at large." Hopkins v. Swansea, 4 M. & W. 621. After approvingly quoting the above, Sherwood, J., in State ex rel. v. Walbridge, 119 Mo., l. c. 391; 24 S. W. Rep., 457; 41 Am. St. Rep., 663, adds: "It is hardly necessary to say that this is the general view," citing 1 Dill. on Mun. Corp. (4th ed.), sec. 308.

The Supreme Court of the United . States announces the same rule in New Orleans Waterworks v. New Orleans, 164 U.S., 471, 481. "The authority to enact by-laws is delegated to the city by the sovereign power and the exercise of the authority gives to such enactments the same force and effect as if they

74 Per Lewis, J., in State v. Vic. had been passed directly by the legislature. They are public laws of a local and limited operation. designed to secure good order and to provide for the welfare and comfort of the inhabitants."

> The ordinance has precisely the same effect as a legislative act, as it "is expressly authorized by the legislature, and whether it be their act or the act of the local city legislature, makes no difference." Per Savage, Ch. J., in Presbyterian Ch. v. New York, 5 Cow. (N.Y.), 538, 541.

The Supreme Court of Missouri said: "A charter adopted direct grant of the constitution itself has all the efficacy of a legislative enactment, and that if * * * a power be given to a city by charter framed and enacted by the legislature itself, ordinances passed in obedience to such charters are laws of the state within the municipality, and are binding upon all persons who come within the scope of their operation, unless they conflict with, and are not in harmony with the constitution and general laws of the state." Grand Ave. Ry. Co. v. Citizens' Ry. Co., 148 Mo., 665, 671, 50 S. W. Rep., 305.

The most recent utterance of the Supreme Court of the United States supports this view. court holds that an ordinance is a law of the state which may impair the obligation of a contract within the meaning of the federal constitution (14th amendment), by the legislature of the state; that the latter prescribes a rule of action which operates upon all—the willing and unwilling. "It comes from a superior, and the inferior is bound to obey it. The charter to a municipal corporation is the exercise of legislative authority. It permits the establishment of by-laws and ordinances; but these are a matter of compact and agreement among the corporators. They do not act upon others, but only upon themselves, and, by mutual consent either directly or indirectly expressed, through the city or town council. These ordinances so made are not the power vested exclusively in the General Assembly."

As affects the liability of citizens *inter sese*, it has been declared in a Missouri case that ordinances differ from charter provisions and legislative acts; that laws controlling the liability of citizens *inter sese* must emanate from the legislature, in whom alone such power is vested by the constitution; that a charter of a city, adopted by the people, is as much a law of the state as if it had been enacted by the legislature, and a

so as to give the federal courts jurisdiction to enjoin its enforcement. Walla Walla V. Walla Walla Water Co., 172 U. S., 1. See sec. 232 et seq. post.

A resolution will have the same effect. Iron M. R. Co. v. Memph's, 96 Fed. Rep., 113. Sec. 232, post.

Contracts which are in contravention of a municipal ordinance have been held void. Milne v. Davidson, 5 Martin, N. S. (La.), 409; 16 Am. Dec., 189; Heland v. Lowell, 3 Allen (Mass.), 407; 81 Am. Dec., 670.

"Within the sphere of their delegated powers municipal corporations have as absolute control as the general assembly (of the state) would have if it never had delegated such powers and exercised them by its own laws." Des Moines Gas Co. v. Des Moines, 44 Iowa 505, 509; 24 Am. Rep., 756.

An ordinance does not partake of the nature of a contract between the corporation and its inhabitants, and therefore the city is not liable for its non-enforcement. Kiley v. Kansas City, 87 Mo., 103; 56 Am. Rep., 443; The Municipal Code of St. Louis, p. 397, sec. 116.

An ordinance authorizing a certain contract and prescribing its terms does not give the contract the force of law or ordinance. State *ex rel*. v. New Orleans & C. R. Co., 37 La, Ann., 589.

Ordinance is a "law" as used in insurance policy. Jones v. Fireman's Fund Ins. Co., 2 Daly (N. Y.). 307.

Ordinances of boards of health have the force of laws within the limits of their territorial jurisdiction. Polinsky v. People, 73 N. Y., 65; People ex rel. v. Court of Special Sessions Justices, 7 Hun. (14 Sup.Ct.), 214; People v. Board of Health, 33 Barb. (N. Y.), 344.

² Markle v. Akron, 14 Ohio, 586, 590. Examine, Bell v. Quinn, 2 Sandf. (N. Y.), 146, 151.

provision of such charter is a valid regulation and binding upon citizens both in their relation to the city and among themselves. "The reason is that the people—the source of all power—conferred the right, by the constitution, upon the city to so legislate by its organic law, just as they granted the legislative power generally to the general assembly, or the judicial power to the courts."

The difference between charter and ordinance will farther appear in treating of the regulation of civil rights and liabilities.³

- § 14. Requisites of a valid ordinance stated. The general requisites of a valid municipal ordinance, one legally binding upon all whom it is designed to operate, may be thus briefly summarized:
- 1. It must be promulgated by a public, or municipal, corporation, duly created and legally existing.
- 2. It must emanate by virtue of power inherent in the corporation, or power either expressly or impliedly delegated to it by the state.
- 3. It must relate to a subject within the scope of the corporation.
- 4. It must be in harmony with the constitution of the United States and the state, the laws of the United States and the state, the municipal charter and general principles of the common law in force in the state.
- 5. Unless it originates by virtue of express delegated power by the state, it must be reasonable in its terms.
- 6. It must be adopted by the authorized tribunal, legally convened.
 - 7. It must be in form as provided.
 - 8. It must be precise, definite and certain in expression.
 - 9. It must be passed in the manner prescribed.

² The action was for alleged negligence, charging violation of an ordinance regulating the careful movement of street cars and designed to protect the public. Sanders v. Southern Electric Ry. Co., 147 Mo., 411, 427; 48 S. W. Rep., 855.

³ See Secs. 40 to 42, post; Baker v. Portland, 58 Me., 199; 10 Am. Law Reg. (N. S.), 559, note by Judge Redfield; Johnson v. Simonton, 43 Cal., 242.

Charter may create civil liability. Rockford v. Hilderbrand, 61 Ill., 155.

- 10. It must be enacted in good faith, in the public interest alone, and designed to enable the corporation to perform its true functions as a local governmental organ.⁴
- § 15. Ordinances must conform to charter. The charter of the city is the organic law of the corporation,⁵ and it bears the same general relation to the ordinances of the city that the constitution of the state bears to the state statutes.⁶ The proposition is self-evident, therefore, that an ordinance can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state.⁷ Thus charter power to remove an "officer at pleasure" cannot be limited by ordinance to removal "for cause." So charter power of the council to appoint and

4"A good by-law should be (a) clearly and definitely expressed, (b) positive, general and equal in its operation as a law, and (c) reasonable in its terms. It must be (d) within the express or necessarily implied powers of the corporation, (e) consistent with, not repugnant to, the general law of the land, and (f) made bona fide in the interests of the corporation, not to serve those of some other person or body of persons." Biggar, Mun. Manual of Canada, p. 327; Phillips v. Denver, 19 Colo., 179; 41 Am. St. Rep., 230; 34 Pac. Rep., 902; Zanone v. Mound City, 103 Ill., 552, 556; Chicago v. Rumpff, 45 Ill., 90, 97; Tugman v. Chicago, 78 Ill., 405.

⁵ East Tennessee University v. Knoxville, ⁶ Baxt. (Tenn.), ¹⁶⁶, 170; Kansas City v. Marsh Oil Co., 140 Mo., ⁴⁵⁸, ⁴⁷¹; ⁴¹ S. W. Rep., ⁹⁴³; St. Louis v. Dorr, ¹⁴⁵, Mo., ⁴⁶⁶, ⁴⁷⁸; ⁴⁶ S. W. Rep., ⁹⁷⁶; St. Louis v. Foster, ⁵² Mo., ⁵¹³; People *ex rel.* v. Mount, ¹⁸⁶ Ill., ⁵⁶⁰; ⁵⁸ N. E. Rep., ³⁶⁰; Williams v. Davidson, ⁴³ Tex. 1, ³⁵; Gabel v. Houston, ²⁹ Tex., ³³⁵, ³⁴³; Cooley's Const. Lim. (6th Ed.), ²²⁷.

⁶ Quinette v. St. Louis, 76 Mo., 402. See sec. 43, post.

⁷ A city ordinance which does not comply with the charter is as invalid as a statute which does not conform to the requirement of a state constitution. People *ex rel.* v. Mount, 186 Ill., 560, 568, 58 N. E. Rep., 360.

"Corporations cannot make bylaws contrary to their constitution. If they do so they act without authority." Per Yates, J., in Rex v. Spencer, 3 Burr., 1839; Placerville v. Wilcox, 35 Cal., 21; Haywood v. Savannah, 12 Ga., 404, 409; Andrews v. Insurance Co., 37 Me., 256; People v. Armstrong, 73 Mich., 288; 16 Am. St. Rep., 578; St. Paul v. Laidler, 2 Minn., 190; 72 Am. Dec., 89; Cape Girardeau v. Fougeau, 30 Mo. App., 551; Hisey v. Charleston, 62 Mo. App., 381; Kemp v. Monett, 95 Mo. App., 452; 69 S. W. Rep., 31; Landis v. Vineland, 54 N. J. L., 75; 23 Atl. Rep., 357; State v. Nashville, 83 Tenn., 697, 54 Am. Rep., 427; Miller v. Burch, 32 Tex., 208, 5 Am. Rep., 242; Gabel v. Houston, 29 Tex., 335, 343; Thompson v. Carroll, 22 How. (U.S.), 422; Thompson v. Richmond, 12 Wall. (U.S.), 349.

8 An ordinance providing that the appointment of a city officer

remove certain officers cannot be transferred by ordinance to the mayor and council.9 So where like charter power is vested in the mayor and council, an ordinance cannot confer such power in the council alone. 10 So an ordinance which abridges the term fixed by charter, 11 or which confers greater powers on an officer, e. g., the mayor, than those given by charter or legislative act.12 will be held void in accordance with the principle stated. Some charters confer upon the officer or head of a department full authority to select all of his subordinates, deputies, clerks and employes, and where such charter power exists the officer cannot be deprived of this power of selection on the part of the legislative body.¹³ The rule is that the power of appointment conferred by charter or statute cannot be taken away by ordinance.¹⁴ Power to pass ordinances is not only limited by the express terms of the charter, but they must not conflict in any degree with its object or the purposes for which the local corporation is organized.15

§ 16. Ordinances must not be inconsistent with the general laws of the state. Ordinances must not be inconsistent with the statutes or general laws of the state, for if they are they will be null and void, unless they emanate by virtue of express grant of the state. The circumstances under which the

shall continue until removed "for cause" is of no effect, where the city charter (St. Joseph) authorizes the appointment by the council during "its pleasure." State ex rel. v. Johnson, 123 Mo., 43, 50; 27 S. W. Rep., 399. To same effect, Horan v. Lane, 53 N. J. L., 275; 21 Atl. Rep., 302; Uffert v. Vogt, 65 N. J. L., 377, 621; 48 Atl. Rep., 574; 47 Atl. Rep., 225. See State v. Draper, 50 Mo., 353.

9 State (Volk) v. Newark, 47 N. J. L., 117.

10 Com. v. Crogan, 155 Pa. St.,448: 26 Atl. Rep., 697.

¹¹ Vason v. Augusta, 38 Ga., 542; Stadler v. Detroit, 13 Mich., 346; East St. Louis v. Kase, 9 Ill. App., 409; Jacksonville v. Allen, 25 Ill. App., 354. ¹² Union Depot Railway Co. v. Smith, 16 Colo., 361; 27 Pac. Rep., 329

¹³ The Municipal Code of St. Louis, p. 385, sec. 89.

¹⁴ Horan v. Lane, 53 N. J. L., 275; 21 Alt. Rep., 302.

¹⁵ Taylor v. Griswold, 14 N. J. L. (2 Green), 222; Mt. Pleasant v. Breeze, 11 Iowa, 399.

Ordinances regulating compensation and fee of city attorney. Boucher v. Moberly, 74 Mo., 113; Lonergan v. Louisiana, 83 Mo. App., 101; Kemp v. Monett, 95 Mo. App., 452; 69 S. W. Rep., 31.

¹⁶ "All by-laws must ever be subject to the general law of the realm and subordinate to it." Norris v. Staps, Hob., 210.

By-laws or ordinances which in-

ordinance may supersede general laws of the state upon the same subject are discussed elsewhere. The adjudications afford many illustrations of this doctrine. Thus an ordinance imposing upon a municipal officer the duties which are required by statute to be performed by a state officer is unauthorized and void. 18 So where the mayor is empowered by statute "in his discretion * * * to impose a fine not exceeding \$20" for a particular offense, an ordinance prescribing a fine of not less than \$3 nor more than \$20 for the same offense, was held void, as limiting the discretion of the mayor conferred by state statute.19 The rule of law seems to be firmly established that, without express grant on the part of the state, that which is allowed by the general laws of the state cannot be prohibited by ordinance.20 Thus where the sale of intoxicating liquor or pool selling is licensed by state statute, an ordinance forbidding such sales altogether within the corporate limits is void.²¹ So without express legislative grant, an ordinance cannot authorize what the statutes forbid.22

fringe the common or statute law of the state, or particular statutes relating to the corporation (provided these particular statutes do not impair the obligation of the charter) are void. Haywood v. Savannah, 12 Ga., 404, 409.

Ordinances which conflict with the constitution or statutes of the state or charter of the local corporation are void. Thomas v. Richmond, 12 Wall. (U. S.), 349; Thompson v. Carroll, 22 How. (U. S.), 422.

¹⁷ Chapter VII, Of Amendment and Repeal of Ordinances. Chapter XV, Of Municipal Control of Offenses Against the State.

18 State (Reed) v. Camden, 50
 N. J. L., 87; 11 Atl. Rep., 137.

19 Landis v. Vineland, 54 N. J. L.,75; 23 Atl. Rep., 357.

Ordinance prescribing greater penalty than state law is void. Schroder v. Charleston, 3 Brev. (S. C.), 533.

The penalties must be the same

(by constitution). Taylor v. Owensboro, 98 Ky., 271; 56 Am. St. Rep., 361; 32 S. W. Rep., 948. But see Chapter V, Of Penalties, sec. 178.

²⁰ Collins v. Hatch, 18 Ohio, 523;51 Am. Dec., 465.

²¹ Sale of liquor. Robinson v. Franklin, 1 Humph. (Tenn.), 156; 34 Am. Dec., 625; State v. Brittain, 89 N. C., 574; State v. Langston, 88 N. C., 692.

Pool selling. Ex parte Ogden (Tex. Cr. App., 1902), 66 S. W. Rep., 1100.

Ordinances relating to animals running at large cannot conflict with state estray laws. Marietta v. Fearing, 4 Ohio, 427, 431. Such laws supersede municipal charters granted after their passage. Dodge v. Gridley, 10 Ohio, 173, per Lane, C. J.

²² In re Ridenbaugh (Idaho, 1897), 49 Pac., Rep., 12.

Gambling. State v. Caldwell, 3 La. Ann., 435.

Selling hay without inspection.

The numerous cases in the notes will show the circumstances under which ordinances have been held void because inconsistent with the laws of the state.²³

§ 17. Same—Exception. By virtue of special power conferred by the state the municipal corporation may enact ordinances contrary to the general state policy, as expressed

New York v. Nichols, 4 Hill (N. Y.), 209.

Selling liquor on Sunday. Wood v. Brooklyn, 14 Barb. (N. Y.), 425.

When ordinance and state statute need not correspond. Regulation of bay windows. Commonwealth v. Goodnow, 117 Mass., 114. Selling liquor on Sunday. McPherson v. Chebanse, 114 Ill., 46; 28 N. E. Rep., 454.

Salary or fees of city officer fixed by state law cannot be changed by ordinance. Behan v. New Orleans, 34 La. Ann., 128; Wood v. Kansas City, 162 Mo., 303; 62 S. W. Rep., 433; Lonergan v. Louisiana, 83 Mo. App., 101.

City authorities cannot change salaries of state officer, without express power. Jarvis v. New York, 49 How. Pr. (N. Y.), 354; Landon v. New York, 39 N. Y. Super. Ct., 467.

23 ORDINANCES MUST NOT BE INCONSISTENT WITH THE STATE LAWS.

Alabama—Ex parte Byrd, 84 Ala.,
17; 4 So. Rep., 397; 5 Am. St.
Rep., 328; Greensboro v. Ehrenreich, 80 Ala., 579; 60 Am. Rep.,
130 (quarantine regulations);
Mobile v. Yuille, 3 Ala., 137; 36
Am. Dec., 441.

Arkansas—Van Buren v. Wells, 53 Ark., 368; 14 S. W. Rep., 38; 22 Am. St. Rep., 214 (carrying concealed weapons); Siloam Springs v. Thomson, 41 Ark., 456, 461 (liquor selling); State v. Lindsay, 34 Ark., 372 (licensing gambling); Vance v. Little Rock, 30 Ark., 435 (taxation).

California—Carpet beating machine, Ex parte Lacey, 108 Cal., 326; 41 Pac. Rep., 411; 49 Am. St. Rep., 93. Selling lottery tickets. Ex parte Solomon, 91 Cal., 440; 27 Pac. Rep., 757. Visiting house of ill fame. In re Ah You, 88 Cal., 99; 25 Pac. Rep., 974; 22 Am. St. Rep., 280. Opium smoking, etc. In re Sic, 73 Cal., 142, 148; 14 Pac. Rep., 405.

Connecticut—State v. Smith, 67 Conn., 541; 35 Atl. Rep., 506; 52 Am. St. Rep., 301 (licensing); State v. Welsh, 36 Conn., 215 (liquor selling); South Port v. Ogden, 23 Conn., 128 (taking oysters); State v. Wordin, 56 Conn., 216 (report by physicians).

Florida—State v. Dillon (Fla., June 5, 1900), 28 So. Rep., 781.

Georgia—Rothschild v. Darien, 69 Ga., 503; Savannah v. Hussey, 21 Ga., 80; 68 Am. Dec., 452; State v. Georgia Med. Soc., 38 Ga., 608; Adams v. Albany, 29 Ga., 56; Livingston v. Albany, 41 Ga., 22.

Illinois—Petersburg v. Metzker, 21 Ill., 205 (fine); Duggan v. Peoria, D. & E. Ry. Co., 42 Ill. App., 536 (regulating railways).

Iowa—Burlington v. Kellar, 18 Iowa, 59, 65.

Kansas—Garden City v. Abbott, 34 Kan., 283; 8 Pac. Rep., 473 (license on lawyers). Ordinances to be valid must observe the requirements of the state statute on the same subject. State v. Young, 17 Kan., 414, distinguishing Emporia v. Volmer, 12 Kan., 622; Saline v. Seitz, 16 Kan., 143;

in general statutes. It is no ground of objection to the validity of prohibitory ordinances, or ordinances regulating the vending of liquor, bawdy houses, and local police matters generally which are peculiarly municipal offenses, that the general laws of the state do not extend the power of prohibition or regulation to all municipal corporations and parts of the state.

Alexander v. O'Donnell, 12 Kan., 608; State ex rel. v. Topeka, 36 Kan., 76; 12 Pac. Rep., 310.

Kentucky—March v. Commonwealth, 12 B. Mon. (Ky.), 25; Simrall v. Covington, 90 Ky., 444; 29 Am. St. Rep., 398.

Louisiana—New Orleans v. Philippi, 9 La. Ann., 44; State v. Burns, 45 La. Ann., 34; 11 So. Rep., 878.

Massachusetts — If ordinance is broader than statute it is void. Newton v. Belger, 143 Mass., 598 10 N. E. Rep., 464 (fire protection); Commonwealth v. Roy, 140 Mass., 432; 4 N. E. Rep., 814 (fast riding).

Minnesota—State v. St. Paul, 32 Minn., 329; 20 N. W. Rep., 243 (sales of vegetables); St. Paul v. Laidler, 2 Minn., 190; 72 Am. Dec., 89 (sale of meat); St. Paul v. Colter, 12 Minn., 41; 90 Am. Dec., 278 (licensing butchers, etc.).

Missouri — State v. Walbridge, 119 Mo., 383; 41 Am. St. Rep., 663 (removal of officers); Ruggles v. Collier, 43 Mo., 353, 363; Kansas City v. Hallett, 59 Mo. App., 160; St. Joseph v. Vesper, 59 Mo. App., 459; In re Dunn, 9 Mo. App., 255; Carr v. St. Louis, 9 Mo., 191; St. Louis v. Cafferata, 24 Mo., 94; Paris v. Graham, 33 Mo., 94; St. Louis v. Heitzeberg, P. & P. Co., 141 Mo., 375; 64 Am. St. Rep., 516; 39 L. R. A., 551 (smoke ordinance); Weber v. Johnson, 37 Mo. App., 601; Baldwin v. Green, 10 Mo., 410.

Nebraska — State v. Hardy, 7 Neb., 377 (liquor selling). New Hampshire—State v. Noyes, 30 N. H., 279.

New Jersey—White v. Bayonne, 49 N. J. L., 311; 8 Atl. Rep., 295; Lozier v. Newark, 48 N. J. L., 452; 2 Atl. Rep., 815; Outwater v. Borough of Carlstadt, 66 N. J. L., 510; 49 Atl. Rep., 533; State (Volk) v. Newark, 47 N. J. L., 117; Breninger v. Belvidere, 44 N. J. L., 350; State (Bowyer) v. Camden, 50 N. J. L., 87; 11 Atl. Rep., 137; State v. Jersey City, 29 N. J. L., 170.

New York—Wood v. Brooklyn, 14 Barb. (N. Y.), 425; Cowen v. West Troy, 43 Barb. (N. Y.), 48; New York v. Nichols, 4 Hill (N. Y.), 209.

North Carolina—State v. Austin, 114 N. C., 855; 19 S. E. Rep., 919; 41 Am. St. Rep., 817 (forbidding minors in saloons); Weith v. Wilmington, 68 N. C., 24; State v. McCoy, 116 N. C., 1059; 21 S. E. Rep., 690 (gambling, when covered by statute, cannot be regulated by ordinance).

Ohio—Mays v. Cincinnati, 1 Ohio St., 268 (hucksters); Markle v. Akron, 14 Ohio, 586 (sale of liquor); Cincinnati v. Gwynne, 10 Ohio, 192 (collection of special tax by action of debt).

Pennsylvania — Livingston v. Wolf, 136 Pa. St., 519; 20 Atl. Rep., 551; 20 Am. St. Rep., 936 (use of sidewalk, bay windows, etc.).

Rhode Island—State v. Pollard, 6 R. I., 290 (disorderly conduct).

South Carolina—State v. Charleston, 12 Rich. Law (S. C.), 480

"Morality and good order, the public convenience and welfare, may require many regulations in crowded cities and towns, which the more sparsely settled portions of the country find unnecessary. And it is for legislative discretion to determine, within the limitations of the constitution, to what extent city or town councils shall be invested with the power of local legislation."²⁴

The circumstances under which ordinances supersede or repeal general state statutes are treated elsewheré. 25

§ 18. Ordinances must harmonize with the public policy and common law of the state. A municipal corporation cannot, without special authority, prohibit what the policy of a general statute of the state permits.²⁶ Thus under a general grant of power, a municipal corporation cannot adopt ordinances "which infringe the spirit, or are repugnant to the policy, of the state as declared in its legislation." The rule has often been declared that ordinances must be in harmony with the

(establishing a court for trial of free persons of color, valid).

Tennessee — Katzenberger v. Lawo, 90 Tenn., 235; 16 S. W. Rep., 611; 25 Am. St. Rep., 681; 13 L. R. A., 135; State ex rel. v. Nashville, 15 Lea (83 Tenn.), 697; Pesterfield v. Vickers, 3 Coldw. (Tenn.), 205.

Texas—Bohmy v. State, 21 Tex. Crim. App., 597; 2 S. W. Rep., 886; Flood v. State, 19 Tex. Crim. App., 584; Angerhoffer v. State, 15 Tex. Crim. App., 613; Ex parte Garza, 28 Tex. Crim. App., 381; 13 S. W. Rep., 779; 19 Am. St. Rep., 845.

Wisconsin—State v. Fisher, 33 Wis., 154 (liquor selling).

²⁴ Per Scott, C. J., in Burckholter v. McConnellsville, 20 Ohio St., 308, 315.

"The modes of procedure customary and suitable in the rural districts, to prevent and punish offenses against person and property, are utterly inadequate to the purpose where men are aggregated in the dense masses of the cities.

Hence the necessity and sanction for an efficient organization of police. * * These laws, though peculiar to the municipality which enacts and enforces them, and though different from the general laws of the state applicable to all the people of the state, have never, for such reasons, been supposed to be invalid. They have not been deemed obnoxious to the objection of being partial laws, or not laws of the land." Trigally v. Memphis, 6 Coldw. (Tenn.), 382, 388, 389.

25 See Chapters VII and XV.

²⁶ Canton v. Nist, 9 Ohio St., 439. An ordinance is void if it is against the policy of the general statute of the state, as one relating to the sale of liquor. Thompson v. Mt. Vernon, 11 Ohio St., 688.

²⁷ Durango v. Reinsberg, 16 Colo., 327; Phillips v. Denver, 19 Colo., 179; 41 Am. St. Rep., 230; 34 Pac. Rep., 902; Marietta v. Fearing, 4 Ohio, 427; Collins v. Hatch, 18 Ohio, 523. *Contra*, Roberts v. Ogle, 30 Ill., 459,

principles of the common law in force in the state.²⁸ This principle is copiously illustrated in cases relating to nuisances. The rule is uniformly adhered to that a municipal corporation cannot arbitrarily declare that to be a nuisance, without proof, which is not so in fact, or recognized as such by the general principles of the common law, or by state statute.²⁹

§ 19. Ordinances must be enacted in good faith. The declaration is often encountered, especially in the earlier cases, that the ordinance must be passed in good faith. The establishment of this fact, of course, is difficult, and sometimes impossible. In many instances, the requirement that ordinances should be made bona fide is synonymous, or used interchangeably, with the declaration that the ordinance should be enacted in the interest of the corporation and public, as distinguished from private interests.30 Thus in the exercise of the police power, "the law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation."31 So in the legitimate exercise of the power to remove dead animals the corporation will not be permitted to confer such right arbitrarily upon one firm or individual to the exclusion of all others by preventing competition, imperatively required by the charter, and thereby create a monopoly to the detriment of the inhabitants.32 So under charter power to limit the number of inns or houses of entertainment, and, with assent of the electors. to prohibit the sale of spirituous liquors, a by-law limiting the number of licenses to one in a township ten miles square and containing 6,000 inhabitants (besides those of a large village situated within the township) was set aside as unreasonable.

28 Simrall v. Covington, 90 Ky.,
444; 29 Am. St. Rep., 398; Barling v. West, 29 Wis, 307, 315; 9
Am. Rep., 576; Mt. Pleasant v. Breeze, 11 Iowa, 399; Taylor v. Griswold, 14 N. J. L. (2 Green),
222.

²⁹ See Chapter XIV. of ordinances relating to police powers. Ch. XV, Of Municipal Control of Offenses Against State.

30 "By-laws, even though reasonably within the powers of the cor-

poration, and not at variance with the general law of the land, may be set aside if it be shown that in passing them the council have not exercised bona fide the powers conferred upon them by the legislature." Biggar, Mun. Manual of Canada, p. 332.

³¹ Per Wilde, J. Austin v. Murray, 16 Pick. (Mass.), 121, 126.

32 See Chaps. VI. and VIII., subdivision 1,

"It was not a bona fide exercise of the discretion of limiting the number of licensed taverns. * * * It was in reality a prohibitory measure * * * and was intended to give the go-by to a legislative enactment which gave the inhabitants of the township a direct voice upon the question of prohibition." In regulating, by ordinance, the price of commodities, as, for example, gas, the price must be fixed at a reasonable rate; but if it is fraudulently placed at a rate which would inevitably entail loss on the part of the company required to furnish it, the ordinance will be held not to have been passed in good faith.

As a violation of the rule of good faith, a by-law for the division of territory into electoral districts, passed to favor the majority of the members of the council to the prejudice of the minority, and to thus control the election, was set aside as unjust, partial and oppressive.³⁵

In a Canadian case power was conferred to enact by-laws "for regulating or prohibiting the passage of traction engines, threshing machines or other heavy vehicles over highways or bridges upon highways," etc. A by-law providing that no traction engine, steam engine, threshing machine or water tank should pass or be transported over any of the highways of the municipality, "except at the sole risk of the owner of such engines," etc., was set aside as not being a bona fide exercise of the power conferred, because it neither regulated nor prohibited the passage of the engines, etc., but was merely an attempt to escape the liability to keep highways in repair as required by law and the consequences of neglecting to do so. The court said: "It does seem that the by-law is rather a refusal by the municipality to exercise the power conferred by the act, than a bona fide exercise of it." "36"

As the corporation is not designed to promote private interests, ordinances favorable alone to corporations and individuals or classes of individuals, in contravention of the public

³³ Per Robinson, C. J., in re Barclay and Township of Darlington, 12 Up. Can. Q. B., 86, followed in re Greystock and Township of Otonabee, 12 Up. Can. Q. B., 458. To same effect, Re Brodie and Town of Bowmanville, 38 Up. Can. Q. B., 580.

³⁴ State v. Cincinnati Gas Co., 18 Ohio St., 262.

³⁵ Mongenais v. Corporation of Rigand, Quebec Rep., 11 Sup. Ct., Canada, 348. To same effect, Kirkham v. Russell, 76 Va., 956, 961.

³⁶ McMillan v. Portage, La Pairie,11 Manitoba Rep., 216, 219.

rights, are unwarranted. Likewise ordinances passed in bad faith and intended to discriminate unreasonably against certain persons or classes, as negroes,³⁷ Chinese laundrymen,³⁸ etc., will be condemned by the courts.³⁹

The question as to how far the motives of the members of a municipal body will be inquired into by the court is discussed elsewhere.⁴⁰

§ 20. Ordinances must be definite and certain. Every ordinance must be clear, precise, definite and certain in its terms. If the ordinance is so vague that its precise meaning cannot be ascertained it will be declared void. An ordinance providing that no occupant of land abutting on a private way shall suffer any filth to remain on that part of the way adjoining his land is not open to objection of indefiniteness because it does not fix a time beyond which it shall not be allowed to remain. So an ordinance directed against the game of "policy" is not void for uncertainty because it does not set out the particular facts which constitute the game. So an ordinance declaring it an offense to "conduct a house of ill-fame in an indecent manner" was sustained as sufficient, without specification of the various acts of indecency.

Sec. 175, et seq. post.

^{37 § 227,} post.

^{38 §§ 193, 194,} post.

³⁹ As to ordinance fixing municipal charge for use of streets by poles, etc., of telegraph company, see dissenting opinion of Mr. Justice Brown in St. Louis v. Western U. Tel. Co., 148 U. S., 92, 105. Chapters VI. and VIII.

^{40 §§ 161, 162,} post.

^{41 &}quot;It has been well said that a by-law ought to be expressed in such manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate." Per Woodhull, J., in McConvill v. Jersey City, 39 N. J. L., 38, 42, citing Grant on Corp., 86. As to certainty of penalty, see

⁴² In order to vary or alter the common law, a by-law ought to be reasonably clear, definite and free

from ambiguity in its language. Jack v. Ontario, S. & H. R. W. Co., 14 Up. Can. Rep., 328; Crome v. Steeper, 46 Up. Can. Rep., 87. This applies especially to those which create a new office. Foster v. Moore, 4 Law Rep. (Ir.), Crown Cases reserved, 670.

⁴³ Commonwealth v. Cutter, 156 Mass., 52; 29 N. E. Rep., 1146.

⁴⁴ The court will take notice of the fact that the term "policy playing" was in current use when the ordinance was passed. State v. Carpenter, 60 Conn., 97, 102. Keeping place for playing policy. State v. Flint, 63 Conn., 248.

^{45 &}quot;It could scarcely be expected that an ordinance affecting houses of this kind should specify the particular acts of indecency which will render its inmates obnoxious to the law's denunciation. These acts may be so various in kind and

An ordinance will not be held void for indefiniteness because of difficulty in applying or construing its provisions. Thus an ordinance passed by virtue of express legislative grant, and following the words of the statute, forbidding the sale of intoxicating liquors in the "residence portion," and permitting such sales in the "business portions" of the city, was held sufficiently definite without defining the boundaries of either district.46 So the words "small ware," as used in the statute conferring the power, may be employed in the ordinance, without definition or farther description.47 So an ordinance prohibiting driving or riding an animal on the street "faster than an ordinary trot' was held not too vague or uncertain.48 But an ordinance prohibiting riding or driving a horse on the street "at an immoderate gait so as to endanger or expose to injury any person' was held bad, as not indicating what was meant by the use of the term "immoderate gait." For the same reason an ordinance simply forbidding the driving of any "drove or droves" of horned cattle through the streets, etc., was pronounced void for vagueness.⁵⁰ Farther illustrations appear in the note.⁵¹

so differing in degree, and withal so numerous, as to defy specification. The experience of the city fathers in that domain is doubtless so limited that in drafting an ordinance which should comprehend all the indecent convolutions of lascivious cyprians they would be forced to put fancy on the wing, and imagine postures they never beheld. This would be dangerous occupation. * * This ordinance, prohibiting a bawdy house being kept in an indecent manner, clothes the magistrate necessarily with discretion to determine whether the particular acts proved are indecent." Shreveport v. Roos, 35 La. Ann., 1010.

48 Shea v. Muncie, 148 Ind., 14, 20; 46 N. E. Rep., 138. The maxim "falsa demonstratio non nocet," applied and false part of description rejected in Poland v. Connolly, 16 Ohio St., 64. As to description

of boundaries, etc., in improvement ordinances, see Ch. XVI.

⁴⁷ Harris v. Hamilton, 44 Up. Can. Q. B., 641.

⁴⁸ The court said that "an ordinary trot is easily shown by proof, and is well understood by any man who has seen horses exercise or trot" Nealis v. Hayward, 48 Ind., 19, 21.

49 Commonwealth v. Roy, 140Mass., 432; 4 N. E. Rep., 814.

⁵⁰ McConvill v. Jersey City, 39 N. J. L., 38.

⁵¹ REGULATING MARKETS. First Municipality v. Cutting, 4 La. Ann., 335. *In re* Nightingale, 11 Pick. (Mass.), 168.

Signs. State v. Higgs, 126 N. C., 1014.

BAY WINDOWS. Commonwealth v. Goodnow, 117 Mass., 114. Livingston v. Wolf, 136 Pa. St., 519; 20 Am. St. Rep., 936. The rules respecting the certainty of improvement ordinances are considered elsewhere.⁵²

- § 21. Ordinances of cities of same class may vary. Cities, although of the same class and organized under the same general laws, need not adopt uniform ordinances. The ordinances may be as variant as the varying municipal necessities, conveniences and sense of public policy in those who exercise the legislative authority may require.⁵³ The same rule applies to ordinances of cities adopting their own charters under constitutional provisions, and to cities under special legislative charters.
- § 22. Notice to be taken of ordinances. Notice of the existence of ordinances is required to be taken by all upon whom they have a binding effect,⁵⁴ as the inhabitants of the municipal corporation which enacted them.⁵⁵ So railroad companies and their employes, using railways within the city, must take notice of all valid ordinances relating to the operation of the road and the cars thereon.⁵⁶ So strangers coming within the corporate limits, upon whom ordinances are binding, are chargeable with notice thereof.⁵⁷ As all persons upon whom they are binding are charged with constructive notice of valid

BURNING OF LIME. State v. Mott, 61 Md., 297.

THE SPEED OF TRAINS. Chicago & E. I. R. R. Co. v. Beaver, 96 Ill. App., 558.

LOCATION OF LIVERY STABLES. Phillips v. Denver, 19 Colo., 179; 41 Am. St. Rep., 230; 34 Pac. Rep., 902.

FIXING WATER RATES. Spring Valley Water Works v. San Francisco, 82 Cal., 286; 16 Am. St. Rep., 116; San Francisco Pioneer Woolen Factory v. Brickwedel, 60 Cal., 166.

ESTABLISHING BOUNDARIES. Williams v. Williard, 23 Vt., 369.

EXCEPTIONS IN ORDINANCE does not render its operation unreasonable. Emporia v. Shaw, 6 Kan. App., 808.

52 Ch. XVI

⁵³ Covington v. East St. Louis, 78 Ill., 548.

54 North Birmingham Street R. R. Co. v. Calderwood, 89 Ala., 247; 18 Am. St. Rep., 105; Heland v. Lowell, 3 Allen (Mass.), 407; 81 Am. Dec., 670; Palmyra v. Morton, 25 Mo., 593; Buffalo v. Webster, 10 Wend. (N. Y.), 99; Burmeister v. Howard, 1 Wash. Ter., 207; Glover, Mun. Corps, 290.

55 Mather v. Ottawa, 114 Ill., 659,
663; Jackson v. Grand Ave. Ry.
Co., 118 Mo., 199, 218, 219; 24 S.
W. Rep., 192; London v. Venacie,
12 Mod., 269.

⁵⁶ Central R. & B. Co. v. Brunswick & W. R. Co., 87 Ga., 386, 13
 S. E. Rep., 520.

57 Pierce v. Bartrum, Cowp., 269; Buffalo v. Webster, 10 Wend. (N. Y.), 99; Queen v. Osler, 32 Up. Can. Q. B., 324, 333. ordinances, no one when prosecuted for violation of an ordinance will be permitted to show that he did not know of its existence.⁵⁸

§ 23. Who bound by ordinances. A by-law of a public or municipal corporation is not an agreement but a law, binding on all persons to whom it applies, whether they agree to be bound by it or not.⁵⁹ Therefore the law seems to be well settled in this country and in England that, in the absence of special charter or legislative restraint, local by-laws and ordinances of a general nature are binding upon all persons within the corporate limits, whether residents or not.⁶⁰ The principle is that whoever comes to reside in any place for however short a duration of time, is an inhabitant pro hac vice, and consequently bound by the same regulations as the other

58 Central Georgia Ry. Co. v. Bond, 111 Ga., 13; 36 S. E. Rep., 299.

⁵⁹ Per Lindley, L. J., in London Association, etc., v. London India D. J. Co., 3 Ch. (1892), p. 252.

An ordinance is not retrospective, of course. Willow Springs v. Withaupt, 61 Mo. App., 275.

As to binding effect on street railroad not in existence when ordinance enacted, see Thompson v. Citizens' Street R. Co., 152 Ind., 461; 53 N. E. Rep., 462.

When railroad accepts an ordinance it is thereby bound by its provisions. Chicago, etc., R. Co. v. People, 79 III. App, 529.

By-laws of a private corporation bind the members only by virtue of their assent, and do not affect third persons. State v. Overton, 24 N. J. L., 435, 440.

Glover, Mun. Corp., 289, 290;
 Willcock, Mun. Corp., 105, 107.
 Butchers Co. v. Morey, 1 Bla., 370.

The people having the power of local government, their by-laws therefore bind strangers coming within the limits. Cuddock v. Eastwick, 1 Salk., 192.

Alabama-N. B. St. R. R. Co. v.

Calderwood, 89 Ala., 247; 18 Am. St. Rep., 105.

Indiana—Horney v. Sloan, Smith (Ind.), 136.

Missouri — Knox City v. Whitaker, 87 Mo. App., 468.

Massachusetts—Com. v. Worcester, 3 Pick. (Mass.), 462; Heland v. Lowell, 3 Allen (Mass.), 407; 81 Am. Dec., 670.

Minn., 323; 53 Am. Rep., 47; 23 N. W. Rep., 237.

New York — Jones v. Fireman's Ins. Co., 2 Daly (N. Y.), 307; Buffalo v. Webster, 10 Wend. (N. Y.), 99.

Pennsylvania — Gibson v. Coraopolis, 22 Pittsb., L. J. N. S. (Pa.), 64.

South Carolina — Kennedy v. Sowden, 1 McMillan (S. C.), 323; Charleston v. King, 4 McCord, L. (S. C.), 487.

By-laws of private corporations. "Those dealing with the corporation through its officers are bound to take the same notice of its by-laws and ordinances that a citizen of the State is with reference to legislative enactments. These ordinances are not such by-laws as

members of the corporation are.⁶¹ "The by-laws which are made by corporations having a local jurisdiction are to be observed and obeyed by all who come within it, in the same manner as aliens and strangers within the commonwealth are bound to know and obey the laws of the land, notwithstanding they may not know the language in which they are written.'62 As stated by the Supreme Court of Ohio, in an early case, "these principles prevail in all well-organized governments, and the experience of ages has proved their practical utility.'63 Many expressions of like import are found in judicial decisions.⁶⁴

§ 24. Ordinances operative upon property within the corporate limits. Ordinances are not only binding on persons, but upon property conveyed or coming within the corporate

apply to private corporations, where none are interested except the individual members, and the rules and regulations by which they are governed are kept subject alone to their own custody and within their own knowledge." Murphy v. Louisville, 9 Bush (Ky.), 189, 196.

61 Pierce v. Bartrum, Cowp., 269; Plymouth v. Pettijohn, 4 Dev. Law (15 N. C.), 591, per Ruffin, C. J.

62 Per Putnam, J., in re Vandine,
6 Pick. (23 Mass.), 187, 190; 17
Am. Dec., 351.

63 Marietta v. Fearing, 4 Ohio, 427, 431.

64 "A non-corporator and non-resident is liable for a breach of the city ordinance, and may be sued and convicted thereof, in the city court." Charleston v. Pepper, 1 Rich. Law (S. C.), 364, 366.

"All who bring themselves within the limits of the corporation are, while there, citizens so as to be governed by its laws." Whitefield v. Longest, 6 Ired. (N. C.), 268, per Nash, J.

In the absence of special grant, "the powers and jurisdiction of the

local corporation are confined to its own limits and its own internal concerns;" therefore, "its by-laws and ordinances are binding upon none but its own members and those properly within its jurisdiction." Gass v. Greenville, 4 Sneed (Tenn.), 62.

Contra. A town cannot impose a penalty by ordinance on a stranger for cutting grass on the "salt meadows" or "common lands" of the town, but must resort to the common law remedy, to recover damages for the alleged trespass. Here it was merely held that a penalty could not be imposed by the town on any person as a trespasser: that the powers given to the town "extend only to regulations for the enjoyment of their common lands, as between those who have a right to enjoy them as commons. * * * The Legislature never intended to delegate to any person or body corporate the power of imposing penalties for injuries to their own lands by trespassers." Foster, Supervisor of Jamaica v. Rhoads, 19 Johns (N. Y.), 191, 193,

limits.⁶⁵ Thus an ordinance forbidding animals, as hogs, from running at large, operates as well on non-residents who suffer their hogs to run at large within the prohibited limits, as upon those who are actually residents.⁶⁶ But where the state law forbids, such ordinances cannot be made to apply to the stock of non-residents running within the city.⁶⁷ Notwithstanding a railroad company does not formally submit itself to the police regulations and ordinances of a city upon entering it, under the principle stated, such company is subject to such regulations nevertheless.⁶⁸

§ 25. Same—Rule as applied to licenses. A license tax imposed on all persons who packed and shipped fish, etc., from the local corporation was held, in a North Carolina case, binding on residents and non-residents alike.⁶⁹ So it has been held

⁶⁵ Gosselink v. Campbell, 4 Iowa, 296; McKee v. McKee, 8 B. Mon. (Ky.). 433.

66 Cartersville v. Lanham, 67 Ga., 753; Whitfield v. Longest, 6 Ired. (N. C.), 268; Friday v. Floyd, 63 Ill., 50; Crosby v. Warren, 1 Rich. Law (S. C.), 385; Folmar v. Curtis, 86 Ala., 354; 5 So. Rep., 678; Horney v. Sloan, Smith (Ind.), 136.

"It is the hog that is not permitted to run at large, and whether it be the property of a resident or non-resident, the mischief is the same and there can be no difference." Rose v. Hardie, 98 N. C. 44, 47; 4 S. E. Rep., 41, approving Whitfield v. Longest, 6 Ired. (N. C.), 268; Spitler v. Young, 63 Mo., 42, holding that the ordinance did not apply to a case where the escape of the hogs was unavoidable -as a result of a flood-where it appears that the owner used due diligence in attempting to recover them.

Vote of a town to restrain cattle from going at large, applies to a non-resident. Gilmore v. Holt, 4 Pick. (Mass.), 258, 264.

Particular ordinance requiring

cattle to be penned at night to keep them off the street, held not to apply to cattle of a non-resident, not kept in the city. Per Ruffin, C. J., in Plymouth v. Pettijohn, 4 Dev. Law (N. C.), 591.

67 Marietta v. Fearing, 4 Ohio, 427, 431. Held to apply to municipal charters granted after the passage of the Estray Act. Dodge v. Gridley, 10 Ohio, 173.

Where the charter expressly provided that ordinances shall not be obligatory on persons or property of non-residents of the corporation, who are citizens of the state, "unless in case of intentional violation," the stock of a non-resident may be forfeited under an ordinance when it appears that he has knowledge of such ordinance, and knew or had reason to believe that his animals when let loose would go into the city. Knoxville v. King, 7 Lea (75 Tenn.), 441.

68 City & Suburban Ry. Co. v. Savannah, 77 Ga., 731; 4 Am. St. Rep., 106. See Chicago, etc., R. R. Co. v. People, 79 Ill. App., 529.

69 Edenton v. Capeheart, 71 N. C., 156.

that a tax on all traders applies to non-residents. So a by-law prohibiting any person not duly licensed therefor from removing house dirt and offal from the city was held to apply to a non-resident. So ordinances imposing fines for failure to take out licenses by non-residents who employ wagons for hire within the city have been sustained. But such ordinances, to be valid, must not discriminate against non-residents. In Missouri an ordinance exacting a license tax for wagons used for pay was held not applicable to wagons of outside residents engaged in hauling in and out of the city. Here it was said that the authority to enact such ordinance cannot be conferred, since the tax being upon outside residents and for the benefit of those living in the city would be, in effect, taking property for private use; that is, for the use of a particular community of which the outside citizen forms no part.

Power to enact such ordinances must exist. Thus where the charter power is restricted to imposing licenses upon attorneys who reside within the city, the ordinance cannot be made applicable to a non-resident attorney who maintains an office and does business within the city.⁷⁴ Likewise, where the charter power to tax is limited to taxable property within the city of non-residents, an ordinance imposing a license tax on carriages used by non-residents going to and from their places of business in the city is unauthorized. But where a slave is expressly placed under the police regulations of the corporation, under such power, the slave becomes taxable property within the city.⁷⁵

§ 26. Territorial operation of ordinances. Municipal ordi-

60½ "It is settled that by coming within the town and acting there, a person becomes liable as an inhabitant and member of the corporation." Wilmington v. Roby, 8 Ired. (N. C.), 250.

License held to apply to non-resident butchers doing business in the city. State ex rel. Wilkinson v. Charleston, 2 Speers (S. C.), 623.

70 In re Vandine, 6 Pick. (Mass.), 187.

⁷¹ Charleston v. Pepper, 1 Rich. Law (S. C.), 364, 367; Pittsburg v. Craft, 1 Pitts. (Pa.), 77. 72 Bennett v. Birmingham, 31 Pa. St., 15.

73 St. Charles v. Nolle, 51 Mo., 122.

The legislature cannot authorize a municipal corporation to tax, for its own local purposes lands lying beyond the corporate limits. Wells v. Weston, 22 Mo., 384. Compare, Langhorne v. Robinson, 20 Gratt (Va.), 661.

74 Garden City v. Abbott, 34
 Kan., 283; 8 Pac. Rep., 473.

 75 Charleston v. State ex rel. Adger, 2 Speers (S. C.), 719. See Chapter XIII.

nances are necessarily local in their application. Usually they operate only in the territory of the municipality by which they are enacted and can have no force beyond it.⁷⁶ Of course, it is entirely competent for the legislature to confer power to pass ordinances which will operate beyond the corporate boundaries. This may be done for the purpose of suppressing or preventing nuisances, which affect the inhabitants of the corporation.⁷⁷ Sometimes the power is conferred to regulate, prohibit and license the sale of intoxicating liquor for a specified distance beyond the municipal boundaries.⁷⁸

A municipal ordinance designed for the city at large operates throughout its boundaries, whatever their change.⁷⁹ Thus a by-law forbidding the keeping of a slaughter house within the limits of a town will apply to a subsequent addition to the town.⁸⁰ So a penal ordinance relating to the sale of liquor, which, in terms, applies to "any territory over which the town may have jurisdiction for that purpose," operates in territory over which the town is given jurisdiction by subsequent legislative act.⁸¹

§ 27. Places within municipal jurisdiction. Speaking generally, the police jurisdiction of the municipality extends to

76 Taylor v. Americus, 39 Ga., 59; Strauss v. Pontiac, 40 Ill., 301; Robb v. Indianapolis, 38 Ind., 49; Horney v. Sloan, 1 Ind., 266; Gosselink v. Campbell, 4 Iowa, 296; Hoggatt v. Bigley, 6 Humph. (Tenn.), 236; Town of Barton v. Hamilton, 18 Ontario Rep., 199, 202; In re Boylan and City of Toronto, 15 Ontario Rep., 13.

Ordinance cannot regulate fares of a street car company to be charged beyond the city limits. South Pasadena v. Los Angeles, etc., R. Co., 109 Cal., 315; 41 Pac. Rep., 1093.

Cannot tax land beyond limits for municipal purposes. Wells v. Weston, 22 Mo., 384. Compare Langhorne v. Robinson, 20 Gratt (Va.), 661.

77 Chicago, etc., Co. v. Chicago,
 88 Ill., 221, 30 Am. Rep., 545; 1
 Starr & Curtis, Ill. Stat., p. 685,

§ 45; Biggar Mun. Manual of Canada, p. 327. See Chapter on Municipal Police Powers.

78 Toledo v. Edens, 59 Iowa, 352; 13 N. W. Rep., 313. Regulation of hucksters one mile beyond. Snell v. Belleville, 30 Up. Can. Q. B., 81. 79 St. Louis Gas Light Co. v. St. Louis, 46 Mo., 121.

80 Virginia v. Smith, 1 Cranch C. C., 47; Fed. Cas., No. 16,967.

Application of ordinances to annexed territory. Swift v. Klein, 163 Ill., 269; 45 N. E. Rep., 219; Covington v. East St. Louis, 178 Ill., 548.

81 "If an ordinance be enacted and afterwards the city limits be extended by adding adjacent territory, no one would contend that a new ordinance must be passed in order to be operative in the newly acquired territory. We can see no difference between that case and

every part of its territory, and, as a rule, a violation of a valid ordinance at any place within such territory constitutes an offense against its authority. Thus a camp-meeting conducted within the limits of the local corporation, although authorized by state laws, is subject to its ordinances. This rule was applied to one duly licensed by the municipal authorities to sell food and drink within the corporate limits, and it was held that such person was thereby authorized to sell such articles at the camp-meeting.82 So where a town is duly authorized to prohibit animals from running at large within its limits the force of its ordinances for this purpose is co-extensive with the territorial limits of the town, and includes a turnpike road passing through it.83 And for police purposes a turnpike road within the corporate limits, although the fee of the soil thereof. is in the turnpike company, is subject to such reasonable regulations as may be deemed expedient.84

In an early New York case it was held that a legislative act extending the bounds of the town over the adjacent navigable waters did not thereby grant the land covered by the waters to the town; but the authority was merely for the purposes of civil and criminal jurisdiction. Hence, an ordinance prohibiting the raking of clams within the boundary lines of the town, under penalty, was declared void as applied to such navigable waters. In the opinion of the court, the town "must show a right of property to the lands * * in the bay * *

this. By this law (legislative act) the extension of the power and jurisdiction is absolute. It does not depend on any act or ordinance of the city specially adopting or invoking the power. If the ordinance had been passed after the law went into force it would not have been necessary that it should specify that its operation extended two miles beyond the city limits. It so extended by the express provision of the law." Toledo v. Edens, 59 Iowa, 352, 353; 13 N. W. Rep., 313.

82 Ex parte McNair, 13 Neb., 195,197; 13 N. W. Rep., 172.

s3 "And we think a turnpike road passing through a town is as much a highway, for the purposes of the act, as a road laid out by authority of the Court of Sessions or of the town. The mischief is the same." Gilmore v. Holt, 4 Pick. (Mass.), 258, 264.

84 Question related to paving and grading turnpike road, and assessing abutters for expense thereof. Held, the fact the city has no charter right to compel the company to grade or pave its road, did not invalidate the assessment therefor. State (Parker) v. Brunswick, 30 N. J. L., 395.

in order to entitle them to make rules to regulate the use of those lands."85

Same-Wharves-Private property. Certain police § 28. ordinances must be limited in their operation to public places, or to such places over which the municipal corporation has Thus an ordinance imposing penalties in respect of the using or obstructing the public wharves, docks, piers and slips was held not to apply to wharves, etc., of private citizens. 86 The basis upon which wharfage and levee charges are authorized to be made is that, by the expenditure on the part of the municipal corporation of money and labor, works are constructed and maintained which facilitate discharging and receiving the cargoes and afford to vessels the means of mooring and remaining in security. Hence, ordinances imposing such charge at a point where the city had constructed no works and expended no money are uniformly held to be beyond the power of the local corporation.87

85 Palmer v. Hicks, 6 Johns (N. Y.), 132.

⁸⁶ It appears that in state and municipal legislation a distinction was made between public and private wharves, etc. Vandewater v. New York, 2 Sandf. Sup. Ct. (N. Y.), 258.

Power to regulate sale of wood restricted to *public landings*. Southwark v. Neil, 3 Yeates (Pa.), 54

⁸⁷ New Orleans v. Wilmot, 31 La. Ann., 65; Packet Co. v. St. Louis, 100 U. S., 423; Illinois, etc., Co. v. St. Louis, 2 Dill. C. C., 70; Waddingham v. St. Louis, 14 Mo., 190.

RIGHT TO COLLECT WHARFAGE.

Ordinarily, improvements of some kind are necessary to authorize collection of wharfage. Dubuque v. Stout, 32 Iowa, 47, 80; 7 Am. Rep., 171; Keokuk v. Keokuk N. L. Packet Co., 45 Iowa, 196; Muscatine v. Hershey, 18 Iowa, 39. Right to collect sustained in absence of expenditures for improvements. Sacramento v. Steamer New World, 4 Cal., 41.

The right to charge and collect wharfage is said to be a right of property and not a right of sovereignty. St. Louis v. Schulenburg & B. Lumber Co., 13 Mo. App., 56.

But the power to erect wharves, landings, etc., on navigable waters and charge toll for the use thereof is a franchise which can only come from the state. The act incorporating the town does not alone confer such right. St. Martinsville v. Steamer "Mary Lewis," 32 La. Ann., 1293.

"Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by the state, a municipal corporation, or a private individual; and when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property. A passing vessel may use the wharf or not at its election, and thus may incur a liability for

Ordinances regulating hackmen, etc., while they are in and about landings, depots and stations, are valid although the property of such places is not that of the city, or, strictly speaking, public property of any kind. "The fact that it is commonly used by hackmen in their business for the purposes mentioned in the ordinance is sufficient." It cannot be questioned that the city has power to provide reasonable regulations respecting the use of private property in order to prevent such property, or the use thereof, from being annoying or detrimental to the life or limb or health of any who may be in the city. Its jurisdiction in this respect may be extended to any place within its limits. Hence, an ordinance forbidding the throwing from the second or upper floors of any building, etc., or from lowering out of such place, cotton in bales, goods

wharfage or not, at the choice of the master or owner." Per Mr. Justice Strong in Packet Co. v. Keokuk, 95 U. S., 80, 85. "The sums paid by the plaintiff in error were exacted and paid as compensation for the use of the improved wharf, and not for the mere privilege of entering and stopping at the port of Saint Louis, or for landing at the shore in its natural condition where there were no conveniences which could be called a wharf." Per Mr. Justice Harlan in Packet Co. v. St. Louis, 100 U. S., 423, 429. The following decisions of the United States Supreme Court support this view: Cannon v. New Orleans, 20 Wall., 577; Tonnage Tax Cases, 12 Wall., 204; Steamship Co. v. Port Wardens, 6 Wall., 31; Cooley v. Port Wardens, 12 How., 299. City cannot impose a duty or tonnage tax on vessels landing on the natural bank of a river. Cape Girardeau v. Campbell, 26 Mo. App., 12, although such landing be made within the wharf limits established by ordinance. Ib. The landing place becomes a wharf when it is improved - designating it as such by ordinance

is insufficient. Ib.; Packet Co. v. St. Louis, 100 U. S., 423; Tobin v. Vicksburg, 100 U. S., 430.

A license fee is a tax within the meaning of Sec. 3, Art. 10, of the constitution of Missouri, and must be uniform on the same class of subjects within the territorial limits of the authority levying it. St. Louis v. Consolidated Coal Co., 113 Mo., 83; 20 S. W. Rep., 699; St. Louis v. Spiegel, 90 Mo., 587; 2 S. W. Rep., 839; St. Louis v. Bowler, 94 Mo., 630; 7 S. W. Rep., 434.

The city may make a classification of boats for wharfage tax; therefore it may make a higher rate for all not returned and assessed for taxation during a designated year. St. Louis v. St. Louis & N. O. Trans. Co., 84 Mo., 156; 12 Mo. App., 570; St. Louis v. Consolidated Coal Co., 113 Mo., 83; 20 S. W. Rep., 699.

The city cannot collect wharfage for goods landed beyond its wharf in times of high water. St. Louis v. Schulenburg & Boeckler Lumber Co., 13 Mo. App., 56.

¹ St. Paul v. Smith, 27 Minn., 364, 366; 7 N. W. Rep., 734.

or any other article, "without a good and sufficient tackle and rope," is a proper police regulation, and such ordinance operates in all parts of the city, and its violation may occur on private property.²

The territorial police jurisdiction is well illustrated in an early New York case. The ordinance provided that "all hogs shall be kept up." It was held to have no application to an action of trespass, supported by proof that the hogs went into complainant's cornfield through a partition fence which divided his farm from the farm of the owner of the hogs. Manifestly, the ordinance was intended to forbid hogs from going at large, which, in the language of the court, "means that they shall not be free commoners upon the highways. It was not intended by this by-law to interfere with the interior economy or management of every man's farm. It could not reasonably have been intended to compel every farmer to keep his swine in a close pen. The power of the town for such interior regulation may well be doubted." Therefore, as the hogs did not enter through the outer fence adjoining a highway or common, but through an inner or partition fence between two neighbors, the ordinance could not be applied to such case.3

§ 29. Same—Regulating speed of trains. Municipal territorial jurisdiction is farther illustrated in cases arising under ordinances regulating the speed of street cars and railroad trains within the corporate limits. The general rule is that such ordinances apply equally to all territory within the corporate limits over which the road runs, including that not laid off into lots, streets or alleys or occupied with buildings, as well as land and property owned by the railroad company,⁴ as switchyards.⁵ In one case such ordinance was held not to apply to engines used in moving cars and making up trains at places within the yards of the company and in and about their own stations, which were not within the limits of any

² The point was made, which was denied by the court, that the *locus* in quo being a close was not within the penalty of the ordinance. Charleston v. Elford, 1 McMullan (S. C.), 234.

³ Sheppard v. Hees, 12 Johns. (N. Y.), 433.

⁴ Whitson v. Franklin, 34 Ind., 392; Merz v. Mo. Pac. R. R. Co., 88 Mo., 672; 14 Mo. App., 459.

⁵ Crowley v. B., C. R. & N. Ry. Co., 65 Iowa, 658, 663; 20 N. W. Rep., 467, 22 N. W. Rep., 918.

public street or thoroughfare. But the ordinance involved, in terms, limited its application to engines and cars "while passing through the city." The opinion concedes power in the city to regulate the speed at all places within its limits, even in places outside of the limits of public streets.6 Where a railroad passes through a populous city, crossing its streets at various points, the exercise of the police power would be of little service to the public, if it could be only at the street crossings. "It may be said that the public has no right to inhibit the speed of trains within the company's own domain, provided the company checks up and crosses the street at the legal rate of speed. But in the exercise of police power such as this, the actual state of affairs must be taken into account: thus not only the difficulty, perhaps impossibility, of reducing a speed at the rate of twenty-five miles per hour to four or five miles an hour in the short space of three or four hundred feet, but also the fact that (though without right) many persons are found walking upon the tracks of the railroads at all hours. Now as a matter of police regulation it will not do to answer. Let the people, who go where they have no right, take care of themselves. The police power is enacted not only for those who exercise a proper degree of reflection, but for those who may not. Life is too sacred to place its security on a basis so uncertain. * * * The safety of a dense population is to be guarded by the police power in a great city, even though in doing this the power may be called into exercise within the dwellings, the lots and private ways of citizens. We see not that the railroad company has greater rights within the city than others."7

Sometimes it appears reasonable to the courts to limit the operation of such ordinances and thus deny their application to certain parts of the road, although within the corporate limits. Thus an ordinance, limiting the speed of railway trains to four miles an hour where the road passed through agricultural lands, fenced on both sides for three miles, after entering the limits of the city and before reaching the inhabited portion thereof, was held to operate as a restraint upon

6 Green v. D. H. Canal Co., 38
Hun. (N. Y.), 51.

Regulating speed of trains confined to streets, squares and public grounds under particular charter power. State (N. J. R. & T. Co.) v. Jersey City, 29 N. J. L., 170.

⁷ Pennsylvania Co. v. James, 81 Pa. St. (32 P. F. Smith), 194, 202, 203. commerce, and, therefore, as to such portion of the road, unreasonable and inoperative.8

- § 30. Judicial limitation of operation of ordinances. Courts sometimes also limit the operation of other classes of ordinances. Thus the general power conferred by charter "to license, regulate and restrain" the sale of liquor, within the city, was held not to authorize a license tax from one engaged in selling liquor at a place two or three miles remote from the settled portion of the city. Here it was said that, to authorize such tax "the benefits to the parties must be reciprocal." It was also held that the city by reason of its general police powers had no right to exact such tax where it appeared that no police supervision was ever taken over such place other than to demand and collect such license fee. court remarked: "A municipal government is one investing the people of a place with the local government thereof. The 'local government' cannot be said to include that which is not local, nor in any way concerns the 'local' affairs.''9
- § 31. Ordinances operating in public or particular places only. Certain police regulations are confined to public or particular places, as streets, alleys, etc., or to acts committed in view of the public, or to specified localities. Thus ordinances relating to drunkenness, for instance, usually restrict such offense to the streets or sidewalks or other public places. Such regulations merely seek to prohibit public drunkenness.¹⁰

8 "The ordinance in question not only places an unreasonable restriction upon the railways themselves, but it unreasonably impedes the whole travelling public." Meyers v. C., R. I. & P. R. Co., 57 Iowa, 555; 42 Am. Rep., 50.

Ordinance may be held unreasonable as applied to one or two streets, but valid as a whole. State (Pennsylvania R. R.) v. Jersey City, 47 N. J. L., 286; Burg v. Chicago, etc., R. R., 90 Iowa, 106; Nicoulin v. Lowery, 49 N. J. L., 391; Rahway Gaslight Co. v. Rahway, 58 N. J. L., 510. Contra, Wygant v. McLauchlan (Oregon), 64 Pac. Rep., 867; Mason City v. Barngrover, 26 Ill. App., 296. The

whole subject is fully treated in the chapter on Police Regulations.

⁹ Salt Lake City v. Wagner, 2 Utah, 400, 403, distinguishing Falmouth v. Watson, 5 Bush. (Ky.), 660, which was put upon the ground that "the vending of ardent spirits was in such proximity to the town as to render its exercise liable to affect the good order or peace of the local community." See Section 186 post.

10 Drunkenness or intoxication, in itself, in a public place, is held to be an offense. Bloomfield v. Trimble, 54 Iowa, 399; Nevada v. Hutchins, 59 Iowa, 506; 13 N. W. Rep., 634; State v. Garrett, 80 Iowa, 589; 46 N. W. Rep., 748; State

In Missouri, an ordinance was sustained which forbade drunkenness "upon any street or sidewalk or in any business house within the corporate limits." So an ordinance prescribing a fine against any one who should be "found intoxicated on the streets" of the village was sustained.¹²

The following common instances may be mentioned where ordinances are intended to have merely a limited and local application: Regulations respecting the sale of refreshments in markets; forbidding the sale of farm products, meat, fish, vegetables, etc., on particular streets or at places other than markets or other designated places; 13 lounging about markets and other public places; intoxication at market places; disallowing dogs or unruly animals in market places during market hours; forbidding the delivering of addresses, discourses, etc., in public parks and on commons without permission;14 the riding or driving of any animal upon a sidewalk;15 the throwing or placing upon any sidewalk or cross-walk fruit or vegetable or other substance which, when stepped upon by any person, is liable to cause him or her to slip or fall; the throwing or casting upon the street or sidewalk articles which will obstruct it, as wires, ashes or animal, vegetable or any substance whatever; distributing advertising matter so as to litter the public streets, etc.; noise on streets or sidewalks, as beating a tambourine;16 restricting the establishment of cemeteries and burial places; confining dairies and cow stables. slaughter houses, soap factories, brick kilns, quarries, the storing of gunpowder and other explosives to particular lo-

v. Pierce, 65 Iowa, 85; 21 N. W. Rep., 195; Commonwealth v. Morrisey, 157 Mass., 471; 32 N. E. Rep., 664; State v. Sevier, 117 Ind., 338; 20 N. E. Rep., 245; People v. French, 102 N. Y., 583; Hill v. People, 20 N. Y., 363; State v. Smith, 3 Heisk. (Tenn.), 465; 1 Cooley's Blackstone (3d Ed.), Book 1, p. 123; 2 Cooley's Blackstone (3d Ed.), Book 4, p. 63; Tiedeman's Lim. Police Power, 302; 1 Bishop's Crim. Law (7th Ed.), sec. 403.

¹¹ Gallatin v. Tarwater, 143 Mo., 40; 44 S. W. Rep., 750.

¹² Green City v. Holsinger, 76 Mo. App., 567.

¹³ Inhabitants of Quincy v. Kennard, 151 Mass., 563; 24 N. E. Rep.,
 860; People v. Keir, 78 Mich., 98;
 43 N. W. Rep., 1039, § 482, post.

¹⁴ Com. v. Abrahams, 156 Mass., 57; 30 N. E. Rep., 79; Com. v. Davis, 140 Mass., 485; 4 N. E. Rep., 577.

15 Commonwealth v. Forrest, 170 Pa. St., 40; 32 Atl. Rep., 652, reversing 3 Pa. Dist. Rep., 797, where it was held that a bicycle was an "animal" within the meaning of the law.

¹⁶ Vance v. Hadfield, 22 N. Y. St., 858. calities; compelling railroad companies to station switchmen at certain public crossings.

§ 32. Ordinances applying to part of city valid. Where ordinances are designed to apply only to certain districts or designated parts of the territorial limits of the authority enacting them, to be valid, it must appear that such districts are so situated as to require peculiar and exceptional provisions. The following ordinances of this character have been sustained as reasonable: Forbidding propelling cars by use of steam or locomotive power on certain streets;¹⁷ limiting bookmaking and poolselling to certain localities; 18 the keeping of swine within particular districts; 19 forbidding animals from running at large within designated limits;20 washing and ironing in public laundries and wash houses in certain sections:21 livery stables in residence districts;22 requiring the removal of snow and ice by owners or occupants of houses bordering upon specified streets;23 designating limits in which prostitutes shall dwell;24 exempting from the operation of an ordinance directed against the emission of dense smoke, resident districts:25 forbidding saloons:26 killing of animals:27 and wooden buildings in designated districts.28

So ordinances (provided the corporation possesses the necessary grant of power) may prohibit heavy hauling on certain streets which may be established as boulevards, and forbid the use of wagons, drays or trucks carrying coal, lumber, hay, iron, machinery, ice, merchandise, farmers' produce, stone,

- ¹⁷ R. R. v. Richmond, 96 U. S., 521.
- 18 Chicago v. Brownell, 146 Ill.,64; 34 N. E. Rep., 595, reversing 41Ill. App., 70.
- ¹⁹ Commonwealth v. Patch, 97 Mass., 221.
- ²⁹ Chattanooga v. Norman, 92Tenn., 73; 20 S. W. Rep., 417.
- ²¹ Per Mr. Justice Field in Barbier v. Connolly, 113 U. S., 27, approved in Soon Hing v. Crowley, 113 U. S., 703.
- ²² Chicago v. Stratton, 162 III.,
 494; 53 Am. St. Rep., 325.
- ²³ In re Goddard, 16 Pick. (Mass.), 504, per Shaw, C. J.
 - In Canada the council may pass

- by-laws as to the removal of snow and ice and define certain areas or streets within the municipality, within or upon which the by-law shall be operative. Biggar, Munic. Manual, p. 663; Stinson v. Browning, L. R., 1 C. P., 321.
- ²⁴ L'Hote v. New Orleans, 177 U.
 S., 587; 20 Sup. Ct. Rep., 788.
- 25 People v. Lewis, 86 Mich., 273;49 N. W. Rep., 140; 37 Am. & Eng. Corp. Cas., 481.
- ²⁶ People ex rel. v. Cregier, 138 Ill., 401; 28 N. E. Rep., 812.
- ²⁷ Brooklyn v. Cleves, Hill & Denio, Supp. (N. Y.), 231.
- ²⁸ Knoxville v. Bird, 12 Lea (Tenn.), 121; 47 Am. Rep., 326.

brick, sand, dirt or earth, building material, etc., or forbid driving cattle, horses, mules, hogs, sheep, etc., on such boulevards, or prohibit the establishment of business houses bordering thereon.

So, under proper grant of power, ordinances may establish on certain streets, building lines and provide that a certain class or character of buildings shall be erected in such district, and may forbid flats, apartment houses, etc. All these and like regulations are general in the larger and more important cities of the country. Like restrictions may be made respecting awnings, signs, bill boards, etc.

Farther illustrations of ordinances of this nature appear in the chapters on the Reasonableness of Ordinances and Police Regulations.²⁹

§ 33. Same—Improvement ordinance. In the exercise of the power to open, construct and otherwise improve highways. streets, alleys, etc., the ordinance providing therefor must necessarily apply to districts or parts of the city. Such ordinances will not be declared void for this reason. What districts are to be embraced and what parts of streets, etc., improved, whether the entire length of the street, or one block or part of a block, depend upon the desirability or necessity of the improvement and the local laws controlling such matters. Partial improvements and improvement by sections are often permitted. Under some charters improvement or benefit districts are established for the construction of streets. sewers, etc. In an early Tennessee case it was held that the ordinance could not select individuals by name and compel improvements and omit others in the same district, without reason therefor.30

The subject of improvement ordinances is fully treated in a subsequent chapter.³¹

§ 34. When ordinances to take effect. Many charters prescribe that no ordinance except the general appropriation ordinance shall take effect or go in force until a certain time

²⁹ Chs. VI. and XIV.

Ordinance dividing municipal limits into railroad districts and limiting the rate of speed of trains in one only, held void. Lake View v. Tate, 130 III., 247; 22 N. E. Rep., 791, affirming 33 III. App., 78.

30 White v. Mayor, etc., 2 Swan. (Tenn.), 364.

31 Ch. XVI Of Public Improvement Ordinances.

(usually ten days) after its approval, unless otherwise provided in the ordinance, or in case of an emergency, etc., the body enacting it, by designated vote, ordinarily two-thirds, otherwise directs; and frequently such vote is required to be taken by yeas and nays and entered upon the record.³² The provision is in the nature of a limitation upon the legislative and ministerial power. It is intended to enable the public to acquire knowledge of the ordinance before it shall become operative for any purpose.³³ Where persons are made liable to penal consequences it is a hardship if they are not seasonably informed. The attestation of the date of the mayor's approval of an ordinance is usually conclusive and cannot be contradicted by parol evidence. The rule in this respect applicable to acts of the legislature is also applicable to ordinances.³⁴

Some charters provide that before an ordinance shall take effect it must be published in a manner provided. Such provisions are generally applicable to police and penal ordinances.³⁵ The publication of ordinances is considered elsewhere.³⁶

"The common rule in regard to legislation is, that it shall take immediate effect unless otherwise provided." This rule is applied to ordinances. Thus where publication is not required and there is no time specified either in the charter or

32 Charter of St. Louis, art. III., § 21; Mun. Code of St. Louis, p. 207; 2 R. S. of Mo. (1899), p. 2483, § 21; Charter of San Francisco, art. II., ch. 1, § 15; Stat. and Amend. to Codes of Cal. (1899), p. 246; Standard v. Industry, 55 Ill. App., 523; Illinois Central R. R. Co. v. People, 161 III., 244; Nat. Bk, of Commerce v. Grenada, 44 Fed. Rep., 262, reversing 41 Fed. Rep., 87; People ex rel. v. Peoria, D. & E. R. R. Co., 116 Ill., 410; Los Angeles Co. v. Eikenberry, 131 Cal., 461; Warsop v. Hastings, 22 Minn., 437; Janesville v. Dewey, 3 Wis., 245.

proving Pacific Railroad Co. v. Governor, 23 Mo., 353.

35 State v. Noblesville, 157 Ind.,
31; 60 N. E. Rep., 704; Union Pac.
R. Co. v. Montgomery, 49 Neb.,
429; 68 N. W. Rep., 619.

"The people are to be informed of the regulations which are to govern them, and time as well as publication is material. The legislature wisely put stress both upon the mode of promulgation and upon the length of time to be allowed, and it would be wrong to abridge this time by construction." Per Graves, J., in Van Alstine v. People, 37 Mich., 523, 525.

³³ Keane v. Cushing 15 Mo. App., 96, 101.

³⁴ Ball v. Fagg, 67 Mo., 481, ap-

³⁶ Section 155 et seq. post.

³⁷ Per Campbell, J., in Stevensonv. Bay City, 26 Mich., 44, 49.

ordinance, the ordinance takes effect from the date of its passage.38

§ 35. Same—Illustrative cases. State constitutions provide that no person shall be punished but by virtue of a law established and promulgated prior thereto and legally applied. This provision has been applied to municipal ordinances prescribing penalties. Where the constitution does not prescribe the mode and time of promulgation, but leaves these matters to the discretion and determination of the law-making power, the implied restriction is that the promulgation shall be reasonably sufficient to accomplish the humane and just purpose of the constitution. This discretion cannot be arbitrarily exercised. A reasonable opportunity must be given to the people within the corporate limits to be informed as to the ordinances they are commanded to obey before they can be punished for their violation. A promulgation that may be insufficient in one community may be sufficient in another, differently circumstanced. In one case the charter did not prescribe the length of time ordinances should be promulgated before they became operative. But it appeared that the ordinance in question had been published seven days. In sustaining the ordinance, in view of the above constitutional provision, it "The presumption is in favor of the reasonableness of the promulgation, which must prevail in the absence of proof of countervailing facts and circumstances. We cannot affirm, as matter of law, that, on the facts disclosed by the record, the ordinance was not in force at the time of its violation."39 Where the charter expressly prescribes that an ordinance shall become a law upon its approval by the mayor, a further charter requirement that all ordinances shall be promulgated by posting or publication for a period of not less than four weeks, does not postpone the operation of an ordinance until after its promulgation.40 Under a charter prescribing that every ordinance shall specify the time when it

38 Com. v. McCafferty, 145 Mass.,
384; 14 N. E. Rep., 451; Com. v.
Davis, 140 Mass., 485; 4 N. E. Rep.,
577; Com. v. Brooks, 109 Mass., 355.

Unless restrained by law, the ordinance may provide that it take effect upon its passage. Johnson v. Finley, 54 Neb., 733.

Time fixed by ordinance. Kendig v. Knight, 60 Iowa, 29; Boehme v. Monroe, 106 Mich., 401; Roodhouse v. Johnson, 57 Ill. App., 73.

39 Pitts v. District of Opelika, 79 Ala., 527.

40 State v. Anderson, 26 Fla., 240, 250; 8 So. Rep., 1.

shall take effect, and that no ordinance shall take effect until it has been published for two successive weeks, an ordinance passed, ordained and ordered published on May 5th, which contained a provision that it shall take effect May 16th, and which is published for two weeks, is void, for the ordinance could not, under the charter, be made to take effect May 16. Hence the time of its taking effect was not prescribed.41 A charter providing that all ordinances shall be published for three days successively and shall take effect within ten days after their enactment (provided, however, that the council may fix a different period), and that no ordinance shall take effect before one publication thereof, was construed to "mean that no ordinance can be enforced and violation thereof punished until the public have been informed of its enactment by at least one publication. The matter of publication is only essential before enactment." Therefore, an ordinance which provided that it should take immediate effect, which was approved August 2nd, was in force on August 10th.42

Under a charter providing that all ordinances of a general nature shall take effect within ten days after their publication, an ordinance providing fire limits within a comparatively small portion of territory was held to be such ordinance.⁴³

41 "It was indispensable that the ordinance should express the time when it would take effect. It was also indispensable that two weeks should be given for notice previous to its taking effect. Both conditions were required. It appears, however, conclusively that the time set for the ordinance to take effect was too short to enable the required notice to be given, and, hence, that the course taken in carrying out one necessary condition made compliance with the other absolutely impossible. This was a violation of the charter. * * * It cannot be admitted that the requirement that two weeks for notice shall elapse before an ordinance shall take effect may be satisfied by publication for two weeks successively, when less than two weeks intervene. The purpose of

the provision is not consistent with any such construction." Per Graves, J., in Van Alstine v. People, 37 Mich., 523, 525.

42 People v. Keir, 78 Mich., 98, 101; 43 N. W. Rep., 1039, per Long, J.

⁴³ Reynolds v. Harris, 27 Weekly Law Bul. (Ohio), 229.

Ordinance relating to the sale of intoxicating liquors under particular charter provision. Schweitzer v. Liberty, 82 Mo., 309, 315.

Salary ordinances. Stuhr v. Hoboken, 47 N. J. L., 147.

Penal ordinances in case where the penalty was imposed by state statute. Oak Grove v. Juneau, 66 Wis., 534; 29 N. W. Rep., 644.

Publication construed as used in ordinance. Waukesha Hygeia M. S. Co. v. Waukesha, 83 Wis., 475.

§ 36. Same subject—Contingency. By virtue of the municipal charter and general maxims applicable to municipal administration, the prohibition against delegation of power applies to the several departments and officers of the municipality, as stated and illustrated elsewhere.⁴⁴ It thus follows that when an ordinance leaves the legislative body, to be valid, it must be complete.⁴⁵ On the question of expediency of the particular ordinance, the body must exercise its own judgment definitely and finally. Where the law is made to take effect on the occurrence of some specified event, which will not of itself render it invalid,⁴⁶ the legislative body must declare it

44 Ch. II, § 84 et seq., post.

45 Lammert v. Lidwell, 62 Mo., 188; O'Neill v. Ins. Co., 166 Pa. St., 72, 77; 30 Atl. Rep., 943; Exparte Wall, 48 Cal., 279; St. Louis v. Clemens, 52 Mo., 133; St. Louis v. Russell, 116 Mo., 248; 22 S. W. Rep., 470; 20 L. R. A., 721; St. Louis v. Howard, 119 Mo., 41; 24 S. W. Rep., 770.

"It is a principle not questioned that, except where authorized by the Constitution, as in respect to municipalities, the legislature cannot delegate legislative power; cannot confer on any body or person the power to determine what shall be the law. The legislature only must determine what it shall be. The courts only must authoritatively determine what it is." Therefore, a legislative act which leaves it to be determined by the courts that such act, or any part of it, shall take effect and become law, is void. In such case it does not matter that the act does not profess in terms to confer such power on the courts, if such power is given in substance and effect. State ex rel. v. Young, 29 Minn., 474, 551, 552; 9 N. W. Rep., 737.

46 The legislature may pass a law to take effect or go into operation upon the happening of a future event or contingency. St.

Louis v. Alexander, 23 Mo., 483; State v. Winkelmeier, 35 Mo., 103: State ex rel. v. St. Joseph, 37 Mo., 270; State v. Binder, 38 Mo., 451; State ex rel. v. Wilcox, 45 Mo., 458; Township Organization Act. 55 Mo., 295; State ex rel. v. Pond, 93 Mo., 606; 6 S. W. Rep., 469; State ex rel. v. Francis, 95 Mo., 44: 8 S. W. Rep., 1; Ex parte Swann, 96 Mo., 44; 9 S. W. Rep., 10; State v. Moore, 107 Mo., 78; 16 S. W. Rep., 937; State v. Dugan, 110 Mo., 138; 19 S. W. Rep., 195; Commonwealth v. Weller, 14 Bush. (Ky.), 218; 29 Am. Rep., 408, 411; Locke's Appeal, 72 Pa. St., 491; Smith v. McCarthy, 56 Pa. St., 359; Com. v. Williams, 11 Pa. St., 61; Commonwealth v. Painter, 10 Pa. St., 214: State v. Parker, 26 Vt., 357; Cooley Const. Lim., 117.

This rule has been applied to municipal ordinances.

Anderson v. Camden, 58 N. J. L., 515; 33 Atl. Rep., 846; Bradley-Ramsay Lumber Co. v. Perkins (La., 1903), 33 So. Rep., 351; Nor. Cent. Ry. Co. v. Baltimore, 21 Md., 93; State v. Kirkley, 29 Md., 85; Baltimore v. Clunet, 23 Md., 499; Thomas v. Grand Junction, 13 Colo. App., 80; 56 Pac. Rep., 665; Buffalo v. Chadeayne, 134 N. Y., 163.

An ordinance for an improve-

expedient if that event shall happen, but inexpedient if the event shall not happen. The members can appeal to no other man or men to judge for them in relation to its present or future propriety, or necessity, but they must exercise that power themselves, and thus perform the duty imposed upon them by the charter.⁴⁷

§ 37. Expiration and suspension of ordinances. A law may be promulgated to continue in force for a specified time only and when such time expires the law ceases as a regulation.⁴⁸ But when by-laws or ordinances are not limited as to the time of their operation they never become obsolete, but continue in force until legally repealed or superseded.⁴⁹ The fact that the ordinance is not enforced and is repeatedly violated has no effect whatever on its force as law.⁵⁰ The corporate authorities have no power to suspend an ordinance nor to authorize a violation of it.⁵¹

ment which provided that it shall not take effect unless within twenty days from its approval a stated sum is deposited with the city treasurer does not contravene the charter, for an ordinance may be made to depend upon the happening of a future event within a reasonable time after its approval. Heman Constr. Co. v. Loevy, 64 Mo. App., 430, 432, 433.

The fact that certain provisions of an ordinance are not to take effect until a specified time in the future does not affect the validity either of the entire ordinance or the particular provisions. Rushville v. Rushville Natural Gas Co., 132 Ind., 575; 15 L. R. A., 321; 28 N. E. Rep., 853.

- ⁴⁷ See Barto v. Himrod, 8 N. Y., 483, 490.
- 48 Chillicothe v. Logan Natural Gas, etc., Co., 11 Ohio Dec. 24; 8 Ohio N. P., 88.
- 49 Cascaden v. Waterloo, 106 Iowa, 673; Ryce v. Osage, 88 Iowa, 558; Commonwealth v. Davis, 140

Mass., 485; 4 N. E. Rep., 577; Bohan v. Weekawken Tp., 65 N. J. L., 490; Manhattan Trust Co. v. Dayton, 59 Fed. Rep., 327; 8 U. S. Cir. Ct. Rep., 140, affirming 55 Fed. Rep., 181; Shrober v. Lancaster, 6 Lanc. Bar. (Pa.), 201.

Ordinance duly passed, presumed to be in force. St. Louis & T. H. R. R. Co. v. Eggmann, 161 Ill., 155; 60 Ill. App., 291.

- ⁵⁰ Commonwealth v. Davis, 140 Mass., 485; 4 N. E. Rep., 577; Ryce v. Osage, 88 Iowa, 558.
- 51 Commonwealth v. Worcester,3 Pick. (20 Mass.), 462.

An ordinance cannot be suspended by resolution. People ex rel. v. Mount, 186 Ill., 560, 578; 58 N. E. Rep., 360; C. & N. P. R. R. Co. v. Chicago, 174 Ill., 439; 51 N. E. Rep., 596; Terre Haute v. Lake, 43 Ind., 481.

City may suspend an ordinance by ordinance, as one relating to use of fire works. Hill v. Charlotte, 72 N. C., 55; 21 Am. Rep., 451.

Suspending an ordinance, as one

The limitation of time in which a law is to apply is very different from the limitation of time it is to continue in force as a law. When by-laws inflicting penalties expire by their own limitation, or are repealed or superseded, they cease to be law in relation to the past as well as the future, and can no longer be enforced in any case. To use the language of an early New Hampshire case: "No case is, however, to be found in which it was ever held before that they thus ceased to be law, unless they expired by express limitation in themselves, or were repealed. It has never been decided that they cease to be law merely because the time they were intended to regulate had expired. Many laws have been passed which were limited in their operation to particular seasons of the vear. This was the case with the statutes which regulated the hunting of deer, and the taking of fish in rivers and ponds. But it is imagined that no one ever supposed that those laws expired by their own limitation every time the season they were intended to regulate expired and revived again with the return of the season. The same is the case with the statutes regulating the observance of the Sabbath. The statutes apply only to one day of the week. But we imagine no person will contend that they remain in force only during Sunday." In accordance with these views, it was held that a penalty incurred under a by-law of a town made to prohibit horses from going at large during certain seasons of the year, might be enforced after the expiration of the year.⁵²

A resolution adopted for a particular and temporary purpose, continues, as a rule, for a reasonable period only, and in such case a formal repeal, of course, is not required to terminate its operation. But if the resolution is in effect an ordinance, and has the force of a local law, it continues to operate until legally rescinded.⁵³

forbidding the discharge of fireworks, creates no municipal liability, Ch. XIV, § 436, post.

Exceptions in ordinance. Emporia v. Shaw, 6 Kan. App., 808.

⁵² Stevens v. Dimond, 6 N. H., 330.

⁵³ Shaub v. Lancaster, 156 Pa. St., 362; Cascaden v. Waterloo, 106 Iowa, 673.

CHAPTER II.

OF THE POWER TO ENACT ORDINANCES

AND HEREIN, THE NATURE OF MUNICIPAL CORPORATIONS AND THE Source, Construction and Exercise of General CORPORATE POWERS.

- § 38. Public corporation empow- § 59. Implied power to dispose of ered to pass ordinances.
 - 39. Corporate as distinguished from private affairs.
 - 40. Ordinance regulating civil rights and liabilities.
 - 41. Same—civil action for breach of ordinances.
 - 42. Same limitation duty to public.
 - 43. The municipal charter its nature and purpose.
 - 44. Same subject.
 - 45. Usual municipal powers.
 - 46. General rule as to municipal powers stated.
 - 47. Powers of New England towns.
 - 48. Rules of construction.
 - 49. Same subject.
 - 50. Effect of specific enumeration of powers.
 - 51. Construction of power "to regulate."
 - 52. Construction of charter.

IMPLIED POWERS.

- 53. Implied power to enact ordinances.
- 54. General doctrine as to implied or incidental powers.
- 55. Implied powers confined to municipal affairs.
- 56. Implied powers respecting offices and officers.
- 57. Implied power to acquire and hold property.
- 58. Same-property beyond corporate limits.

- property.
 - 60. Same-property held for particular purposes.
 - 61. Implied power to transfer. donate or dedicate property for particular uses.
 - 62. Implied power to mortgage or pledge property.
 - 63. Implied powers as to police and sanitary regulations.
 - 64. Implied power to supply water.
 - 65. Implied power to purchase engines, etc., to prevent and suppress fires.
 - 66. Implied power as to lighting.
 - 67. Same-implied power to regulate price of light.
 - 68. Appropriations as donations forbidden.
 - 69. Appropriations for celebrations, entertainments, etc., void.
 - 70. Bounties to soldiers.
 - 71. Expenditures to obtain or oppose legislation.
 - 72. Exercise of powers by virtue of usage or custom.
 - 73. Same subject.
 - 74. Miscellaneous illustrations of implied powers.

EXECUTION OF POWERS.

- 75. Method of exercise of powers.
- 76. Judiciary will not control exercise of discretionary powers.
- 77. Same subject.

- § 78. Limitation of rule of nonjudicial interference.
 - 79. When ordinance necessary to exercise power.
 - 80. Same subject-legislative or executive powers.
 - 81. Same subject-self-enforcing charter provisions.
 - 82. Distinction between mandatory and discretionary pow-
 - 83. Same subject.

- § 84. Public powers cannot be surrendered or delegated.
 - 85. Powers and duties imposed upon particular departments or officers cannot be dele-
 - 86. Legislative authority cannot be delegated.
 - 87. Same-illustrations.
 - 88. Same subject.
 - 89. Ministerial duties may be delegated.

§ 38. Public corporation empowered to pass ordinances. By-laws, ordinances or local laws are enacted by bodies politic and corporate, duly constituted and existing by public law. For all practical purposes, corporations in this country may be considered under three general classes: First, public corporations—variously styled public, political, civil and municipal—created by the sovereign power for public or political purposes, as counties, townships, parishes, school, road, levee, drainage, reclamation, irrigation, sanitary and taxing districts, cities, towns, villages and boroughs, and other public boards or bodies invested with certain specified subordinate powers to be exercised for local purposes, connected with and designed to promote the public good. Second, corporations technically private but yet of quasi-public character, having in view some public enterprise in which the public interests are involved to such an extent as to justify conferring upon them important governmental powers, as, for example, the exercise of the right of eminent domain. Such corporations include railroad, street railway, turnpike, canal, telegraph, telephone, gas, water, etc., companies. Third, corporations strictly private, the direct object of which is to promote private interests.1 But those created to conduct the local civil

1 Miners' Ditch Co. v. Zellerbach, 37 Cal., 543, 577.

Judge Dillon adopts the usual division of corporations into public and private. 1 Dillon Mun. Corp. (4 Ed.), secs. 52-56.

Judge Thompson refers to the three general classes mentioned in the text. 1 Thompson, Corp., section 22 et seq.

PUBLIC AND PRIVATE CORPORATIONS. Ten Eyck v. Delaware and Raritan Canal Co., 18 N. J. L., 200, 203, 204; Hanson v. Vernon, 27 Iowa, 28; Foster v. Fowler, 60 Pa. St., 27, 30, 31; Dartmouth College v. Woodward, 4 Wheat. (U.S.), 518; State v. Knowles, 16 Fla., 577; State ex rel. v. Associated Press, 159 Mo., 410; 60 S. W. Rep., 91; Interocean government of specified inhabitants and territory are usually classified as municipal corporations, which, in a strict sense, only embrace incorporated cities, towns, villages and boroughs, and to this class is given the power to pass ordinances of various kinds, to better enable the inhabitants thereof to provide all necessary and desirable police regulations, conveniences and comforts. The distinction between the designation "municipal corporations," as here employed, and other public corporations, as those usually called quasi-corporations or corporations sub modo, is marked, but for the purposes of this work farther classification, description or definition of corporations in general need not be given.

§ 39. Corporate as distinguished from private affairs. "The primary object of municipal ordinances is public, and not private, and their violation is redressed by the legal penalties." The municipal corporation is strictly of political institution; it is but a part of the internal government of the state. All its purposes and objects are public, and the powers it exercises, if not inherent in it, or delegated to it by the state, would reside in the state. The legal view is that, as created, the corporation falls precisely within the definition of a municipal corporation given in an early English case, "an investing the people of the place with the local government thereof."

"Private gain, trading, speculation, or the derivation of pecuniary profit, are not purposes or objects within the con-

Publishing Co. v. Associated Press, 184 Ill., 438; 56 N. E. Rep., 822; Munn v. People, 94 U. S., 113, affirming 69 Ill., 80; Chicago B. & Q. R. R. Co. v. Iowa, 94 U. S., 155; Lawrence v. Chicago & N. W. R. R. Co., 94 U. S., 164; Chicago N. & St. Paul R. R. Co. v. Ackley, 94 U. S., 179; Stone v. Wisconsin, 94 U. S., 181; Washingtonian Home v. Chicago, 157 Ill., 414; 41 N. E. Rep., 893; 29 L. R. A., 798.

RECLAMATION DISTRICTS, designed to make large bodies of land fit for cultivation by distributing water over them, are held to be public corporations. People v. LaRue, 67 Cal., 526; 8 Pac. Rep., 84; Hoke

v. Perdue, 62 Cal., 545; People v. Williams, 56 Cal., 647; People v. Reclamation Dist., 53 Cal., 346; Dean v. Davis, 51 Cal., 406.

So are Irrigating Districts, intended to render the land fit for use by removing the excess of water. Central Irrigation Dist. v. De Lappe, 79 Cal., 351; 21 Pac. Rep., 825.

² Per Campbell, J., in Cook v. Johnson, 58 Mich., 437; 25 N. W. Rep., 388; Taylor v. Lake Shore and Michigan Southern Ry. Co., 45 Mich., 74; 7 N. W. Rep., 728; 9 Am. & Eng. Ry. Cas., 127.

3 Cudon v. Eastwick, Salk., 192.

templation of the charter; and no powers are conferred to stimulate, encourage or advance such purposes, further than the incidental encouragement and advancement which may follow a prudent exercise of the powers of local government.''4 As a local governmental institution it merely exists for the benefit of the people within its corporate limits. All its rights, franchises, property and offices belong to its inhabitants for their use and benefit as a compactly settled community; and its officers are merely temporary trustees, solemnly charged with the duty for the time being of administering such rights, franchise, property and offices, not to subserve the interests of some private person or class of persons, nor as a private business corporation for pecuniary profit either to themelves or the city as a corporation, but wholly for the benefit of the public in supplying such municipal needs, conveniences and comforts as will advance the prosperity of the whole community.

Therefore a by-law will be held bad when it appears to have been passed not to subserve the interests of the corporation, that is, the public, but those of some private person or class of persons.⁵ Thus an ordinance designed to preserve private property is beyond the province of the municipal corporation;

4 Wetumpka v. Wetumpka Wharf Co., 63 Ala., 611, 624.

It has none of the peculiar characteristics of a trading company, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities and its powers are different. Nashville v. Ray, 19 Wall. (U. S.), 468, 475.

It is organized not to make money, but to spend it. Matthews, City Government of Boston, p. 189. 5 In re Peck and Town of Galt, 46

Up. Can. Q. B., 211, 220.

NOT IN PUBLIC INTEREST. Local improvement by-law held not in public interests and void. Pells v. Boswell, 8 Ontario Rep., 680.

By-law opening a lane held not passed in public interest, but simply to subserve interest of an individual. In re Morton & City of St. Thomas, 6 Ontario App. Rep., 323.

A by-law provided for the drainage of lands, but it appeared that the corporation intended to remedy a private grievance, and hence the by-law was held bad. Re Tp. of Romney and Tp. of Mersea, 11 Ontario App. Rep., 712, 723.

By-law to indemnify a councilman for the expenses of an election contest, held not in public interest. Re Bell v. Tp. of Manvers, 2 Up. Can. Com. Pleas, 507; 3 Up. Can. Com. Pleas, 400.

Where the by-law depended upon the vote of a member of a council who was interested, it was set aside. Hewison v. Tp. of Pembroke, 6 Ontario Rep., 170. See Sec. 108 post,

that protection must be enforced under the laws of the iand. "In no instance can a municipal corporation delegate power to private individuals to be exercised for their own private benefit, to do injury to the property of their neighbors, and relieve them from responsibility for the damages they may occasion, or reduce their liability to such as may result from want of proper care." So an ordinance cannot interfere with arrangements made by a railroad company with an omnibus company for the delivery of passengers and their baggage, which arrangements are not unlawful in themselves, and which relate to the cars of the company on its own premises.

§ 40. Ordinances regulating civil rights and liabilities. In a New York case it is declared to be an axiomatic truth that every person while violating an express law, whether statute or ordinance, is a wrong-doer, and, as such, ex necessitate negligent in the eye of the law, and every innocent party whose person is injured by the act which constitutes a violation of the law is entitled to a civil remedy for such injury, notwithstanding any redress the public may have. Prior to this declaration many cases had affirmed that where a person is required by statute to do a named act, and fails, any person specially injured by the neglect is entitled to recover his damages in an action on the case, if no other remedy is given, and that, too, even when the statute imposes a penalty for its viclation. Whether such action can be maintained must

⁶ To preserve property from encroachment in case of wharves. Horn v. People, 26 Mich., 221, per Campbell, J.

⁷ Mairs v. Manhattan Real Estate Assn., 89 N. Y., 498, 506, per Rapallo, J.

8 Napman v. People, 19 Mich., 352.

⁹ This rule was declared in Jetter v. New York & H. R. R. Co., 2 Abb. Ct. App. Dec. (N. Y.), 458, 464; 2 Keyes, 154, in overruling Brown v. B. & S. L. R. R. Co., 22 N. Y., 191. This case is limited by later New York cases. Massoth v. D. & H. Canal Co., 64 N. Y., 524, after

reviewing the cases, concludes that

it is an open question in New York

whether the violation of a municipal ordinance is negligence per se. In Knupfle v. Knickerbocker Ice Co., 84 N. Y., 488, the New York cases are considered and the conclusion stated: "The result of the decisions, therefore, is, that the violation of the ordinance is some evidence of negligence, but not necessarily negligence."

10 Couch v. Steel, 3 El. & B. (77 Eng. C. L. Rep.), 402, 411, per Lord Campbell, C. J.; Steam Navigation Co. v. Morrison, 13 Com. Bench—N. S.—(76 Eng. C. L. Rep.), 581, 594, per Williams, J.; Caswell v. Worth, 5 El. & B. (85 Eng. C. L. Rep.), 848, 855, 856, per Coleridge, J.; Atkinson v. New Castle & G,

depend on the "purview of the legislature in the particular statute, and the language which they have there employed." "The nature of the duty and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit." In a case of an ordinance passed by virtue of a special legislative grant, requiring railroads to fence their tracks within the corporate limits, it is said: "The duty it due, not to the city as a municipal corporation, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation and to an action for its recovery." 13

In actions for common law negligence, evidence that plaintiff violated a statute or ordinance is admissible for the purpose of showing negligence on his part. Likewise in such actions, the cases hold, with few exceptions, that for the purpose of showing defendant's negligence it is competent to introduce in evidence the statute or ordinance and prove that the same was violated by defendant. The application of these well-established rules is considered in a subsequent chapter.¹³/₂

Failure to observe an ordinance requiring certain precautions in blasting rock has been held sufficient evidence to support an action in behalf of one damaged because of such violation.¹⁴ In an action for damages resulting from plaintiff falling into a hole in the street, it appeared that defendant had failed to comply with the requirements of an ordinance

Waterworks Co., L. R., 6 Exch., 404.

Failure to protect hatchway as required by statute. Parker v. Bernard, 135 Mass., 116.

Obstruction of highway by railroad in violation of statute. Patterson v. Detroit, etc., Ry., 56 Mich., 172; 22 N. W. Rep., 260.

Rule applied where statute related to erection of wooden buildings in a city and which was violated to special injury of plaintiff. Aldrich v. Howard, 7 R. I., 199, 213.

¹¹ Per Lord Cairns in Atkinson v. Newcastle Waterworks Co., L. R., 2 Exch. Div., 441.

¹² Taylor v. L. S. & M. S. R. R.
Co., 45 Mich., 74; 40 Am. Rep.,
457; 9 Am. & Eng. Ry. Cas., 127;
N. W. Rep., 728, per Cooley, J.

¹³ Per Mr. Justice Matthews in Hayes v. Mich. Cent. R. R., 111 U. S., 228, 240.

13½ Ch. XII, Of Evidence of Ordinances.

14 Devlin v. Gallagher, 6 Daly(N. Y.), 494, 496.

relating to the mode in which vaults in streets should be protected. The court, in holding that this circumstance affected the defendant, said: "The doing of any unlawful act subjects the doer to every consequence that falls from it. This is the principle of universal operation and founded on good sense and public justice."

In an action for damages occasioned by the blowing down of a sign by the wind in an extraordinary gale, which sign had been suspended over a street with due care as to its construction and fastenings, but in violation of an ordinance which subjected its owner to a penalty for placing and keeping it there, it was held that this illegal act contributed to plaintiff's injury.¹⁶ While the ground of such liability is negligence, it seems that the act of defendant in wrongfully placing the sign, in the opinion of the court, alone rendered him liable. This act was in violation of the rule of conduct in such cases which had been established by ordinance. If no municipal regulation had existed on the subject, and the view had been adopted that the sign had been rightfully placed where it was, the only question would have been presented, whether defendant had used due care in securing it. If he had done so, the damage would have been caused, without his fault, by the extraordinary and unusual gale of wind, and thus, having been produced by the ris major, plaintiff would have had no remedy. To adopt the illustration of the court: A chimney or roof properly constructed and secured with reasonable care may be blown off by an extraordinary gale and injure a neighbor's building; but this is not a ground of action.¹⁷ Hence, in determining the question whether in these and like cases the ordinance creates the liability, it is important to consider whether, in the absence of the ordinance. what was done or omitted by defendant constituted a want of due care. Here the wrongful act of suspending the sign

and kept it there illegally, and this illegal act of his has contributed to the plaintiff's injury. The gale would not of itself have caused the injury if the defendant had not wrongfully placed this substance in its way." Salisbury v. Herchenroder, 106 Mass., 458,

¹⁵ Owings v. Jones, 9 Md., 108,117.

¹⁶ Salisbury v. Herchenroder, 106 Mass., 458.

^{17 &}quot;But the defendant's sign was suspended over the street in violation of a public ordinance of the city of Boston, by which he was subject to a penalty. He placed

over the street was the proximate cause of the damage, and, therefore, the specific negligent act of defendant. If such act was in itself wrongful and in violation of the legal rights of plaintiff, it is clear that the cause of action does not rest upon the ordinance. But if, on the other hand, it was wrongful only because prohibited by a reasonable police regulation, admittedly within the jurisdiction of the local corporation, it follows that the ordinance created a new civil liability

Same—Civil action for breach of ordinance. cases assert that the breach of duty arising from the violation of the statute in one case, and the ordinance in the other, is of the same nature, and the consequences the same, as relating to the duty which the defendant owes to individuals, as, for example, their safety in using the streets. Thus an ordinance requiring teams attached to vehicles to be fastened or hitched when left standing unattended in the streets, has been held "to impose a legal duty, such that a civil action for damages might be maintained for a breach thereof as in the case of like statutory duty." As respects the point under consideration, some cases have extended the analogy between statutes and ordinances farther. In support, the well-established principle is invoked that an ordinance which a municipal corporation is authorized to make is as binding on all persons within the corporate limits as a statute or other law of the state, and all persons bound thereby are required to take notice of its existence. Thus a petition was held good, on demurrer, which founded the cause of action for damages for destruction of property upon an ordinance relating to the keeping of crude petroleum, naphtha, etc., which defendant had violated, and which breach of duty caused the loss.¹⁹

18 Bott v. Pratt, 33 Minn., 323, 328; 23 N. W. Rep., 237, sustaining an instruction which charged the jury, in substance, that if they should find that defendant left his horse unhitched in the street, in violation of the ordinance, and the damage to the plaintiff was occasioned thereby the liability of the defendant was established.

19 The court quoted, as follows: "It is founded," says Chief Baron Comyns, "upon a wrong. In all

cases, where a man has temporal loss or damage by the injury of another, he may have an action on the case." Com. Dig. tit., Action on the Case, A. The court then said: "This injury may be caused by the unlawful act of another, or from the careless and negligent manner in which a lawful act is performed." * "It cannot be doubted that it is competent for the legislature of this state to delegate to municipal corporations,

In an action to recover damages for personal injuries sustained by plaintiff in falling through an elevator opening in defendant's establishment, an instruction was approved which declared that it was the duty of defendant to provide a gate or railing to the elevator hatchway, as required by an ordinance, and that a failure to do so was negligence.²⁰ quently the same court, in affirming the principle of the last case, that an ordinance could afford a basis for a civil action, sustained a petition against a demurrer in an action for damages for the death of a child, occasioned by falling into a hatchway on premises owned by defendant, wherein it appeared that defendant had failed to comply with the provisions of an ordinance which required that the hatchway should be protected so as to prevent any one from falling into it. The theory of the petition was that the ordinance prescribed a rule of conduct for the violation of which a defendant could be held in damages to a third person.21

§ 42. Same—Limitation—Duty to public. It is clear that ordinances of this character cannot be extended beyond the proper limits of municipal jurisdiction. In so far as they are

like Chicago, the power to pass ordinances; and it is well settled that such ordinances, when within the legislative authority given, have the force, as to all persons bound by them of laws passed by the legislature of the state." Wright v. C. & N. W. R. R. Co., 7 Ill. App., 438, 445, 446.

²⁰ While it was stated that the ordinance was valid, the defendant was obliged to obey it, and was liable for failure to do so, the "whole ordinance might have been dropped out of this case entirely without affecting its merits." Wendler v. People's House Furnishing Co., 165 Mo., 527, 540; 65 S. W. Rep., 737. (In a court composed of seven judges, three dissented.)

²¹ Hirst v. Ringen Real Estate Co., 169 Mo., 194; 69 S. W. Rep., 368.

Failure to observe ordinance as

to guarding hatchway constitutes negligence. Ryan v. Thomson, 6 Jones & S. (38 N. Y. Sup. Ct.), 133.

An ordinance of the City of St. Louis required every person, who made an excavation in or adjoining any pubic street, to fence the same with a substantial fence not less than three feet high, etc. Held that such an ordinance can only be made the basis of a civil liability when it rests upon, and has for its object, the enforcement in a particular way of an obligation imposed by the general law; and held, further, that the ordinance came within this principle, in that an obligation to guard such an excavation existed at common law, and the ordinance merely prescribed that this obligation should be discharged in a certain manner. Jelly v. Pieper, 44 Mo. App., 380, per Biggs, J.

designed to preserve the life and limb of those within the corporate limits, they will be sustained as proper police regulations, and where individuals suffer damage by reason of the violation of certain of such ordinances, as we have seen, some cases hold that the one in default is subject to civil action on the theory that the duties enjoined by such regulations are due not alone to the public in its corporate capacity, but also to individuals as such. On the other hand, where the duty imposed is due alone to the corporation as a legal entity, an ordinance passed in pursuance of the police power and carrying its own punishment, as for a misdemeanor, for its violation, cannot create a civil liability. Such ordinance does not constitute a rule of conduct binding third persons inter sese, and therefore cannot create a civil liability against a person violating it and in favor of one damaged by such violation. The only liability for infraction is the penalty imposed.²² Thus owners of land abutting on streets are held liable to the corporation alone for breach of ordinances requiring the removal of snow and ice from the sidewalk within a specified time after the fall thereof. The ground is that it is the sole

²² Connecticut. Hartford v. Talcott, 48 Conn., 526; 40 Am. Rep., 189.

Illinois. Brink's Chicago City Exp. Co. v. Kinnare, 168 Ill., 643; 67 Ill. App., 498.

Iowa. Keokuk v. District of Keokuk, 53 Iowa, 352; 5 N. W. Rep., 503.

Kansas. Chicago, etc., R. R. Co. v. Kennedy, 2 Kan. App., 693.

Maryland. Flynn v. Canton Co., 40 Md., 312; 17 Am. Rep., 603.

Minnesota. Bott v. Pratt, 33 Minn., 323, 327; 23 N. W. Rep., 237.

Missouri. Hirst v. Ringen Real Estate Co., 169 Mo., 194, 200; 69 S. W. Rep., 368; Saunders v. So. Electric R. R. Co., 147 Mo., 411, 427; 48 S. W. Rep., 855; Moran v. Pullman Palace Car Co., 134 Mo., 641, 650; 36 S. W. Rep., 659; 56 Am. St. Rep., 543; Holwerson v. St. Louis and S. R. Co., 157 Mo., 216; 57 S. W. Rep., 770; 50 L. R. A., 850; Becker v. Schulte, 85 Mo. App., 57; Norton v. St. Louis, 97 Mo., 537; 11 S. W. Rep., 242.

New York. Moore v. Gadsden, 93 N. Y., 12.

Ohio. Administrator of Chambers v. Ohio Life Ins. Co., 1 Disney (Ohio), 327, 336.

Breach of ordinance is merely evidence of negligence to be considered with other facts in the case. Knupfle v. Knickerbocker Ice Co., 84 N. Y., 488.

Ordinance cannot authorize encroachment in streets, and thus relieve those erecting or maintaining them from civil liability. New York v. Heft, 13 Daly (N. Y.), 301.

An ordinance cannot give the city a right of action on account of damages to private property, as ornamental shade trees. Goshen v. Crary, 58 Ind., 268,

duty of the city to keep its streets in condition for travel, and not the duty of private persons.²³ The owner of property fronting on a street is not liable to the corporation for damages recovered of the latter by one for injuries received by falling on the ice on the sidewalk in front of such property, notwithstanding an ordinance required the owner to keep his sidewalk free from ice and snow, and prescribed a penalty

²³ The remedy is exclusively against the inhabitants of the city in their corporate capacity. Kirby v. Boylston Market Association, 14 Gray (Mass.), 249; 74 Am. Dec., 682.

"The ordinance was not intended for the benefit of the plaintiff, as an individual, or as one of a particular class, but for the public at large." Flynn v. Canton, 40 Md., 312, 323; 17 Am. Rep., 603, 614.

"In this case the duty was to keep the sidewalk free from obstruction. It will not be claimed that this was not a duty to the whole public of the city, and the disputed question is whether it is also a duty to each individual making use of the walk." "The duty to build the walk is only a public duty, and the duty to keep it in a condition for use is also a public duty." Per Cooley, J., in Taylor v. L. S. & M. S. Ry. Co., 45 Mich., 74, 77; 77 N. W. Rep., 728; 9 Am. & Eng. Ry. Cas., 127; 40 Am. Rep., 457.

In Van Dyke v. Cincinnati, 1 Disney (Ohio), 532, the action was against one H., the abutter, and the city. In denying liability of the property owner, the court said: "As the owner of adjacent property there was no common law duty upon the defendant H. to remove the obstruction (snow and ice). It is not claimed that he is a public officer charged with the performance of this particular duty,

and no statutory liability is shown. * * * So far as it is claimed that the enactment of such an ordinance creates a positive duty on the part of the owners of the property to clear their sidewalks of the obstructions named, the neglect of which is to make them answerable for the consequences to such as may suffer therefrom, no matter to what extent, we deny that the city council has the power to impose any such obligation. * * The ordinance imposed upon H. a duty to the public alone which can only be enforced by the penalty prescribed, and the noncompliance of which does not subject him to a civil action at the suit of a private person."

After commenting on the English cases, sustaining liability by virtue of statutes, it is said in a Rhode Island case: "But even if the liability had its origin in the common law, we do not find that it has ever been held to extend to a neglect of duty enjoined simply by a municipal ordinance and we think there are reasons why it should not extend it. The power to enact ordinances is granted for particular local purposes. includes or is coupled with a power to prescribe limited punishments by fine, penalty, or imprisonment for disobedience. No power is given to annex any civil liability. The power, being delegated, should be strictly construed. It would seem, therefore, that the

for its violation.24 Individuals are liable for any injuries they may do by interfering with the safety and convenience of travelers.25 If what they do constitutes a nuisance or tort, and actionable as such at common law, they may be held liable for all resulting damages, irrespective of ordinance regulation on the subject. Thus where one creates a nuisance or obstruction in a public highway,26 or suffers snow and ice to accumulate upon an awning placed by him over a sidewalk, and the awning being insufficient to hold the snow and ice, gives way and damages a pedestrian,27 he is responsible in damages for any injury in consequence thereof. The liability in these and like cases rests alone on negligence, the defendant in each instance being the author of the illegal act, and the tort consists in the violation of the legal rights of the one who suffers damages-rights recognized under the general principles of law and not created by ordinance.28 But the failure of the abutting property owner to remove snow, which has

mere neglect of a duty prescribed in the exercise of such a power should not be held to create as a legal consequence, a liability, which, within its power, could not be directly imposed." Heeney v. Sprague, 11 R. I., 456, 462; 23 Am. Rep., 502, distinguishing Jones v. Firemen's Fund Ins. Co., 2 Daly (N. Y.), 307, and Bell v. Quin, 2 Sandf. (N. Y.), 146.

City cannot impose duty on abutter to keep sidewalk free from obstruction by snow, ice, etc. Gridley v. Bloomington, 88 Ill., 554; Chicago v. O'Brien, 111 Ill., 532.

²⁴ St. Louis v. Conn. Mutual Life Ins. Co., 107 Mo., 92; 17 S. W. Rep., 637.

The lot owner is not liable unless he has been negligent by obstructing the sidewalk or excavating under it. Jansen v. Atchison, 16 Kan., 358, 384, per Brewer, J.

Where the corporation is, by statute or charter, exempted from liability for defective sidewalks, streets, etc., the abutting property owner cannot be held liable for damages to one injured. Eustace v. Jahns, 38 Cai., 3, 21.

Agreement to keep sidewalk in repair, held sufficient to render property owner liable to city for failure to do so. Brookville v. Arthurs, 130 Pa. St., 501; 18 Atl. Rep., 1076.

It is the duty of the city to keep its streets in a reasonably safe condition for persons travelling thereon. Kiely v. Kansas City, 87 Mo., 103.

This duty cannot be evaded, suspended or cast upon others by any act of the corporation. Russell v. Columbia, 74 Mo., 480; Welsh v. St. Louis, 73 Mo., 71.

²⁵ Shipley v. Fifty Associates, 101 Mass., 251, 252.

²⁶ Smith v. Smith, 2 Pick. (Mass.), 621; Stetson v. Faxon, 19 Pick. (Mass.), 147; Dobson v. Blackmore, 9 Ad. & El., 991.

²⁷ Milford v. Holbrook, 9 Allen (Mass.), 17.

²⁸ Owner of building liable for damages from sliding mass of ice and snow from roof upon travelfallen on the sidewalk, has never been recognized as a ground of action for damages for resulting injuries at common law. The snow is not created by the act of the defendant, nor is it placed upon the pavement by his act or by the act of any agency over which he has control. Under the rule of the common law there is no obligation imposed upon him to remove it. As stated in a Rhode Island case: "We do not suppose that the creation of a civil liability between individuals was any part of the object for which the power to enact ordinances was granted."29

The principle involved is well illustrated in a Pennsylvania

lers. Shipley v. Fifty Associates, 101 Mass., 251.

A building so erected that its roof overhangs the street is a nuisance and snow and ice falling therefrom creates a liability. Garland v. Towne, 55 N. H., 55.

Abutting property owner, who turns water from his building onto the sidewalk by means of gutters or spouts, is jointly liable with the city if he fails to exercise reasonable care to guard pedestrians from injury resulting from the formation from such water of ice upon the sidewalk. Reedy v. St. Louis Brewing Association, 161 Mo., 523, 533: 61 S. W. Rep., 859.

Making a manhole for the reception of coal by abutter renders him liable, where the same is left unguarded and one falls therein. Benjamin v. Met. St. Railroad Co., 133 Mo., 274; 34 S. W. Rep., 590. Making and maintaining an opening or area in a lot at the street line. Buesching v. St. Louis Gas Light Co., 73 Mo., 219.

Excavation which renders highway unsafe. Butz v. Cavanaugh, 137 Mo., 503; 38 S. W. Rep., 1104; Wiggins v. St. Louis, 135 Mo., 558; 37 S. W. Rep., 528; Jelly v. Piper, 44 Mo. App., 380.

Any act which renders the street hazardous creates liability. Heer

Dry Goods Co. v. Citizens Ry. Co., 41 Mo. App., 63; Bailey v. Culver, 84 Mo., 531; Carvin v. St. Louis, 151 Mo., 334; 52 S. W. Rep., 210.

Liability for electric wires along public streets. Gannon v. Laclede Gas Light Co., 145 Mo., 502; 46 S. W. Rep., 968; 47 S. W. Rep., 907.

²⁹ Heeney v. Sprague, 11 R. I., 456, 461; 23 Am. Rep., 502.

"Speaking for myself alone, my views have not changed in the least, and I am still of opinion that such ordinances do not constitute a rule of conduct binding third persons inter sese, but are mere police regulations carrying their own punishment for their violation, and that punishment a fine, and that they are not admissible in evidence at all in an action based upon common law negligence, for no utterance of a municipal assembly can be evidence of common law negligence. as the majority of this court, in banc, holds otherwise, as to such ordinance affording the basis for a civil action, the proper administration of the law requires that such decision shall be obeyed and followed by all the members of the court until the court otherwise rules." Per Marshall, J., in Hirst v. Ringen Real Estate Co., 169 Mo., 194, 200; 69 S. W. Rep., 368.

case. An ordinance of Philadelphia required the owners of wharves on the Schuylkill and Delaware Rivers to put in and maintain cap-logs upon them to a height of not less than eight inches. A narr declared upon the ordinance as raising a duty which defendant company was bound to observe, and laid the damages resulting from the loss of a horse and cart as a consequence of the neglect of such duty. In holding that there was no cause of action, the court observed: "Let us suppose that these wharves were so constructed that extra ordinance. no charge of negligence could arise, and hence no common law action would lie; would disobedience to this regulation, of itself, subject the company to such charge and action? This question would seem almost to answer itself: for if it be affirmed, then may civil duties and civil remedies be given or taken away by ordinances; a power as yet quite beyond the reach of municipal legislation. The national or state legislature may do this, for it is the supreme power, and as such can make that immoral which was before indifferent, and that neglect which was before prudence, but the city of Philadelphia has no such power. Its ordinances are but police regulations enforceable by penalties, recoverable by actions of debt or otherwise, as may be prescribed, but if not so enforced they come to nothing. An ordinance may forbid the maintenance by my neighbor of a cesspool upon his premises, and it may, by penalty, compel him to abate it, but whether it does so or not, I may, if I am damaged thereby, have my common law action against him; but if I am not damaged I am without remedy. In this the ordinance neither helps nor hinders."30

§ 43. The municipal charter—Its nature and purpose. In this country, the theory is that the state antedates the municipal corporation, and hence the charter is, in theory, a delegation of a portion of the state's powers for local self-government.³¹ The state has all necessary power for the protection

³⁰ Per Gordon, J., in Philadelphia and Reading R. R. Co. v. Ervin, 89 Pa. St., 71, 75, 76; 33 Am. Rep., 726.

As to right of action to enjoin continuance of wooden building forbidden by ordinance. McCloskey v. Kreling, 76 Cal., 511; 18 Pac. Rep., 433; Oldstein v. Fireman's Building Assn., 44 La. Ann., 492; 10 So. Rep., 928.

Where licensed porter loses luggage, action will lie on his bond. Chillicothe v. Raynard, 80 Mo., 185.

31 Kelly v. Meeks, 87 Mo., 396; State v. Wilcox, 45 Mo., 458; Rug-

of the property, health and comfort of the public, and it may delegate this power to its municipal corporations in such measure as may be deemed desirable for the best interests of the public:32 and the state may resume it again when deemed expedient.³³ In legal language, we say the state, through its legislature, delegates its power relating to civil government or local administration to counties, cities, towns and other forms of public corporations, which delegation is regarded as a qualification of the fundamental maxim of government that the legislature cannot delegate its powers to make laws.34 And while true in theory, the fact is, accurately speaking, the state cannot be considered as delegating authority which it never possessed, since the management of local affairs was never a state duty or power.35 However, the courts regard charters as instruments conferring privileges or recognizing rights emanating from the state, the paramount authority.36

gles v. Collier, 43 Mo., 353; St. Louis v. Clemens, 43 Mo., 395; St. Louis v. Russell, 9 Mo., 507; State v. Simonds, 3 Mo., 414.

32 Stoutenburgh v. Hennick, 129 U. S., 141, 147; Covington v. East St. Louis, 78 Ill., 548.

³³ Harmon v. Chicago, 110 Ill., 400, 409.

34 In re Wall, 48 Cal., 279; Hill v. Decatur, 22 Ga., 203; Predu v. Ellis, 18 Ga., 586; Harmon v. Chicago, 110 Ill., 400, 408; Louisville City R. R. Co. v. Louisville, 8 Bush. (Ky.), 415; State v. Merrill, 37 Me., 329; Fell v. State, 42 Md., 71; Metcalf v. St. Louis, 11 Mo., 103; Markle v. Akron, 14 Ohio, 586; Clarke v. Rochester, 28 N. Y., 605.

"Municipal corporations form an exception to the rule which forbids the legislature to delegate any of its powers to subordinate divisions." McMahon v. Savannah, 66 Ga., 217, 224.

35 The American system of government "is one of complete decentralization, the primary and vital idea of which is that local

affairs shall be managed by local authorities and general affairs only by the central authority." Cooley's Const. Lim., 223; People v. Hurlbut, 24 Mich., 44; 9 Am. Rep., 103; People v. Detroit, 28 Mich., 228; 15 Am. Rep., 202; People v. Draper, 15 N. Y., 532, 561; People v. Albertson, 55 N. Y., 50; State ex rel. v. Denny, 118 Ind., 449; 21 N. E. Rep., 274; 24 Am. & Eng. Corp. Cas., 223; Kirkham v. Russell, 76 Va., 956; State v. Moores, 55 Neb., 480; 76 N. W. Rep., 175, overruling State v. Seavey, 22 Neb., 454; 35 N. W. Rep., 228; articles by the author, "Limitation of Legislative Control," etc., 34; Am. Law Review, p. 505 et seg.; "Constitutional Right of Local Self Government of Municipalities and Principles Applicable to Central Control," 35 Am. Law Review, p. 510 et seq.; Andrews' Am. Law, § 450 et seq.

36 GOVERNMENTAL CHARTERS—descriptions and definitions. Burrill's Law Dictionary, title "Charter;" Anderson's Law Dictionary, title "Charter;" Bouvier's Law Dic. (Rawl's Ed.), title "Charter:"

Neither is the charter nor any legislative act regulating the use of property held by a municipal corporation for governmental purposes a contract within the meaning of the constitutional prohibition of laws impairing the obligation of contracts.³⁷ Therefore, the general doctrine, supported by an unbroken line of authorities, is that political powers conferred upon a corporation for the local government of a place are not vested rights as against the state, and where there is no constitutional restriction, either express or implied, upon the action of the legislature, it has absolute power to create, change or modify them at pleasure.³⁸ The theory deducible

Black's Law Dictionary, title "Charter;" Bergman v. St. Paul M. B. Association, 29 Minn., 275, 278; 13 N. W. Rep., 120; Granger's Life Ins. Co. v. Kamper, 73 Ala., 325; State v. Railroad Commissioners, 37 N. J. L., 228, 238; Dew v. Judges, etc., 3 Hen. & M. (Va.), 1, 22.

As to nature of charter government among the early American Colonies, see 1 Story, sec. 161.

MUNICIPAL CHARTERS. State v. Ehrmantraut, 63 Minn., 104; 65 N. W. Rep., 251; Smith v. Sherry, 50 Wis., 210, 214, 215; 6 N. W. Rep., 561.

"CORPORATE POWERS." The phase in a constitution "to grant corporate powers or privileges," held to mean "in principio donationis" and equivalent to the phrase "to grant corporate charters." Atty. General v. Chicago & N. W. Ry. Co., 35 Wis., 425, 460; Brady v. Moulton, 61 Minn., 185, 186; 63 N. W., 489.

37 State v. B. & O. R. R. Co., 3 How. (U. S.), 534, affirming 12 Gill. & J. (Md.), 399; Layton v. New Orleans, 12 La. Ann., 515.

"Legislation impairing the obligation of contracts." 25 Am. Law Reg. (N. S.), 81, 83, 84.

"Legislative power to amend charters." 11 Am. Law Reg. (N.

S.), 1; Cooley's Const. Lim. (6th Ed.), 229; Black on Const. Prohibition, sec. 45, 46; 1 Hare's Am. Const. Law, p. 627, et seq.

38 Mount Pleasant v. Beckwith, 100 U. S., 514; Williams v. Eggleston, 170 U. S., 304, 310; Laramie County v. Albany County, 92 U. S., 307; U. S. v. B. & O. R. R. Co., 17 Wall. (U. S.), 322, 329; St. Louis v. Russell, 9 Mo., 507; St. Louis v. Allen, 13 Mo., 400; State ex rel. v. St. Louis County, 34 Mo., 546; State ex rel. v. Linn County, 44 Mo., 504; St. Louis v. Shields, 52 Mo., 351; State ex rel. v. Miller, 66 Mo., 328.

"Legislative control of Municipal Corporations," 8 Cent. L. J., 3; Black on Constitutional Prohibitions, sec. 47; Cooley's Const. Lim. (6th Ed.), 228.

The doctrine is carried to the extreme limit by Sharswood, J., in Philadelphia v. Fox, 64 Pa. St., 169, 180, 181, where he says the state may continue the city's corporate existence, "and yet assume or resume the appointment of all its officers and agents into its own hands; for the power which can create and destroy can modify and change." This is a type of many judicial assertions on this subject. Judge Dillon doubts this conclusion and adopts the observations of Judge Cooley, contained in his

from the authorities may be thus broadly stated: The legislature creates municipal corporations, defines and limits their powers and enlarges and diminishes them at will, points out the agencies which are to exercise them, and possesses such general supervision and control of them as it shall deem proper and needful for the public welfare.³⁹

§ 44. Same subject. The charter creates the body politic and corporate, contains the municipal powers and gives the form of municipal organization, locates the corporate boundaries and wards or other subdivisions, classifies and distributes the powers and duties of the various departments, boards and officers, and provides the manner in which the several powers shall be exercised. All of these matters should be definitely established. The precise limits of power that may be conferred by charter are impossible of definition. They will be sustained in so far as they relate to matters of local self-government and administration.⁴⁰ Special legislative charters necessarily vary in the powers conferred and in the rights recognized in them. So charters adopted by virtue of constitutional provisions will be unlike in many respects, and this is clearly within the contemplation of the constitution.⁴¹

work on Taxation (2nd Ed.), ch. 21, p. 678, where he says, that "in the general framework of our republican governments nothing is more distinct and unquestionable than that they recognize the existence of local self-government and contemplate its permanency. Some state constitutions do this in express terms, others by necessary implication." He admits that the legislature has usually a large authority in determining the extent of local powers and the framework of local government; while it may shape the local institutions, it can not abolish them, and, without substituting others, take all authority to itself." Dillon, Mun. Corp. (4th Ed.), note 1. p. 127.

30 "Public corporations are the auxiliaries of the state in the important business of municipal rule, and are called into being at the

pleasure of the state, and the same voice which speaks them into existence can speak them out." Ewing v. Hoblitzelle, 85 Mo., 64, 77.

Compare this statement with the following later decisions: St. Louis v. Dorr, 145 Mo., 466; 41 S. W. Rep., 1094; 46 S. W. Rep., 976; Kansas City ex rel. v. Scarritt, 127 Mo., 642; 29 S. W. Rep., 845; 30 S. W. Rep., 111; State ex rel. v. Field, 99 Mo., 352; 12 S. W. Rep., 802; Murnane v. St. Louis, 123 Mo., 479; 27 S. W. Rep., 711, which properly declares that "the important business of municipal rule" is a local and not a state matter.

40 Cooley's Con. Lim. (6th Ed.), 227.

41 State ex rel. v. Field, 99 Mo., 352; 12 S. W. Rep., 802; Kansas City v. Marsh Oil Co., 140 Mo., 458; 41 S. W. Rep., 943.

Under the general incorporation laws of most of the states there is uniformity in the rights and powers in so far as they relate to classes and grades. Hence, where classification is mandatory all municipal corporations of the same class or grade possess the same rights and powers and are subject to the same restrictions.

In this country, municipal charters are either granted by legislative authority of the state by general or special act, or framed and adopted by the people of the particular community by virtue of the state constitution. But it must be borne in mind that in every instance the particular charter contains the municipal powers, rights and obligations, points out the manner in which they are to be exercised and must be construed in the light of the constitution and laws of the state. The constitutional charter stands on no higher legal plane than a legislative, for all charters are subject to and controlled by the general law of the state.42 A municipal charter, when acted on, is more than an ordinary law of the state, "for it constitutes a sort of organic law, a constitution for a local self-government, within its territorial limits, extending in its scope to the extra regulations required for the good government of a city or town, to be enacted and carried into effect by its municipal officers." ⁴³ The charter is the power of attorney which defines and limits the objects and powers with which the municipal authorities are entrusted.44 "The corporation," remarked the Supreme Court of California in an early case, "owing its existence to the law, is precisely what the law makes it. * * * The general legislative powers residing in the state government may delegate to a municipal

⁴² Kansas City v. Lorber, 64 Mo. App., 604.

General laws supersede provisions of charter, when. Ewing v. Hoblitizelle, 85 Mo., 64; Davies v. Los Angeles, 86 Cal., 37; 24 Pac. Rep., 771; *In re* Cloherty, 2 Wash., 137, 139, 140; 27 Pac. Rep., 1064.

A charter framed by constitutional provisions will supersede the former charter of the particular municipal corporation whether granted by general or special statute, and after its adoption becomes the mandatory organic law. People ex rel. v. Bagley, 85 Mo., 343, distinguishing Ex parte Ah You, 82 Cal., 339; 22 Pac. Rep., 929; People ex rel. v. Henshaw, 76 Cal., 436; 18 Pac. Rep., 413; Thomason v. Ashworth, 73 Cal., 73; 14 Pac. Rep., 615.

43 Williams v. Davidson, 43 Tex., 1, 35; Gabel v. Houston, 29 Tex., 335, 343.

44 Per Wagner, J., in Hitchcock v. St. Louis, 49 Mo., 484, 488.

government some portion of its own powers; but these grants are held in subordination to the general power, and are not construed as taking from that government any other power or rights than those clearly granted.''45

§ 45. Usual municipal powers. When a particular place and the inhabitants thereof become a body politic and corporate, there is thereby constituted, in contemplation of law, a legal personality or artificial person; and the usual powers conferred and recognized and which may be exercised as a municipal corporation are: to acquire a name, and by that name shall have perpetual succession; power to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity and in all actions whatsoever; authority to purchase, receive, hold and manage property, real and personal, for municipal purposes and power to dispose of the same for the benefit of the corporation; and authority to adopt a common seal which may be altered at pleasure.

The various statutes differin phraseology in enumerating the general powers of municipal corporations, and many of them confer special or particular powers. The Minnesota statute, after enumerating the general municipal powers, provides that incorporated cities "shall have the general powers possessed by municipal corporations at common law." The Supreme Court of Michigan early declared that the cities and towns of that state were municipal corporations "of common law origin and having no less than common law franchises." The law generally recognizes the common law origin of municipal corporations proper and permits the exercise by them of certain incidental or implied powers in order to enable them to fulfil

45 Per Baldwin, J., in Oakland v. Carpentier, 13 Cal., 540, 545; Douglas v. Placerville, 18 Cal., 643, 647; New London v. Brainard, 22 Conn., 552; Benjamin v. Webster, 100 Ind., 15; Spaulding v. Lowell, 23 Pick. (Mas.), 71, 74.

"The powers of all corporations are limited by the grants in their charter and cannot extend beyond them." Petersburg v. Metzker, 21 lll., 205.

All city charters are limited by the operation of the general law. Kennedy v. Miller, 97 Cal., 429; 32 Pac. Rep., 558.

⁴⁷ Laws of Minn., 1899, p. 51. The charter of Milwaukee contains the same provisions. Butler v. Milwaukee, 15 Wis., 493, 497.

48 People v. Hurlbut, 24 Mich., 44; 9 Am. Rep., 103.

the purposes of their creation in supplying local needs and conveniences.

§ 46. General rule as to municipal powers stated. A municipal corporation may exercise, first, all powers granted in express terms, consistent with the federal constitution and laws, and the state constitution; second, certain implied or incidental powers, in harmony with the federal and state constitutions and laws, and the municipal charter, (a) growing out of those expressly granted, or (b) those which belong to it because it is a municipal corporation, or (c) those which are essential or reasonably proper, to give effect to powers expressly granted, or recognized, as pertaining to municipal existence.⁴⁹

49 THE GENERAL RULE AS TO THE powers possessed and which may be exercised, adopting Judge Dillon's statement (1 Dillon, Mun. Corp., 4th Ed., sec. 89), is thus given in a Virginia case: "First, powers granted in express words; second, those necessarily or fairly implied or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,-not simply convenient but indispensable." Duncan v. Lynchburg (Va., 1900); 34 S. E. Rep., 964; 48 L. R. A., 331.

This statement is either literally or in substance contained in the following cases:

Alabama—Eufaula v. McNab, 67 Ala., 588; New Decatur v. Barry, 90 Ala., 432; 24 Am. St. Rep., 827.

California—Reis v. Graff, 51 Cal., 86.

Colorado—Phillips v. Denver, 19 Colo., 179; 41 Am. St. Rep., 230.

Connecticut—New London v. Brainard, 22 Conn., 552.

Illinois — Huesing v. Rock Island, 128 Ill., 465; 21 N. E. Rep., 558; Cook County v. McCrea, 93 Ill., 236.

Iowa — Henke v. McCord, 55

Iowa, 378; 7 N. W. Rep., 623; Field v. Des Moines, 39 Iowa, 575; Logan v. Pyne, 43 Iowa, 524; 22 Am. Rep., 261.

Indiana—Champer v. Greencastle, 138 Ind., 339; 46 Am. St. Rep., 390; Richmond v. McGirr, 78 Ind., 192.

Louisiana — State v. Itzcovitch, 49 La. Ann., 366; 62 Am. St. Rep., 648; State v. Robertson, 45 La. Ann., 954; 40 Am. St. Rep., 272.

Massachusetts — Lowell v. Boston, 111 Mass., 454; 15 Am. Rep., 39, 62; Spaulding v. Lowell, 23 Pick. (Mass.), 71, 74, 75, per Shaw, C. J.; Williard v. Newburyport, 12 Pick. (Mass.), 227; Bangs v. Snow, 1 Mass., 181; Stetson v. Kempton, 13 Mass., 272; Com. v. Stodder, 2 Cush. (Mass.), 562; 48 Am. Dec., 679.

Montana — Davenport v. Kleinschmidt, 6 Mont., 502; 13 Pac. Rep., 249; 16 Am. & Eng. Corp. Cas., 301.

Michigan—Detroit, etc., Ry. Co. v. Detroit, 110 Mich., 384; 68 N. W. Rep., 304; 64 Am. St. Rep., 350.

Missouri — Nevada v. Eddy, 123 Mo., 546; 27 S. W. Rep., 471; State ex rel. v. Murphy, 134 Mo., 548; 31 As relates to the exercise of powers, it is generally regarded that corporations have none of the elements of sovereignty; that they cannot go beyond the powers granted them, and that they must exercise such granted powers in a reasonable manner. These are legal propositions that cannot be disputed.⁵⁰ "A corporation being a mere creature of the law, possesses

S. W. Rep., 784; 34 S. W. Rep., 51; 35 S. W. Rep., 1132; St. Louis v. Herthel, 88 Mo., 128; Kansas City v. Swope, 79 Mo., 446; Leach v. Cargill, 60 Mo., 316; Kiley v. Oppenheimer, 55 Mo., 374; State v. Clark, 54 Mo., 17; Knapp v. Kansas City, 48 Mo. App., 485; Joplin v. Leckie, 78 Mo. App., 8; Knox City v. Thompson, 19 Mo. App., 523; Kirkwood v. Meramec Highlands, 94 Mo. App., 637; 68 S. W. Rep., 761; Independence v. Cleveland, 167 Mo., 384; 67 S. W. Rep., 216.

New York — New York v. Dry Dock, etc., R. R. Co., 133 N. Y, 104; 28 Am. St. Rep., 609.

North Carolina—Smith v. Newbern, 70 N. C., 14; 16 Am. Rep., 766; State v. Webber, 107 N. C., 962; 22 Am. St. Rep., 920.

New Jersey—Carron v. Martin, 26 N. J. L., 594; 69 Am. Dec., 584. Oregon — Corvallis v. Carlile, 10 Oreg., 139.

Pennsylvania—Sharpless v. Mayor, 21 Pa. St., 147; 59 Am. Dec., 782-790.

Texas—Ex parte Garza, 28 Tex. App., 381; 19 Am. St. Rep., 845; Williams v. Davidson, 43 Tex., 1, 33; Brenham v. Brenham Water Co., 67 Tex., 542; 20 Am. & Eng. Corp. Cas., 207.

Utah—Levy v. Salt Lake City, 3 Utah, 63; 1 Pac. Rep., 160.

Vermont — St. Johnsbury v Thompson, 59 Vt., 300, 305.

Virginia — Lynchburg & R. St. R. Co. v. Dameron, 95 Va., 545, 548; 28 S. E. Rep., 951; Kirkham v. Russell, 76 Va., 956; Danville v.

Shelton, 76 Va., 325; Winchester v. Redmond, 93 Va., 711; 57 Am. St. Rep., 822.

West Virginia—Parkersburg Gas Co. v. Parkersburg, 30 W. Va., 435; 4 S. E. Rep., 650; Charleston v. Reed, 27 W. Va., 681; 55 Am. Rep., 336; Christie v. Malden, 23 W. Va., 667; Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va., 739; 50 L. R. A., 142, 149; 35 S. E. Rep., 994.

Wisconsin — Bell v. Platteville, 71 Wis., 139; 36 N. W. Rep., 831; 20 Am. & Eng. Corp. Cas., 177; Gilman v. Milwaukee, 61 Wis., 588, 592; 21 N. W. Rep., 640.

United States—Thomas v. Richmond, 12 Wall. (U. S.), 349; Thompson v. Lee County, 3 Wall. (U. S.), 327; Detroit v. Detroit City Ry. Co., 56 Fed. Rep., 867; Freeport Water Co. v. Freeport, 180 U. S., 587, affirming 186 Ill., 179, 57 N. E. Rep., 862; Danville Water Co. v. Danville, 180 U. S., 619, affirming 186 Ill., 326, 57 N. E. Rep., 1129.

⁵⁰ Per Bliss, J., in St. Louis v. Weber, 44 Mo., 547:

"The powers of all corporations are limited by the grants in their charters and cannot extend beyond them." Per Breese, J., in Petersburg v. Metzker, 21 Ill., 205, 206.

In referring to the powers of towns, in Massachusetts, Parker, C. J., observed: "Their corporate powers depend upon legislative charter or grant; or upon prescription where they may have exercised the powers anciently without any

only those properties which the charter confers upon it, either expressly or as incidental to its very existence." ⁵¹

Much difficulty arises in the application of the general doctrine relating to what powers may be exercised by municipal corporations because of the miscellaneous and sometimes in-

particular act of incorporation." Stetson v. Kempton, 13 Mass., 272, 278.

"A corporation being merely a political institution, it can have no other capacities than such as are necessary to carry into effect the purposes for which it was established." Kyd on Corp., 70.

⁵¹ Dartmouth College v. Woodward, 4 Wheat. (U. S.), 518, 578; Green's Brice's Ultra Vires, p. 28; Cooley's Const. Lim., p. 235.

"It is a rule of great public utility and courts should recognize and enforce it as a safeguard against the tendency of municipalities to embark in enterprises not germane to the objects for which they are incorporated. Even towns, which, under our peculiar political history and policy, it was strongly urged in Webster v. Town of Harwinton, 32 Conn., 131, possessed, because of their independent character, large original powers, were held to have no original or inherent powers whatever, but only such as are either expressly granted by the legislative power of the state or are necessary to the performance of their duties as territorial and municipal corporations." Dailey v. New Haven, 60 Conn., 314, 320; 22 Atl. Rep., 945.

If officers transcend the charter's powers their acts are neither binding on the corporation nor third persons.

"The trustees of a town possess only such powers as are specifically conferred by the act of incorporation, or are necessary to carry into effect the powers expressly granted. They must keep within the limits prescribed by the charter. If they transcend the authority conferred thereby, their acts are not binding on the town or third persons. They have no power to give away the funds of the town, or appropriate them to purposes not warranted by the charter. They must faithfully apply the corporate property to the uses and objects specified in the charter. As they cannot directly dispose of it by way of gratuity, so they cannot accomplish the result by device or indiscretion. They cannot under color of a sale transfer the property of the corporation without consideration; nor can they under pretense of satisfaction discharge a debt due the corporation without payment." Petersburg v. Mappin, 14 Ill., 193; 56 Am. Dec., 501.

"The powers vested in a corporate body or chartered association of men, are for a public purpose, and consist, not in a restriction of powers before vested, but in a delegation of new and particular powers which cannot be extended beyond the letter of the act of incorporation, unless the implication of some power beyond the letter be unavoidable, and necessarily follow the powers expressly given. And then the obvious aim and sense of the law cannot but be the very law: and we have the true construction in allowing such implied powers." Per Richardson, J., Charleston v. State ex rel. Adger, 2 Speers (S. C.), 719, 729.

definite purposes for which these public corporations are constituted. 52

§ 47. Powers of New England towns. New England towns, like other corporations, can exercise no powers except such as are expressly granted to them, or such as are necessary to enable them to discharge their duties and carry into effect the objects and purposes of their creation.⁵³ They act not by any inherent right of legislation, like the legislature of the state, but their authority is delegated.54 "It is quite too late," as observed in a Connecticut case, "to urge for them the possession of any inherent or prescriptive rights or powers, or any rights or powers not expressly or impliedly delegated to them by the legislative power of the state. ''55 In Vermont it has been held that the towns in existence in that state when the state constitution was adopted have no reserved sovereignty not possessed by all other towns in the state.⁵⁶ The corporate powers of towns depend upon legislative charter or grant; or upon prescription, where they may have exercised the power anciently without any particular act of incorporation. What powers the New England towns may exercise are fully stated in the cases in the note.⁵⁷

Denying inherent legislative powers. People ex rel. v. Mitchell, 35 N. Y., 551, relying on Thomson v. Lee County, 3 Wall. (U. S.), 327.

"Sovereignty resides only in the entire state. In the municipal or other local communities thereof. or in their magistracies, there is no such thing as an inherent and independent authority or right to govern, by which the communities themselves or any of the members thereof must be legally bound. Submission is due to the obligations which such bodies undertake to impose only so far as the state, in the exercise of its sovereign for the general has delegated authority to create them." Per Manning, J., in Mobile v. Moog, 53 Ala., 561, 564, 565.

⁵² Spaulding v. Lowell, 23 Pick. (Mass.), 71, 75; Willard v. New-

buryport, 12 Pick. (Mass.), 227; Eufaula v. McNab, 67 Ala., 588.

53 Abendroth v. Greenwich, 29 Conn., 356, 363.

⁵⁴ Willard v. Borough of Killingworth, 8 Conn., 247.

55 Booth v. Woodbury, 32 Conn.,118, 125.

56 Bennington v. Park, 50 Vt., 178.

⁵⁷ Connecticut—Farrel v. Derby, 58 Conn., 234; 20 Atl. Rep., 460.

Maine—Winterport Water Co. v. Winterport, 94 Me., 215; 47 Atl. Rep., 142, 1045; Maine Water Co. v. Waterville, 93 Me., 586; 45 Atl. Rep., 830; Rackliff v. Greenbush, 93 Me., 99; 44 Atl. Rep., 375; Reynolds v. Waterville, 92 Me., 292; 42 Atl. Rep., 553; Luques v. Dresden, 77 Me., 186; Parsons v. Monmouth, 70 Me., 262; Westbrook v. Deering, 63 Me., 231; Gilman v.

§ 48. Rules of construction. The policy of the law is to require of municipal corporations a reasonably strict observance of their powers. Therefore, the courts incline to adopt a strict rather than a liberal construction, thus applying substantially the same rule which is applied to charters of private corporations.⁵⁸ As a general proposition, only such powers and rights can be exercised under grants of the legislature to corporations, whether public or private, as are clearly comprehended within the terms of the act or derived therefrom by necessary implication, regard being had to the objects of the grants. "Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." Charters are special grants of power from the sover-

Waterville, 59 Me., 491; Opinion of Justices, 58 Me., 590; Winchester v. Corinna, 55 Me., 9; Frankfort v. Winterport, 54 Me., 250; Alley v. Edgecomb, 53 Me., 446; Barker v. Dixmont, 53 Me., 575; Opinion of Justices, 52 Me., 595; Augusta v. Leadbetter, 16 Me., 45, 47, 48; Bussey v. Gilmore, 3 Me., 191.

Massachusetts-Coolidge v. Brookline, 114 Mass., 592; Minot v. Roxbury, 112 Mass., 1; 17 Am. Rep., 52; Per Parker, C. J., Stetson v. Kempton, 13 Mass., 272; 7 Am. Dec., 145; Rumford School District v. Wood, 13 Mass., 193; Dillingham v. Snow, 5 Mass., 547; Bangs v. Snow, 1 Mass., 181, 187; Spaulding v. Lowell, 23 Pick. (Mass.), 71, per Shaw, C. J.; Willard v. Newburyport, 12 Pick. (Mass.), 227; Parsons v. Goshen, 11 Pick. (Mass.), 396; Vincent v. Nantucket, 12 Cush. (Mass.), 103; Hardy v. Waltham, 3 Metc. (Mass.), 163; Anthony v. Adams, 1 Metc. (Mass.), 284; Freeland v. Hastings, 10 Allen (Mass.), 570.

New Hampshire — Bachelder v. Epping, 28 N. H., 354; Concord v. Boscawen, 17 N. H., 465.

Vermont-Mount Holly v. Peru,

72 Vt., 68; 47 Alt. Rep., 103; Sheldon Poor House Assn. v. Sheldon, 72 Vt., 126; 47 Atl. Rep., 542; Westfield v. Coventry, 71 Vt., 175; 44 Atl. Rep., 66; Montpelier v. Elmore, 71 Vt., 193; 44 Atl. Rep., 71; Bates v. Bassett, 60 Vt., 530, 534; 15 Atl. Rep., 200.

58 Cooley's Const. Lim., 195; Corvallis v. Carlile, 10 Oreg., 139, 141;45 Am. Rep., 134.

⁵⁹ Per Mr. Justice Nelson in Minturs v. Larue, 23 How. (64 U. S.), 435, 436; Meday v. Rutherford, 65 N. J. L., 645; 48 Atl. Rep., 529; Ft. Scott v. Eads Brokerage Co. (U. S. C. C. A.), 117 Fed. Rep., 51.

"To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect." Per Waite, C. J., in speaking of power to issue bonds, in Ottawa v. Carey, 108 U. S., 110, 121; Clark v. Davenport, 14 Iowa, 494; Richards v. Clarksburg, 30 W. Va., 491; 4 S. E. Rep., 774; 20 Am. & Eng. Corp. Cas., 111; Winchester v. Redmond, 93 Va., 711, 714; 25 S. E. Rep., 1001; Kirkham v. Russell,

eign authority, and ordinarily they must be strictly construed. Whatever is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld.⁶⁰ "It is only by such grants that the government power can surrender its just authority. Nor, as a general rule, can any evil ever arise from such construction, since the inhabitants of the corporation are not deprived of that protection which the state extends to her citizens in general. The power of the corporation is merely something added, as to the particular locality, to the general powers of government; or in other words, it is a special jurisdiction, created for specified purposes, and, like all such jurisdictions, it must be confined to the subjects specially enumerated."

§ 49. Same subject. As it is a well established principle that a municipal corporation may exercise such powers as are reasonably proper to give effect to powers expressly granted, the rule stated in the last paragraph does not confine the con-

76 Va., 956, 961; Tax Collector v. Dendinger, 38 La. Ann., 261, 263; Joplin v. Leckie, 78 Mo. App., 8, 12; Knapp v. Kansas City, 48 Mo. App., 485; Cook Co. v. McCrea, 93 Ill., 236; Somerville v. Dickerman, 127 Mass., 272; Agnew v. Brall, 124 Ill., 312; 16 N. E. Rep., 230; Eufaula v. McNab, 67 Ala., 588.

"In determining on the extent of such power (to hold real estate in a particular instance, under a charter), we are to look at the grant and the restrictions; and, unless the power is found in the charter, it cannot be considered as possessed. The very grant of specified powers, under restrictions, is an exclusion of other powers in reference to the same subject matter, not granted by the charter." Bank of Michigan v. Niles, 1 Doug. (Mich.), 401, 404; People v. Utica Ins. Co., 15 John (N. Y.), 357.

60 Douglass v. Placerville, 18 Cal., 643, 647.

⁶¹ Per Fisher, J., in Leonard v. Canton 35 Miss., 189, 190, 191.

Hitchcock, J., in Collins v. Hatch, 18 Ohio, 523, 51 Am. Dec., 465, declares that should there be an error in construing municipal powers it is better to err in restricting than in extending them.

Parker v. Baker, 1 Clarke Ch. (N. Y.), 223, holding that nothing can be taken by intendment unless it obviously results from the grant as a necessary legal inference.

Doubt as to existence of power is resolved against the city. Logan v. Pyne, 43 Iowa, 524, 22 Am. Rep., 261; State v. Webber, 107 N. C., 962; 22 Am. St. Rep., 920; St. Paul v. Laidler, 2 Minn., 190, 72 Am. Dec., 89.

Strict construction adopted. State v. Smith, 67 Conn., 541; 52 Am. St. Rep., 301; Heeney v. Sprague, 11 R. I., 456.

Reasonable construction. Cochrane v. Frostburg, 81 Md., 54; 48 Am. St. Rep., 479; Ex parte Garza, 28 Tex. App., 381; 10 Am. St. Rep., 845; Ex parte Gregory, 20 Tex. App., 210; 54 Am. Rep., 516.

struction of the powers to the strict word and letter, but whatever is necessary and proper to carry into execution the granted powers, or the powers recognized as belonging to the municipal corporation, has always been conceded by the strict constructionists. Ear The construction should not be so strict and literal as to defeat the whole machinery of municipal regulation. "The strictness then to be observed in giving construction to municipal charters should be such as to carry into effect every power clearly intended to be conferred on the municipality, and every power necessarily implied in order to a complete exercise of the powers granted."

In speaking for the Supreme Court of Michigan, Cooley, J., observed: "There is a principle of law that municipal powers are to be strictly interpreted; and it is a just and wise rule. Municipalities are to take nothing from the general sovereignty except what is expressly granted. But when a power is conferred which in its exercise concerns only the municipality, and can wrong or injure no one, there is not the slightest reason for any strict or literal interpretation with a view of narrowing its construction. If the parties concerned have adopted a particular construction not manifestly erroneous, and which wrongs no one, and the state is in no manner concerned, the construction ought to stand. That is good sense, and it is the application of correct principles in municipal affairs."

While a corporation can do no act for which authority is

⁶² East Tenn. University v. Knoxville, 6 Baxt. (Tenn.), 166, 171.

63 Smith v. Madison, 7 Ind., 86, 87.

"Within the limits prescribed by the charter or statute applicable municipal corporations are to be favored by the courts. Powers expressly granted, or necessarily implied, are not to be defeated or impaired by a stringent construction. * * Possessing, as these municipal corporations do, the power of assessment and sale of private property, often wielded by the indiscreet or the selfish, the grossest abuses would inevitably

follow, if they were not held strictly within the powers granted and the means prescribed for the execution of these powers." Kyle v. Malin, 8 Ind., 34, 37.

"All power is subject to abuse. A demonstration of the evil consequences to flow from the abuse of a particular power does not demonstrate the non-existence of that power." Slack v. Maysville & L. R. R. Co., 13 B. Mon. (Ky.), 1, 15.

64 Per Cooley, J., in Port Huron v. McCall, 46 Mich., 565, 574; Gregory v. New York, 40 N. Y., 273, concerning liberal construction of powers of board of health. not expressly given, or may not be reasonably inferred, "if we were to say," to employ the language of the Supreme Court of Connecticut, "that they can do nothing for which a warrant could not be found in the language of their charters, we should deny them in some cases the power of self-preservation, as well as many of the means which are necessary to effect the essential object of incorporation; and therefore it has long been an established principle in the law of corporations that they may exercise all the powers within the fair intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted. In doing this they must have a choice of means adapted to ends and are not to be confined to any one mode of operation."65

§ 50. Effect of specific enumeration of powers. When the state delegates to municipal corporations the powers of local self-government, it also delegates the power to pass all needful rules and regulations in the form of ordinances for this purpose. 66 Charters generally contain specific enumerations of the subjects upon which the municipal corporation may legis-This enumeration is usually followed by a general delegation of authority to pass all ordinances which may be necessary for the promotion of the police and sanitary affairs of the city, its good order, advancement of commerce and general welfare of the locality, which shall be consistent with the constitution and general laws of the state and the local charter. This latter grant is generally, though not always, considered to give authority to enact ordinances upon all other subjects within the scope of municipal jurisdiction which are not mentioned in the specific enumeration. Of course, the passage of such ordinances must be reasonably necessary for the purpose of enabling the corporation to fulfil the objects of its creation. In other words, the detailed enumeration is not construed as denying the inherent power of the municipal corporation to make all proper or necessary ordinances respecting matters not specified, unless the intention to do so The limitation is that all such ordinances must be confined strictly to corporate or municipal purposes,67 and be

⁶⁵ Bridgeport v. Housatonuc R.
R. Co., 15 Conn., 475, 501; State ex rel. v. Walbridge, 119 Mo., 383, 394;
24 S. W. Rep., 475, contains similar expressions.

⁶⁶ See Sec. 53 et seg.

c7 Without special authorization, municipal ordinances cannot relate to state affairs. State v. Hayes, 61 N. H., 264, 314.

in harmony with the charter, constitution, general laws and public policy of the state.⁶⁸

§ 51. Construction of power "to regulate." Ordinarily the power "to regulate" will not be construed to include the power to prohibit.⁶⁹ "A power simply to regulate does not embrace a power to prohibit or destroy a trade or occupation." Therefore, ordinances to be valid cannot interfere with lawful employment. The cases respecting nuisances fully

The doctrine that municipal powers should be confined to corporate affairs, and the distinction between such and state matters is considered elsewhere. § 55 post. Ch. XV.

68 Compare the following cases with respect to particular facts. State v. Ferguson, 33 N. H., 424, 430: Monroe v. Lawrence, 44 Kas., 607; State v. Webber, 107 N. C., 962; 12 S. E. Rep., 598; Collins v. Hatch, 18 Ohio, 523; 51 Am. Dec., 465; State v. Freeman, 38 N. H., 426; Ireland v. Globe Milling, etc., Co., 19 R. I. 180; 32 Atl. Rep., 921; Clark v. South Bend, 85 Ind., 276; 44 Am. Rep., 13; Indianapolis v. Gas Co., 66 Ind., 396: McPherson v. Chebanse, 114 Ill., 46; 28 N. E. Rep., 454; Cairo v. Bross, 101 Ill., 475; Dubois v. Augusta, Dudley (Ga.), Rep., 30: Williams v. Augusta, 4 Ga., 509, 514; Milwaukee v. Gross, 21 Wis., 243.

Power to enact is sometimes strictly construed. State v. Hammond, 40 Minn., 43; St. Paul v. Briggs, 85 Minn., 290; 88 N. W. Rep., 984; Huesing v. Rock Island, 128 Ill., 465, 476; 15 Am. St. Rep., 129.

The power is confined to the things and objects specified in the charter. New Orleans v. Philippi, 9 La. Ann., 44; State v. Paterson, etc., R. R. Co., 45 N. J. L., 310; State v. Zeigler, 32 N. J. L., 262;

Brooklyn v. Furey, 9 Misc. Rep. (N. Y.), 193; 30 N. Y. Supp., 349; State v. La Crosse, 107 Wis., 654; Child v. Hudson Bay Co., 2 P. Wm., 207. See Sec. 53, post.

Ordinances may be enacted on subjects not enumerated. Nashville v. Linck, 12 Lea (80 Tenn.), 499.

Necessary powers not excluded by enumeration. Spaulding v. Lowell, 23 Pick. (Mass.), 71.

Maxim expressio unius est exclusio alterius is sometimes applied. Keokuk v. Scroggs, 39 Iowa, 447; State v. Fay, 44 N. J. L., 474; Telephone Co. v. Oshkosh, 62 Wis., 32.

Trades not enumerated excluded. New Hampton v. Conroy, 56 Iowa, 498; Oskaloosa v. Tullis, 25 Iowa, 440; Palaquemines v. Roth, 29 La. Ann., 261; Winants v. Bayonne, 44 N. J. L., 114.

Manner of enforcement. Grand Rapids v. Hughes, 15 Mich., 54.

Ejusdem generis applied. Thomas v. Hot Springs, 34 Ark., 553; Tuck v. Waldron, 31 Ark., 462; Snyder v. North Lawrence, 8 Kan., 82; St. Paul v. Traeger, 25 Minn., 248; St. Louis v. Laughlin, 49 Mo., 559. See § 52, supra, and notes.

69 As power to regulate driving horned cattle through street. Mc-Conville v. Jersey City, 39 N. J. L., 38

⁷⁰ State v. Mott, 61 Md., 297, 309; Baltimore v. Radecke, 49 Md., 217.

illustrate this principle. Thus an ordinance was condemned which made it unlawful to work, or use for the burning of oyster shells or stone lime, any kiln within the city. The court held that the mere burning of lime was not unlawful, since it was not a nuisance per se, irrespective of location, and hence, an ordinance could not so declare unless it be a nuisance in fact according to the common law or statutory definition.71 However, the judicial decisions respecting the power of minnicipalities to abate nuisances under the general powers are not uniform. Thus an ordinance forbidding the establishment of additional cemeteries or burial grounds within the limits of the city was sustained in South Carolina. Here it was held that it was not necessary to the existence of the power to pass that there be a present occasion for its existence, the court holding that it is sufficient if there is a future emergency which may demand it, and such question was solely for the municipal authorities.⁷² The construction of the power to regulate is treated in the chapters on License and Police Regulations.73

§ 52. Construction of charter. The existence and scope of the municipal powers are a matter of construction if claimed by virtue of legislative grant or charter authority, and the object will be to ascertain the legislative or charter intent; but if claimed as necessarily belonging to the corporation because designed to conduct the local civil government and regulate the internal affairs of the place, the investigation will go beyond the terms of the charter or legislative grant and include a consideration of common law powers, or those incidental to such corporate existence, which have been enforced and recognized by the law, apart from express charter or legislative grant. In ascertaining the powers of the city, the words in the charter are to be given their ordinary meaning and effect and no rule of an official can affect their interpretation. The city cannot extend its powers by unauthor-

Erection of private hospital forbidden. Milne v. Davidson, 5 Martin, La. (N. S.), 409; 16 Am. Dec., 189.

⁷¹ State v. Mott, 61 Md., 297.

⁷² Charleston v. Wentworth Street Baptist Church, 4 Strob. Law (S. C.), 306.

⁷⁸ Chapters XIII and XIV.

⁷⁴ Inherent or incidental municipal powers are treated in the Sections which follow.

⁷⁵ Ritterskamp v. Stifel, 59 Mo. App., 510.

ized definitions of words in its charter.⁷⁶ It is a cardinal rule of construction that words must be interpreted in the sense in which they are ordinarily used and understood, unless some other interpretation is clearly indicated by the charter.⁷⁷ All provisions of the charter bearing on the same subject should be construed together.⁷⁸

Certain rules or maxims of interpretation are invoked, but only for the purpose of ascertaining the true intent and meaning of the particular provision. "In arriving at this intention, the whole and every part of the instrument or enactment must be taken and compared together. The real intention, when once accurately and indubitably ascertained, will prevail over the literal sense of the terms. When the words used are explicit, they are to govern, of course. If not, then recourse

76 Brookfield v. Kitchen, 163 Mo.,
 546; 63 S. W. Rep., 825; Kansas
 City v. Lorber, 64 Mo. App., 604.

As to admissions of unconstitutional provisions of charter, see State ex rel. v. Smith, 150 Mo., 75; 51 S. W. Rep., 713.

77 State ex rel. v. Rusk, 55 Wis., 465, 476; 13 N. W. Rep., 452; Wildner v. Ferguson, 42 Minn., 112; 43 N. W. Rep., 794; 18 Am. St. Rep., 495.

78 Kirkham v. Russell, 76 Va.,
956, 967; Verdin v. St. Louis, 131
Mo., 26; 33 S. W. Rep., 480; 36 S.
W. Rep., 52; Young v. Kansas
City, 27 Mo. App., 101, 113; Holland v. Baltimore, 11 Md., 186.

"A statute, it has been said, is to be so construed, if possible, as to give sense and meaning to every part, and the maxim was never more applicable than when applied to the interpretation of a statute." Brown's Legal Maxims (4th Ed.), pp. 419-420, approvingly quoted in Chicago Dock Co. v. Garrity, 115 Ill., 155, 165; 4 N. E. Rep., 448.

"In adjusting these general provisions of the charter we are not called upon to construe them by any rigid technical rules, but must

be governed by consideration of reason and justice." Ruschenberg v. Southern Electric R. Co., 161 Mo., 70; 61 S. W. Rep., 626.

It is a well recognized rule of law that the meaning of a word is or may be known by the accompanying words. There is also a further kindred rule that where several particulars are named, followed by a more generic term, it is considered that the more generic term intends only other things ejusdem generis, or of the like kind. St. Louis v. Laughlin, 49 Mo., 559; Commonwealth v. Dejardin, 126 Mass., 46; Harlow v. Tufts, 4 Cush. (Mass.), 448.

Compare In re Swigert, 119 Ill., 83; Shirk v. People, 121 Ill., 61; Webber v. Chicago, 148 Ill., 313; Foster v. Blount, 18 Ala., 687; Bishop, Contracts, § 409; Endlich, Interp. Stat., § 405.

A city authorized by its charter to levy and collect a license tax on several kinds of business trades and avocations enumerated, including "manufacturing and other corporations or institutions," is not empowered to levy such tax on natural persons in the manufactur-

is had to the context, the occasion and necessity of the provision, the mischief felt, and the remedy in view.'79

In ascertaining the meaning of the particular provision, not only should the instrument be considered as a whole, but it is also sometimes important to look into the provisions of the prior charters, if any, bearing on the subject, the policy of local laws respecting corporations, and the legislative history of the state.

It is elementary law that an invalid part of a charter or statute does not invalidate the whole act.⁸⁰

IMPLIED POWERS.

§ 53. Implied powers to enact ordinances. If neither express nor implied power exists in the municipal corporation to deal with the subject matter, a by-law or ordinance relating thereto is clearly ultra vires the corporation. The right of a corporation to make by-laws for the regulation of its affairs appears to be as old as the Twelve Tables of the Roman Civil Law. It has always been the law that municipal as well as private corporations possess the incidental or implied power to enact such by-laws in harmony with charter provisions and the general rules of law as will better enable them to carry out the purposes of their creation. It has been said that the mere creation of a corporation carries with it power to make by-laws which are reasonable and not contrary to general law. The restrictions on the power of the corporation to

ing business, the court holding that neither the rule ejusdem generis, nor noscitur á sociis were applicable; that the words "other corporations or institutions" did not comprehend any class of corporations that do not fall within the previous designation of "manufacturing corporations;" and a license tax could only be levied "on corporate entities engaged in manufacturing." Joplin v. Leckie, 78 Mo. App., 8. See § 50, supra.

79 Per Wright, C. J., in District Township v. Dubuque, 7 Iowa, 262, 275.

80 Moreland v. Millen, 126 Mich.,381; 85 N. W. Rep., 882; People v.

Hurlbut, 24 Mich., 44; Brooks v. Fisher, 79 Cal., 173; 29 Am. & Eng. Corp. Cas., 9; 21 Pac. Rep., 652.

⁸¹ LIABILITY for arrest and imprisonment under void ordinances. McGraw v. Marion, 98 Ky., 673; 34 S. W. Rep., 18; 47 L. R. A., 593.

Solution Solution Sec. 7. In England the power to pass by-laws exists by usage and custom. Lambertville v. Thornton, 1 Ld. Raym., 91.

83 Coal Float v. Jefferson, 112
Ind., 15; 13 N. E. Rep., 115; Chamberlain v. Evansville, 77 Ind., 542.
84 Mobile v. Yuille, 3 Ala., 137, 143; 36 Am. Dec., 441.

Compare Commonwealth v. Stod-

pass by-laws is limited, of course, to the powers conferred by its charter, and to certain implied and incidental powers indicated in subsequent sections.⁸⁵

§ 54. General doctrine as to implied or incidental powers. The familiar maxim that the grant of power takes within all the necessary incidents to make that grant effectual, applies to municipal corporations with respect to the powers and authority exercised by them. So It thus follows that the city may do many things, by ordinance and otherwise, not in

der, 2 Cush. (Mass.), 562, 575; Napman v. People, 19 Mich., 352; Barling v. West, 29 Wis., 307; Taylor v. Pine Bluff, 34 Ark., 603.

85 In Child v. Hudson Bay Co., 2 P. Wm., 207, it is declared that a corporation has an implied power to make by-laws; "but when the charter gives the corporation power to make by-laws, they can only make them in such cases as they are enabled to do by the charter, for such power given by the charter implies a negative that they shall not make by-laws in other cases."

Judicial expressions exist to the effect that the power to pass ordinances is limited to the cases and objects specified in the charter.

Iowa—Knoxville v. Chicago, etc., R. R. Co., 83 Iowa, 636; 32 Am. St. Rep., 321.

Louisiana—New Orleans v. Philippi, 9 La. Ann., 44.

Maryland—Baltimore v. Porter, 18 Md., 284; 79 Am. Dec., 686.

Minnesota-State v. Hammond, 40 Minn., 43.

Missouri—Trenton v. Clayton, 50 Mo. App., 535.

Nebraska—Littlefield v. State, 42 Neb., 223; 47 Am. St. Rep., 697.

New Jersey—State v. Zeigler, 32 N. J. L., 262.

New York—Brooklyn v. Furey, 9 Misc. Rep. (N. Y.), 193; 30 N. Y. Supp., 349; Thompson v. Schermerhorn, 6 N. Y., 92; 9 Barb. (N. Y.), 152.

Oregon—Corvallis v. Carlile, 10 Oregon, 139; 45 Am. Rep., 134.

Pennsylvania — Southwark v. Neil, 3 Yeates (Pa.), 54.

South Carolina—Sumter v. Deschamps, 4 S. C., 297.

Texas — Wright v. Victoria, 4 Tex., 375.

May pass ordinance on subjects not enumerated, Nashville v. Linck, 80 Tenn. (12 Lea.) 499. Grant to pass ordinances is in addition to incidental power to make by-laws. Cross v. Morristown, 33 N. J. L. 57.

See Sec. 50, supra.

s6 Ex parte Marmaduke, 91 Mo. 228, 262; 4 S. W. Rep., 91; State ex rel. v. M., K. & T. R. R. Co., 164 Mo., 208; 64 S. W. Rep., 1801; Hill v. St. Louis, 159 Mo., 159; 60 S. W. Rep., 116; St. Charles v. Elsner, 155 Mo., 671; 56 S. W. Rep., 291; State ex rel. v. Walbridge, 119 Mo., 383, 394; 24 S. W. Rep., 457; Grover v. Huckins, 26 Mich., 476; Dullam v. Willson, 53 Mich., 392; 19 N. W. Rep., 112; Page v. Weeks, 13 Mass., 199.

When power is expressly granted, all necessary power to carry out the specific grant is implied. McFarlain v. Jennings, 106 La., 541; 31 So. Rep., 62.

terms expressly authorized by its charter or the general statutes of the state applicable. There are many implied powers which attach themselves to municipal corporations, inherent powers, which belong to them because they are municipal corporations, just as certain powers are inherent in courts and other public agencies because of the very nature and attributes of their organization.⁸⁷ But no powers can be implied except such as are essential to the objects and purposes of the corporation as created and established.⁸⁸ In other words, the power must relate to some corporate purpose, some purpose which is germane to the general scope of the object for which the corporation was created, or such as has a legitimate connection with that object and a manifest relation thereto.⁸⁹

"Implications of authority in bodies corporate, more especially those created for municipal purposes, should be clear and undoubted, and the party claiming through them should be able to point them out with certainty and precision. The fact that he cannot, is conclusive that they do not exist. Mere general arguments drawn from the convenience of possessing a power under certain circumstances in case of an emergency -conclusions that, if possessed, it might be beneficially exercised, are very dangerous sources of corporate authority. Implications spring from the necessities of some power actually conferred, and not from notions of what would be convenient or expedient under particular circumstances."90 Therefore, where a municipal corporation undertakes that which does not necessarily appertain to the municipality, it must have express power to do so. This is a well established rule.91 Generally, implied powers include all such as are necessary to carry out the objects of the corporation.

87 Per Sherwood, J. in Aurora
Water Co. v. Aurora, 129 Mo., 540,
576; 31 S. W. Rep., 946.

May exercise powers incidental and essential. Mayo v. Dover and F. Village Fire Co., 96 Me., 539; 53 Atl. Rep., 62.

88 Ottawa v. Carey, 108 U. S., 110, 120.

S., 256; People v. Dupuyt, 71 Ill.,
Harris v. Livingston, 28 Ala.,

577; Marion v. Chandler, 6 Ala., 899.

90 Per Dixon, C. J. in Butler v. Milwaukee, 15 Wis., 493, 497, distinguishing Miller v. Milwaukee, 14 Wis., 642.

Implied power to prescribe fire limits and prevent the erection of of wooden buildings therein. Bumgartner v. Hasty, 100 Ind., 575; 50 Am. Rep., 830.

91 Williamsport v. Commonwealth, 90 Pa. St., 498. a cardinal rule, applicable to all corporations. "That there may be a difference in even the implied powers of municipal corporations is possible. An implied power springs from necessity. That which may be necessary for a large city, may not be necessary for a small city, or borough. That which is not necessary cannot be implied." ⁹²

§ 55. Implied powers confined to municipal affairs. Municipal powers are to be construed with reference to the object contemplated by the state in the grant of the charter, and the extent of the power it confers is to be measured and limited by the purposes for which the corporation was created. Bearing in mind that the municipal corporation is created primarily to regulate and administer the local and internal affairs of the place incorporated, in contradistinction to those matters which are common to and concern the people of the state at large, it may be stated as a general proposition that, unless expressly authorized, the municipal corporation may only exercise such powers as pertain to the local and internal affairs of the municipality. Every power usually granted to municipal corporations points to an object local and domestic, purely municipal in character and such as is necessary to enable it to fulfil its municipal existence.93 Within this sphere much latitude may be allowed corporate authorities if in the exercise of the power no injury or harm is done. Where a general and indefinite power is added to those given in express words, such power is to be confined in its exercise to the ordinary objects and purposes of municipal corporations, and is not to be construed to comprehend a matter which is given to the state and affects its people at large. The courts have experienced much difficulty in ascertaining the precise limits. The point may be illustrated by a Virginia case. The municipal

92 Williamsport v. Commonwealth, 90 Pa. St., 498.

A municipal corporation "is not limited to the exercise of the powers specifically granted, but possesses, in addition, all such powers as are either necessarily incident to those specified, or essential to the purposes and objects of its corporate existence." LeCouteulx v. Buffalo, 33 N. Y., 333, 336.

98 Skyes v. Columbus, 55 Miss.,115, 138, 139.

Cannot regulate practice in state courts where the city is an ordinary litigant, by substituting the state code of procedure for one of its own. Badgley v. St. Louis, 149 Mo., 122; 50 S. W. Rep., 817; Noble v. Kansas City, 95 Mo., App. 167.

charter authorized the city "to do all such things as it may deem proper for the prosperity, quiet and good order of the city." The court, considering that this grant of power was intended to be confined to ordinary purposes of municipal corporations, held that the power did not authorize the city to offer rewards for the detection, apprehension or conviction of offenders against the criminal laws of the state, since this was a state matter. 94

The power of municipal corporations to exercise control over subjects embraced in state statutes by legislation or otherwise is considered elsewhere.⁹⁵

§ 56. Implied powers respecting offices and officers. It has been held that a municipal corporation cannot, without express authority, create an office and select an incumbent and clothe him with the power of a municipal officer, 1 as the office of pound keeper.2 But officers may be created to attend to municipal functions, although not specifically mentioned in the charter.3 This power may be implied. Thus, where the city is given charge of streets, the office of street commissioner may be created.4 So, under the power to preserve the health, a board of health may be created by ordinance.⁵ So, a charter providing that it shall be the duty of the city clerk, "in person or by deputy," to attend all meetings of the council, gives implied power to create the office of deputy clerk.6 But the power to grant, hold, lease, and dispose of property has been held not to authorize the creation of the office of fund commissioner as a department of the city government. So it has been held that express power is neces-

94 Winchester v. Redmond, 93
 Va., 711; 25 S. E. Rep., 1001; 57
 Am. St. Rep., 822; 44 Central Law Journal, 57.

95 Chapter XV.

¹ Hoboken v. Harrison, 30 N. J. L., 73.

² White v. Tallman, 26 N. J. L., 67.

³ Collopy v. Cloherty, 95 Ky., 330; 25 S. W. Rep., 497.

⁴ State *ex rel* v. May, 106 Mo., 488; 17 S. W. Rep., 660.

⁵ Boehm v. Baltimore, 61 Md., 259

Authority to establish is sometimes authorized by law. Quinn v. Cumberland County, 162 Pa. St., 55; 29 Atl. Rep., 289.

6 Lowrey v. Lexington, 24 Ky., L. Rep., 516; 68 S. W. Rep., 1109. Right to create, under reorganization and adoption of new charter in particular case. Lowrey v. Lexington, 24 Ky., L. Rep., 516; 68 S. W. Rep., 1109.

7 Smith v. Morse, 2 Cal., 524.

sary to authorize the creation of new bureaus in city departments.⁸ A general provision that the aldermen shall have power to fix the compensation of 'all officers' of the corporation, does not confer implied or incidental power upon the board of aldermen to provide by ordinance salaries for themselves.⁹

At common law it is an established principle in England that a municipal corporation may, by virtue of its inherent or incidental power, pass a by-law imposing a penalty upon such as refuse, without legal cause, an office to which they have been duly-elected.¹⁰ Judge Dillon intimates that, even in this country, under the usual general welfare clause, or under their incidental powers, municipal corporations may, by ordinance, impose a reasonable fine because of a similar refusal.¹¹ A municipal corporation has a right to the services of any of its members, and may enforce such service by suitable ordinance.¹² It was a common law incident of all corporations to remove a corporate officer—from office for reasonable and just cause.¹³

§ 57. Implied power to acquire and hold property. At common law a municipal corporation, unless restrained by its charter or some statute applicable, possesses power to purchase and hold all such real estate as may be necessary to the proper exercise of any power specifically conferred, or essential to those purposes of municipal government for which it was created. One of the common law powers incident to corporations was to purchase and hold lands, chattels, etc. Thus, the express charter power "to establish and regulate markets," carries with it the power to purchase market grounds on credit, whereon to erect and establish a market,

⁸ People v. New York Fire Comrs., 23 Hun. (N. Y.), 317.

⁹ State (Gregory) v. Jersey City, 34 N. J. L., 429.

¹⁰ Willcock, Mun. Corp., 305, 588.

¹¹ 1 Dillon, Mun. Corp. (4th Ed.)
sec. 223, approved in Aurora Water Co. v. Aurora, 129 Mo., 540,
576; 31 S. W. Rep., 946.

¹² State (Gregory) v. Jersey City, 34 N. J. L., 429, 431, citing

Willcock, Mun. Corp., 71; Angell & Ames on Corp., 352.

State ex rel v. Walbridge, 119
 Mo., 383; 24 S. W. Rep., 457; St.
 Louis v. Schoenbusch, 95 Mo., 618;
 S. W. Rep., 791.

¹⁴ Le Couteulx v. Buffalo, 33 N. Y., 333, 336; Root v. Shields, Woolw. 340; 20 Fed. Cas. No. 12, 038.

¹⁵ Angell and Ames on Corp. 64,65; 2 Kent's Com. 277, 278.

where the general law does not forbid.¹6 So the power to erect a court house gives the implied power to purchase the necessary land on which to erect the building where no suitable site is possessed by the corporation.¹7 Likewise the power to erect a court house and jail necessarily embraces the power to purchase lands on which to erect them.¹8 In an early case, the Supreme Court of California remarked that, the purchase of "any property" in connection with a given object includes the power to purchase property both real and personal necessary to the object.¹9 But the mere power to enter into a contract to supply the city with water and machinery and connect pipes for supplying the water does not authorize the purchase of a site upon which to erect waterworks.²0

§ 58. Same—Property beyond corporate limits. Unless expressly authorized, the established rule is that, municipal corporations cannot acquire, hold and control real property beyond their corporate limits.²¹ Therefore the general power "to purchase, hold and convey an estate, real or personal, for the public use of said corporation," does not authorize a municipal corporation to hold lands beyond its

16 Ketchum v. Buffalo, 21 Barb. (N. Y.), 294, affirmed in 14 N. Y., 356, where it was pertinently said: "Without the power to procure a suitable place the first step could not be taken towards the establishment or foundation of a market. The power to establish, therefore, must of necessity include that of procuring the requisite site."

Power to build market house gives power to hire building for market purposes. Wade v. Newbern, 77 N. C., 460.

Grant of charter powers relative to markets necessarily carries with it the right to purchase land on which to establish. People v. Lowber, 28 Barb. (N. Y.), 65. Wharf purposes. *In re* Buffalo, 68 N. Y., 167. Denied as to acquiring hospital site. Von Schmidt v. Widber, 105 Cal., 151; 38 Pac. Rep., 682.

Power to establish and maintain a school, confers implied power to acquire school property. Le Couteulx v. Buffalo, 33 N. Y., 333.

If city has no power to incumber its own property by mortgage it cannot purchase mortgaged property. Fidelity Trust & G. Co. v. Fowler Water Co., 113 Fed. Rep., 560.

- 17 Sheidley v. Lynch, 95 Mo.,
 487; 8 S. W. Rep., 434; 24 Am. &
 Eng. Corp. Cas. 520.
- ¹⁸ DeWitt v. San Francisco, 2 Cal., 289.
- ¹⁹ DeWitt v. San Francisco, 2 Cal., 289.
- ²⁰ People ex rel v. McClintock, 45 Cal., 11.
- ²¹ Unless expressly authorized villages in Michigan cannot condemn lands outside of their limits. Houghton v. Huron Copper M. Co., 57 Mich., 547, 554; 24 N. W. Rep., 820,

boundaries to be used as a highway, and a conveyance of such land for this purpose will be held void.²² This power is usually conferred by charter or statute.²³ Cooley, J., declares that the right to take possession, hold, improve and control and extend its police authority over lands outside the corporate limits, as, for example, a public park, "is, beyond doubt, a franchise. It must come by sovereign grant and not otherwise."²⁴ The capacity of a municipal corporation to take a conveyance of land cannot, after the transfer has reached completion, be called in question in a collateral way, but this may be contested only by the state.²⁵

²² Riley v. Rochester, 9 N. Y., 64, 69, 71, approving Denton v. Jackson, 2 Johns., Ch. (N. Y.), 320, 336; North Hempstead v. Hempstead, 2 Wend. (N. Y.), 109, 136, holding that a town's power "is confined to its own limits and without some special provision it cannot, as of course, possess any control or rights over lands lying within another town."

²³ As power to hold land for a small-pox hospital. Richmond v. Henrico County, 83 Va., 204; 2 S. E. Rep., 26; 18 Am. & Eng. Corp. Cas. 520.

Judge Dillon expresses the opinion that there are purposes for which such a corporation may, without special grant, purchase and hold extra—territorial lands, as for a pest house, cemetery and the like objects of a municipal character. 2 Dillon, Mun. Corp. (4th Ed.), 565 and note.

"Under a general grant of power to buy and hold real property, it is understood municipal corporations may even buy and hold real estate beyond the corporate limits, for the location of cemeteries, pest houses and other purposes connected with the sanitary conthe municipality." of dition Champaign v. Harmon, 98 Ill., 491, 494, 495.

²⁴ Per Cooley, J. in Mayor of Detroit v. Park Commissioners, 44 Mich., 602, 605; 7 N. W. Rep., 180. Compare Lester v. Jackson, 69 Miss., 887; 11 So. Rep., 114.

"Lands held bv the city beyond would her limits held by as by her an individual proprietor, and her powers over them would only be commensurate with those enjoyed by private owners. But, by authorizing her to hold lands beyond her limits for objects intimately connected with the purpose of the corporation and highly necessary for her prosperity and welfare, it was intended that, over places she should exercise such police powers as would be required in order to make them answer the purposes for which they were designed." Chambers v. St. Louis, 29 Mo., 543, 574, 575.

Right to hold land beyond city limits for wharf purposes affirmed, under particular charter. Hafner v. St. Louis, 161 Mo., 34; 61 S. W. Rep., 632.

Land beyond limits for reservoir. Newman v. Ashe, 9 Baxt. (68 Tenn.), 380.

25 Champaign v. Harmon, 98 Ill.,
491, 496; Hafner v. St. Louis, 161
Mo., 34, 42; 61 S. W. Rep., 632;
Conn. Mutual Life Ins. Co. v.

§ 59. Implied power to dispose of property. In the absence of legal restrictions, the general proposition has often been asserted that a municipal corporation possesses the power to dispose of any property which it has a right to acquire.26 "Independent of positive law, all corporations have the absolute jus disponendi of lands and chattels, neither limited as to objects, nor circumscribed as to quantity."27 "A corporation is an artificial person, and by the terms of its creation it possesses the same capacity to purchase or to sell that an individual has who possesses the capacity to contract. This doctrine has been long settled, and repeatedly recognized, from a very early period to the present time.²⁸ Indeed, so necessarily incidental is this power that it has been holden²⁹ that a corporation cannot be created possessing the power of holding, without the power of disposing; and that a clause in the charter, restricting the alienation of their property, without consent of the chancellor, is void. The statutes, restraining ecclesiasti-

Smith, 117 Mo., 261, 289; 22 S. W. Rep., 623; Ragan v. McElroy, 98 Mo., 349; 11 S. W. Rep., 735; Thornton v. The National Exchange Bank, 71 Mo., 221; Shewalter v. Pirner, 55 Mo., 218; Land v. Coffman, 50 Mo., 243; Chambers v. St. Louis, 29 Mo., 543, 576, 577; Vidal v. Girard's Execu. 2 How. (43 U. S.), 127; 11 L. Ed., 205.

Question of abuse of corporate powers cannot be contested in suit of private citizen whose interests may be affected. Holvelman v. K. C. Horse R. R., 79 Mo., 632.

State alone can object to a want of capacity in a corporation to hold lands which it was not authorized by its charter to purchase or take by devise.

California—Natoma W. & M. Co. v. Clarkin, 14 Cal., 544.

Illinois—Hough v. Cook County Land Co., 73 Ill., 23; Alexander v. Tolletson Club, 110 Ill., 65; Barnes v. Suddard, 117 Ill., 237; 7 N. E. Rep., 477.

Indiana-Baker v. Neff, 73 Ind.,

68; Hayward v. Davidson, 41 Ind., 212; Henry County v. Slatter, 52 Ind., 171.

Missouri—Atlantic & P. R. R. v. St. Louis, 66 Mo., 228, 251.

Oregon—Raley v. Umatilla County, 15 Oregon, 172; 13 Pac. Rep., 890.

Pennsylvania—Goundie v. Northampton Water Co., 7 Pa. St., 233.

Tennessee—Barrow v. Nashville & C. T. Co., 9 Humph. (Tenn.), 304.

United States—Smith v. Sheeley, 12 Wall. (U. S.), 358; National Bank v. Matthews, 98 U. S., 621, 628; Myers v. Croft, 13 Wall. (U. S.), 291.

Newark v. Elliott, 5 Ohio St.,
113; Southport v. Stanley, 125 N.
C., 464; 34 S. E. Rep., 641; Weeks
v. Galveston, 21 Tex. Civ. App.,
102; 51 S. W. Rep., 544.

²⁷ Davies, J., in Wyatt v. Benson, 4 Abb. Pr. (N. Y.), 182, 187. ²⁸ Co. Lit., 44, 300, 306; Sid., 162; Com. Dig. title "franchise." 1 Ves. & Bearne, 226.

29 10 Rep. 1.

cal and eleemosynary corporations, are all the limitations imposed by the laws of England, upon power to sell.'30

All property of the municipal corporation of a private nature may be sold.³¹ But the chief point of view from which this authority is regarded is the public interest. While it is a recognized rule of the common law that, municipal corporations may, in so far as they possess private rights, dispose of their property without special authority from the state, this limitation exists: That property possessed and used by them as public agencies of the state for the purpose of governmental administration they cannot alienate without special authorization. All property held by the city in fee simple, without limitation or restriction as to its alienation, may be disposed of by the city at any time before it is dedicated to a public use.32 In other words, the city has the right to sell or dispose of property, real or personal, to which it has the absolute title and which is not affected by a public trust, in substantially the same manner as an individual unless restrained by statute or charter; and this power is an incidental power inherent in all corporations, public or private.33 Thus, land held by the city in full use and ownership-e. g., commons acquired by confirmation under Act of Congress-may be sold when no longer needed for public use.³⁴ So land bought for a public purpose, if not actually so used, cannot be said to be affected by a public trust, and hence may be sold.35

30 Reynolds Heirs v. Stark County Comrs., 5 Ohio, 204, 205, 206, per Lane, J.

May sell stock in water company subscribed by it. The discretionary power of a municipal corporation to sell or dispose of property will not be interfered with by the courts. Terre Haute v. Terre Haute Waterworks Co., 94 Ind., 305.

31 Ft. Wayne, L. S. & M. S. Ry., 132 Ind., 558; 32 Am. St. Rep., 277; 18 L. R. A., 367; 32 N. E. Rep., 215.

32 Ft. Wayne v. L. S. & M. S. Ry. Co., 132 Ind., 558; 32 Am. St., Rep., 277; 18 L. R. A., 367; 32 N. E. Rep., 215, 558.

This rule is recognized as of an-

cient origin in the English common law and was declared during the reign of Charles II. Smith v. Barrett and Clifford, 1 Siderfin, 161, 162.

33 Semmes v. Columbus, 19 Ga., 471; see Board v. Reynolds, 44 Ind., 509; Shannon v. O'Boyle, 51 Ind., 565; Bowlin v. Furman, 28 Mo., 427.

34 Cummings v. St. Louis, 90 Mo., 259, 264, 265; 2 S. W. Rep., 130.

35 Kings County Ins. Co. v. Stevens, 101 N. Y., 411; 5 N. E. Rep., 353; Konrad v. Rogers, 70 Wis., 492; 36 N. W. Rep., 261; Beach v. Haynes, 12 Vt., 15; Warren County v. Patterson, 56 Ill., 111,

§ 60. Same—Property held for particular purposes. But the city cannot alienate property of a public nature in violation of the trust upon which it is held, e. g., property dedicated for public use as a common,³⁶ or property conveyed to be used as an ornamental park only.³⁷ In neither case does the city acquire an absolute title. In this sense all property is public which has been dedicated to public use, or which may be affected by a public trust, either general or special. Municipal corporations hold all property in which the public is interested, such as streets, alleys, public squares, commons, parks and wharves, in trust for the use of the public, and on principle, such trust property can no more be disposed of by the municipality than can any other trust property held by an individual.³⁸ Thus, a city empowered to erect and regulate pub-

³⁶ Where the conveyance is of such a character as to dedicate the property acquired to a specified purpose, the city takes it in trust for the public and cannot dispose of it in violation of such trust. Cummings v. St. Louis, 90 Mo., 259; 2 S. W. Rep., 130; Price v. Thompson, 48 Mo., 361; see Rutherford v. Taylor, 38 Mo., 316.

Land purchased for a public common by the city may be sold. Beach v. Haynes, 12 Vt., 15. But this cannot be done after the public common has been actually dedicated to public use. State Woodward, 23 Vt., 92, 99. In the case of Bowlin v. Furman, 28 Mo., 427, it was held that the city of Carondelet had the power to seil lands which were granted to it by the state for the benefit of its schools, and this, whether the proceeds went for the benefit of its schools or not. See Woodson v. Skinner, 22 Mo., 13; Swartz v. Page, 13 Mo., 603; Castleton v. Langdon, 19 Vt., 210; San Francisco v. Beideman, 17 Cal., 443; Ellis v. Comrs. of San Francisco, 38 Cal., 629; French v. Quincy, 3

Allen (Mass.), 9; Bolling v. Mayor, 8 Leigh. (Va.), 224; LesBois v. Bramell, 4 How. (U. S.), 449.

³⁷ Rowzee v. Pierce, 75 Miss.,
 846; 65 Am. St. Rep., 625; 23 So.
 Rep., 307.

38 California—San Francisco v. Itsell, 80 Cal., 57; 22 Pac. Rep., 74; Hoadley v. San Francisco, 50 Cal., 265; Sawyer v. San Francisco, 50 Cal., 370; Hoadley v. San Francisco, 70 Cal., 320; 12 Pac. Rep., 125, affirmed, 124 U. S., 639.

Iowa—Ransom v. Boal, 29 Iowa, 68.

Kentucky—Augusta v. Perkins, 3 B. Mon. (Ky.), 437; Alves' Executors v. Henderson, 16 B. Mon. (Ky.), 131.

Missouri—St. Louis v. Mo. Pac. Ry. Co., 114 Mo., 13; 21 S. W. Rep., 202; Matthews v. Alexandria, 68 Mo., 115; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo., 192; 13 S. W. Rep., 822; Glasgow v. St. Louis, 87 Mo., 678.

New York—Still v. Lansingburgh, 16 Barb. (N. Y.), 107; Brooklyn Park Comrs. v. Armstrong, 45 N. Y., 234. lic wharves and fix the rate of wharfage thereat, cannot lease the wharf, farm out its revenue and delegate a person to fix the rates.³⁹ So, where a city condemned private property for use as a wharf it cannot, by ordinance or otherwise, lease it uncon-

Vermont—State v. Woodward, 23 Vt., 92.

Wisconsin — Lord v. Oconto, 47 Wis., 386; 2 N. W. Rep., 785.

Streets, alleys, public grounds, squares, etc.:

Warren v. Lyons City, 22 Iowa, 351: Augusta v. Perkins, 3 B. Monroe (42 Ky.), 437; Giltner v. Carollton, 7 B. Monroe (46 Ky.), 680; Cooper v. Alden, Har. (Mich.), 72; People v. Albany, 4 Hun. (N. Y.), 675; Commonwealth v. Young Men's Christain Association, 169 Pa. St., 24, 32; Atl. Rep., 121; Crocker v. Collins, 37 S. C., 327; 34 Am. St. Rep., 752; 15 S. E. Cannot abdicate con-Rep., 951. trol over streets. Chicago, etc., R. R. v. Quincy, 136 Ill., 563; 27 N. E. Rep., 192; 29 Am. St. Rep., 334.

City holds public streets. in which it only has a mere easement (the fee being in abutters to the center) in trust for the public, transfer therefore cannot streets or easement therein. Statute authorizing a city "to sell and dispose" of streets, if deemed expedient, applies only to streets in which the city owns the fee. The fee of the street is in abutters to the center thereof. This cannot be taken from abutters without compensation, as constitution forbids. State v. Taylor, 107 Tenn., 455, 464; 64 S. W. Rep., 766.

Cannot dispose of books intended for benefit of officers. Litchfield v. Parker, 64 N. H., 443; 14 Atl. Rep., 725.

"It may be seriously questioned, whether, after land has been ap-

propriated to public uses it can be transferred unconditionally to another for a private use. The authorities are against such right." C., S. F. & C. Ry. Co. v. McGrew, 104 Mo., 288, 299; 15 S. W. Rep., 931, citing Mills' Eminent Domain, sec. 57; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo., 192; 13 S. W. Rep., 822; Strong v. Brooklyn, 68 N. Y., 1.

No part of property dedicated by legislative act as a public landing can be leased by city to a private individual. Reighard v. Flinn, 189 Pa. St., 355; 42 Atl. Rep., 23.

"The trusts devolving upon the states for the public, and which can only be discharged by the management and control of the property in which the public has an interest, cannot be relinquished by a transfer of the property. * * * The state can no more abdicate its trust over property in which the whole people are interested * * * so as to leave the property entirely under the use and control of private * than it can abdicate its police powers in the administration of government and the preservation of the peace." Per Mr. Justice Field in Ill. Cent. R. R. v. Illinois, 146 U. S., 387, 453.

39 Matthews v. Alexandria, 68 Mo., 115. See St. Louis v. St. Louis Gas Light Co., 5 Mo. App., 484.

"A trust created for any public purpose cannot be assignable at the will of the trustee." Cooley's Const. Lim. (6th Ed.), 249. ditionally for a term of years to be used in the prosecution of private business and for private gain.⁴⁰

All property purchased by the city or in which it has otherwise acquired the fee simple title, where the corporation is acting in its quasi private capacity, may be regarded as the absolute property of the city. All such property which has been conveyed to the city or dedicated to it or condemned by it for designated public purposes is held by the city for such purposes and no other. It is a well established principle that when private property is condemned or conveyed conditionally for one public use, it cannot be appropriated to another or different use. The restraint is that property held by the city for one public use cannot be disposed of in violation of the use for which it is held.⁴¹

⁴⁰ Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo., 121; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo., 192; 13 S. W. Rep., 822.

41 Belcher Sugar Refining Co. v.
St. Louis Grain Elevator Co., 82
Mo., 121; 101 Mo., 192; 13 S. W.
Rep., 822; Cummings v. St. Louis,
90 Mo., 259; 2 S. W. Rep., 130.

"The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken." Missouri Const. 1875, Art. II., Sec. 21.

The authorities of a city cannot lawfully appropriate to other uses land which has been dedicated by the donor as a street, nor can they divert it to uses foreign to those for which it was dedicated, and it has been questioned whether it is within the power of the legislature to authorize such a diversion or disposal of it. Warren v. Lyons, 22 Iowa, 351, 356, 357; Glasgow v. St. Louis, 87 Mo., 678. Legislature may grant power to alienate lands acquired by condemnation and held in fee for park pur-

poses. Driscoll v. New Haven (Conn. 1902); 52 Atl. Rep., 618.

Legislature may authorize sale of land held for park purposes. Brooklyn Park Comrs. v. Armstrong, 45 N. Y., 234; 6 Am. Rep., 70; Clark v. Providence, 16 R. I., 337; 15 Atl. Rep., 763; 1 L. R. A., 725; Mowry v. Providence, 16 R. I., 422; 16 Atl. Rep., 511.

FOR PARTICULAR PURPOSES.

Engine company cannot sell property given to it by the inhabitants. Perry v. Stowe, 111 Mass., 60.

Land leased by city to religious corporation may be sold under a law forbidding sales of property held for public purpose, as this was not a public purpose. Arkenburgh v. Wood, 23 Barb. (N. Y.), 360.

Town hall may be sold. Shaver v. Salisbury Commissioners, 68 N. C., 291.

Waterworks property acquired by the city at its own expense to furnish water to its inhabitants and extinguish fires cannot be disposed of without legislative authority, as such property is held § 61. Implied power to transfer, donate or dedicate property for particular uses. Unless restricted by law, a municipal corporation may transfer, donate or dedicate property for particular public uses, especially if such purposes are calculated to advance the governmental and municipal interests of the locality.⁴²

as a public trust. Huron Waterworks Co. v. Huron, 7 S. D., 9; 58 Am. St. Rep., 817; 30 L. R. A., 848; 62 N. W. Rep., 975; 8 S. D., 169; 65 N. W. Rep., 816; Lake Co. Water & Light Co. v. Walsh (Ind., 1902); 65 N. E. Rep., 530.

Land purchased by a city beyond its limits for a reservoir, although never used for such purpose, may be sold. Newman v. Ashe, 9 Baxt. (68 Tenn.), 380.

The power to sell any lands belonging to the municipality does not authorize a dedication of certain lands to the free and common use of its inhabitants, so as to prevent future sales by the proper authorities. Wright v. Victoria, 4 Tex., 375.

Sales of property must be made on the conditions under which it is held. Compton v. Waco Bridge Co., 62 Tex., 715.

Surplus or refuse soil remaining after grading street may be sold by city. Griswold v. Bay City, 35 Mich., 452.

Public property cannot be disposed of for purposes different from the objects of its original appropriation. Savannah v. Steamboat Co., R. M. Charlt. (Ga.), 342.

Where law forbids, valid sale cannot be made. Heydenfelt v. Hitchcock, 15 Cal., 514; Pimental v. San Francisco, 21 Cal., 351.

Discretionary power of sale vested in governing board. San Diego v. San Diego & L. A. R. Co., 44 Cal., 106; Coopers v. San Jose, 55 Cal., 599.

Where a locus publicus ceased, in whole or in part, to be applicable to its original destination, the state may direct its application to another public object. Municipality No. 2 v. Orleans Cotton Press, 18 La., 122; 36 Am. Dec., 624.

Right of city to purchase gas plant and works upon conditions specified in contract may be compromised by city with gas company and all the city's rights thereunder disposed of. Such disposition is not *ultra vires* of the municipal charter. St. Louis v. St. Louis Gas Light Co., 70 Mo., 69, reversing 5 Mo. App., 484.

City may sell public property and apply it to a different use from that originally contemplated. Memphis v. Wright, 6 Yerg. (14 Tenn.), 497; 27 Am. Dec. 489.

42 Irrevocable dedication of property for the use of a public wharf. Illinois & St. L. R. & Canal Co. v. St. Louis, 2 Dillon, C. C., 70; 12 Fed. Cas. No. 7,007.

Reservation of land for school purposes held valid. Board of Education v. Fowler, 19 Cal., 11; Cincinnati v. McMicken, 6 Ohio Cir. Ct. Rep., 188.

Conveyance of property to incorporated university within city limits held valid and irrevocable. Louisville v. Louisville University, 15 B. Mon. (54 Ky.), 642.

City may dedicate its own lands

§ 62. Implied power to mortgage or pledge property. Without special charter power, as a rule, a municipal corporation has no authority to mortgage or pledge municipal property. It is said that this power is not essential to the declared objects of the corporation.⁴³ Under a charter conferring power to hold real and personal property and convey the same in any manner whatever, and to make all contracts essential for the public welfare, a city was permitted to mortgage its waterworks.⁴⁴ But authority to construct a bridge gives no power to execute a deed of trust of the bridge to trustees, which empowers them to collect tolls, and pledges the bridge and the tolls for the payment of the debt incurred in its construction.⁴⁵

to use as streets, and may bind itself by covenant with its grantees of abutting lands that lands so dedicated shall be forever kept as a public street. Story v. New York Elevated R. Co., 90 N. Y., 122; 43 Am. Rep., 146, reversing 3 Abb. N. C. (N. Y.), 478.

Under general power to dispose of corporate property a city cannot, without special legislative authority, donate land and buildings to the county in which the city is situate, in order to induce a relocation of the county seat in such city. Brockman v. Creston, 79 Iowa, 587; 44 N. W., 822.

Conveyance of municipal property for private uses, as for factory purposes, held illegal. Kent v. Dithridge & Smith Cut Glass, 10 Ohio, Cir. Ct. Rep., 629; 5 Ohio Cir. Ct. Dec., 107.

When land may be granted to a railroad company for the bed of its road. Allegheny v. Ohio & P. Ry. Co., 26 Pa. St., 355.

Power to sell and alienate all public lots or parcels of land within the city limits, held not to authorize a dedication of certain timber lands to the common use of its citizens. Wright v. Victoria, 4 Tex., 375.

Where the power is discretionary with the council, it may grant lands to railroad company in consideration of the company's abandoning certain grade crossings by putting in viaducts and subways. Spitzer v. Runyan, 113 Iowa, 619; 85 N. W. Rep., 782.

⁴³ Scott's Executors v. Shreveport, 20 Fed. Rep., 714; Branham v. San Jose, 24 Cal., 585.

44 Adam v. Rome, 59 Ga., 765.

Held property might be mortgaged without assent of a majority of the legal voters required by the charter in sales of property. Middle Savings Bank v. Dubuque, 15 Iowa, 394.

⁴⁵ Mullarky v. Cedar Falls, 19 Iowa, 21.

In purchase of property, right to give mortgage and vendor's lien on the property in favor of the vendor recognized, under particular charter. Edey v. Shreveport, 26 La. Ann., 636.

Mortgaging property for the use and benefit of the city, held valid under particular city charter. Adams v. Memphis & L. R. Ry. Co., 2 Coldw. (42 Tenn.), 645.

- § 63. Implied powers as to police and sanitary regulations. The preservation of the public health is a legitimate corporate purpose, and to this end a municipal corporation may establish and maintain a supply of wholesome water from within or without the city; also public parks, hospitals and pest houses. 46 So it has been held that a city may enact and enforce police ordinances without special authorization as a result of the fact of its being incorporated. 47 Ordinances relating to municipal police regulations are fully treated in a subsequent chapter. 48
- § 64. Implied power to supply water. Where a city has power by its charter to provide for a supply of water it has been held that in this express grant there is implied the power to furnish the supply by contract. So the general grant, "the mayor and board of aldermen shall have power by ordinance to prevent and extinguish fires," and "to pass ordinances in maintaining the peace and good government, health and welfare of the city," etc., confers the implied power to contract with a water company to supply the city and its inhabitants with water, thus rendering the city liable on such contract for fire hydrant rents. Charter power to purchase

46 East Tennesse University v. Knoxville, 6 Baxt. (Tenn.) 166, 173.

Hospitals and pest houses. Rae v. Flint, 51 Mich., 526; 16 N. W. Rep., 887; McPherson v. Nichols, 48 Kan., 430; 29 Pac. Rep., 679; Vionet v. First Municipality, 4 La. Ann., 42.

Without express legislative authority a municipal corporation cannot legalize a common nuisance. State v. Luce, 9 Houst. (Del.), 396; 32 Atl. Rep., 1076.

⁴⁷ Sayre Borough v. Phillips, 148 Pa., 482; 24 Atl. Rep., 76; 33 Am. St. Rep., 842.

48 Chapter XIV.

49 Waterworks Co. v. Atlantic City, 39 N. J. Eq., 367.

50 The decision is put upon the ground that, as the city was given the power to prevent and extin-

guish fires, without the power to procure water for this purpose, the express grant would be inefficacious: that unless the power to procure water be implied in the express grant, the latter must remain vain and nugatory: that whatsoever the law necessarily implies in a statute is as much a part or parcel thereof as if expressly stated therein. Therefore, the power to extinguish fires fairly and necessarily implies power to effectuate the intent involved in the grant by the execution of its incidents. "Science, so far as we know, has not yet suggested any means of extinguishing great fires without the application of water. * * * A fire engine without water would be quite a useless machine in the hands of a city government. Water is quite as in-

and construct waterworks is no authority to rent hydrants and tax the people therefor; but authority "to provide the city with water * * * for the extinguishment of fires and the convenience of the inhabitants generally," leaving the manner of such provision to the corporate authorities, is such power. As the water cannot be provided without expense, the power to incur the expense is implied, and as means to meet the expense can only come from taxation, the power to levy the tax is implied.⁵¹ In Georgia the doctrine is broadly stated that a municipal corporation, having the usual powers expressly granted by charter or legislative act, has the power to make all such contracts in its corporate capacity as the local authorities may deem necessary for the welfare of the city which are not in conflict with the constitution and laws of the state or of the United States. In this case the city entered into a contract for the construction of a system of waterworks, and it was held that the grant of power was broad enough to cover the contract.52

§ 65. Implied power to purchase engines, etc., to prevent and suppress fires. The rule of law is established that the grant of express power to suppress fires carries with it the right to purchase fire engines and other apparatus to accomplish this purpose.⁵³ It has often been held that a municipal

dispensable in extinguishing fires as a fire engine. When there is a of waterworks having system proper pressure, fire engines can be dispensed with, but in no case can the grant of power be made efficacious without a supply of water. It is apparent that the reasons why the grant of power to suppress fires should carry with it the power to procure water to extinguish fires are much more cogent than those which sustain the power to purchase the fire engines." Webb City, etc., Waterworks Co. v. Webb City, 78 Mo. App., 422, 427, 428. To same effect, Bridgeford v. Tuscumbia, 16 Fed., 910; Carleton v. Washington, 38 Kan., 726; 17 Pac. Rep., 656.

Power to extinguish fires carries

with it the power to procure water. Salena v. Neosho, 127 Mo., 627, 641; 30 S. W. Rep., 190.

⁵¹ Lexington v. Lafayette Co. Bk.,165 Mo., 671, 679; 65 S. W. Rep.,943.

⁵² Rome v. Cabot, 28 Ga., 50.

53 Charter authority to pass ordinances to suppress fires, appoint fire wardens, engineers, etc., and to levy a tax to support the fire department imports a power to purchase engines and apparatus. Green v. Cape May, 41 N. J. L., 45.

If the expenditure be in furtherance of some duty enjoined by a statute, a contract made in reference thereto will be valid and binding upon the town. Allen v. Taunton, 19 Pick. (Mass.), 485.

corporation possesses inherent power to purchase fire engines for the protection of the property of its citizens from fire; that this power does not of necessity depend on the question whether the charter has or has not expressly granted such power.⁵⁴ Towns in their corporate capacity that own valuable property which is exposed to injury and destruction by fire may, in that capacity, take precautionary measures against such injury and destruction, either by the purchase of engines, hose, hooks and ladders, or by the appropriation of money in aid of engine and hook and ladder companies in their respective towns.⁵⁵

⁵⁴ Bluffton v. Studabaker, 106 Ind., 129; 6 N. E. Rep., 1; 13 Am. & Eng. Corp. Cas. 529, quoted with approval in Webb City, etc., Waterworks Co. v. Webb City, 78 Mo. App., 422, 427.

"It was long ago declared that the power to prevent danger from fire is an incidental one, belonging to all municipal corporations." Clark v. South Bend, 85 Ind., 276; 44 Am. Rep., 13.

"The rule has always been that a municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens against fire. * * * The exercise of such power is not the exercise of a new power, nor of one not connected with the purpose for which public corporations are organized; on the contrary, it is the exercise of a power long possessed by municipal corporations and closely connected with the purposes for which such organized." corporations are Baumgartner v. Hasty, 100 Ind., 575; 50 Am. Rep., 830; 8 Am. & Eng. Corp. Cas. 353.

55 Van Sicklen v. Burlington, 27 Vt., 70.

Town may appropriate money for the repair of fire engines used for the purpose of extinguishing fires therein whether they belong to the town or were purchased by private subscription. Allen v. Taunton, 19 Pick. (Mass.), 485. In Torrey v. Millbury, 21 Pick. (Mass.), 64, a town voted to raise and appropriate a sum to purchase a fire engine, provided an equal amount was raised by individual subscription for the same pose. It did not appear that the town had any corporate property to be benefited by that appropriabut its legality was sustained upon a general duty resting upon municipal corporations of that character, to provide whatever shall be deemed "an object of common convenience and necessity." Approved by Isham, J., in Van Sicklen v. Burlington, 27 Vt., 70, 78.

May purchase fire apparatus. Hunneman v. Fire District, 37 Vt., 40.

Under statute which allows money to be raised by a village for "extraordinary expenditures," by submission of the proposition to a vote of the people of the village, money with which to purchase a fire engine, etc., may be so raised. Witheril v. Mosher, 9 Hun. (N. Y.), 412.

General clause in charter, after enumerating certain things the city is empowered to do, recited,

§ 66. Implied power as to lighting. It is generally held that a municipal corporation has the implied power to supply its inhabitants with light in streets and public places.⁵⁶ The Supreme Court of Indiana has considerably extended the doctrine of implied power. The question at issue was whether the city had the right to establish an electric lighting plant, not only for the lighting of the streets and public places of the city, but also for the distribution of the electric light among its inhabitants for gain. There it was held that since, among the implied powers of a municipal corporation, is the power to enact and enforce reasonable by-laws or ordinances for the preservation of health, life and property, this general police power gave the power to light the streets and public places independently of any specific charter or statutory power to that effect, in any manner agreed upon by the local authorities. Having determined that such plant could be established for municipal purposes, the court said: "We can see no good reason why it may not also at the same time furnish it (electric

"and to do every matter and thing which they may deem necessary for the good order and welfare of the city." In holding that the city has power to purchase appliances for extinguishing fires, the Court remarked: "Good government and good order and the welfare of the city imply much more than mere preservation of social order. Sanitary regulations and appliances for extinguishing fires, to an extent reasonably commensurate with the city's wants, to be judged by the corporate authorities, are certainly within the purview of good city government. We do not wish to be understood as affirming that any specified grant of power is necessary to the performance of this very necessary police function. We hold it is inherent in every city government, as one of its incidental powers, unless taken away by statute." Birmingham v. Rumsey & Co., 63 Ala., 352, 356.

Where the charter empowers the city to organize a fire department and regulate the same and to adopt such other measures as should "conduce to the interest and welfare of the city," the city is thereby authorized to purchase a fire engine and to issue its negotiable bonds therefor. Desmond v. Jefferson, 19 Fed. Rep., 483; Burrton v. Harvey County Savings Bank, 28 Kan., 390; Carleton Co. v. Washington, 38 Kan., 726; 17 Pac. Rep., 656.

58 Heilbron v. Cuthbert, 96 Ga.,
312; 23 S. E. Rep., 206; Hequembourg v. Dunkirk, 49 Hun. (N. Y.),
550; 2 N. Y. Suppl., 447; Mauldin v. Greenville, 33 S. C., 1; 11 S. E. Rep., 434; Ellinwood v. Reedsburg, 91 Wis., 131; 64 N. W. Rep.,
885.

Power includes power to purchase and construct plant, etc. Hay v. Springfield, 64 Ill. App., 671.

light) to the inhabitants to light their residences and places of business. To do so is, in our opinion, a legitimate exercise of police power for the preservation of property and the health."57 Clearly, such broadening of implied powers contravenes the general rule, sometimes invoked, that the enumeration of specific powers prevents a body to which such specific powers are granted from exercising other similar powers. If a city may exercise such powers because it is a municipal corporation, or because of the general grant to it of police powers, it is not easy to comprehend what powers of a municipal nature are not incidental or inherent. A contrary rule was announced in Massachusetts, where it was held that power to erect and maintain works for the manufacture and distribution of electric lights for lighting the public streets and places and to furnish light to the inhabitants could not be implied as an incident to the power expressly granted to erect and maintain street lamps—at least where it has become the custom of the legislature to specifically define from time to time the purpose for which municipal corporations may raise money.⁵⁸ Charter power "to construct, maintain and operate gas works and to pass all ordinances necessary to regulate the same," has been held to be, in effect, a general grant of power to have the city lighted with gas, and therefore conferred implied authority to contract with others to furnish gas and to grant to a corporation the exclusive right to use the streets for that purpose for a term of years.59

§ 67. Same—Implied power to regulate price of light. In Indiana it has been held that, the power to provide reasonable regulations for the supply and distribution of natural gas does not confer power to regulate the price thereof; 60 in Missouri that, under a particular charter of a gas company,

57 Crawfordsville v. Braden, 130 Ind., 149; 28 N. E. Rep., 849; 30 Am. St. Rep., 214. It may be noted that there existed a general statute in Indiana giving cities power to light their streets, etc.; power to contract with individuals or corporations for this purpose and the power to grant franchise, to supply inhabitants with electric light, but the decision does not rest upon this statute.

58 Spaulding v. Peabody, 153
Mass., 129; 26 N. E. Rep., 421; 33
Am. & Eng. Corp. Cas., 638; 10 L.
R. A., 397. See Secs. 50, 53, supra.
59 Newport v. Newport Light Co.,
84 Ky., 166, 175, 177.

60 Lewisville Natural Gas Co. v. State, 135 Ind., 49; 34 N. E. Rep., 702; 21 L. R. A., 734, overruling Rushville v. Rushville Natural Gas Co., 132 Ind., 575; 28 N. E. Rep., 853; 15 L. R. A., 321,

granted by the legislature, neither the state nor the city had power to regulate the price of gas;⁶¹ and in Washington that the power to regulate and control the use of light does not include the power to regulate the price of light furnished by private companies under franchise.⁶² But a legislative act conferring upon a city the power to regulate the price of gas, was held, in an early Ohio case, to give power to make reasonable regulations respecting the price thereof where the power to alter or repeal the gas companies' charter was expressly reserved.⁶³

§ 68. Appropriations as donations forbidden. Unless expressly authorized by charter or statute, a municipal corporation cannot appropriate or give away the public money as pure donations to any person, corporation or private institution, not under the control of the city and having no connection with it.⁶⁴ Thus, appropriations for national guards in

⁶¹ State *ex rel.* v. Laclede Gaslight Co., 102 Mo., 472; 14 S. W. Rep., 974; 15 S. W. Rep., 383; 22 Am. St. Rep. 789.

G2 Tacoma Gas and Electric LightCo. v. Tacoma, 14 Wash., 288; 44Pac. Rep., 655.

63 State v. Cincinnati Gas Light and Coke Co., 18 Ohio St., 262,

⁶⁴ Petersburg v. Mappin, 14 Ill., 193; 56 Am. Dec., 501; Campbell v. Tp. of Elma, 13 Up. Can. Com. Pleas, 296; Jones v. Port Arthur, 16 Ontario Rep., 474; Jarvis v. Fleming, 27 Ontario Rep., 309; *Re* Schachan and County of Frontenac, 41 Up. Can. Q. B., 175.

"They (council) have no power to squander or give away the funds or property of the incorporation, but all property within their control, belonging to the corporation, must be honestly applied to the uses and purposes specified in the act of incorporation. The city council have no power to sell, or in any manner dispose of the property of the corporation without consideration." Per Craig, J., in Agnew v. Brall, 124 Ill., 312; 16

N. E. Rep., 230; 20 Am. & Eng. Corp. Cas., 134.

A municipal corporation cannot vote to pay a sum of money to one damaged while in the employ of the corporation on account of his needy circumstances, though it may vote a sum in settlement of such claim, based on a legal liability. Matthews v. Westborough, 134 Mass., 555, 562; 2 Am. & Eng. Corp. Cas., 239. Compare McGinness v. New York, 26 Hun. (N. Y.), 142.

In speaking for the Supreme Court of Missouri, construing the charter of the City of St. Louis, Wagner, J., in Hitchcock v. St. Louis, 49 Mo., 484, 488, observed that the members of the municipal assembly "in the discharge of their duties, do not act for themselves, but for the public. They are trustees clothed with a trust, not for the corporation as such, but the citizens and the public who have confided the authority to them. The charter is the power of attorney which defines and limits the objects and powers with which the absence of express power are unauthorized.⁶⁵ So a vote of money for the purchase of uniforms for an artillery is void, without charter or statute authority.⁶⁶

§ 69. Appropriations for celebrations. entertainments. etc., void. Without express authority, a municipal corporation may not appropriate the public revenue for celebrations, entertainments, etc. Such power cannot be implied.67 Massachusetts it was early held that a town cannot appropriate money for a Fourth of July celebration. The court declined to support the authority on the ground of uniform practice and usage. 68 A like ruling was made in Connecticut. 69 Municipal appropriations for other celebrations have, for like reason, been declared illegal, as, for example, the anniversary of the surrender of Cornwallis.⁷⁰ So municipal expenditures for entertainments of official visitors;71 or to provide a ball and banquet have been declared illegal.⁷² By statute, towns in Massachusetts are authorized to appropriate money "for the purpose of celebrating any centennial anniversary of its incorporation.''73 So in that state cities may appropriate limited sums for armories, for the celebration of holidays, "and for

they are intrusted. The diversion of the money of the taxpayers for any purpose other than that which is expressed in the charter is a perversion of the trust and an excess of authority. That there is no express power in the charter conferring authority to make donations, gifts or gratuities, is too clear to require argument."

65 Knapp v. Kansas City, 48 Mo. App., 485.

66 Claffin v. Hopkinton, 4 Gray (Mass.), 502.

67 Hodges v. Buffalo, 2 Denio (N. Y.), 110; Com. v. Gingrich, 21 Pa. Super. Ct., 286, distinguishing Com. v. Pittsburg, 183 Pa. St., 202; 38 Atl. Rep., 628; Cumberland Co. v. Poor Directors, 7 Pa. Super. Ct., 614; McKean County v. Young, 11 Pa. Super. Ct., 481.

⁶⁸ Hood v. Lynn, 1 Allen (Mass.), 103; Gerry v. Stoneham, 1 Allen (Mass.), 319. 69 New London v. Brainard, 22 Conn., 552.

⁷⁰ Tash v. Adams, 10 Cush. (Mass.), 252.

⁷¹ Law v. People, 87 Ill., 385, but see *contra*, Tatham v. Philadelphia, 11 Phil. (Pa.), 276; 2 Weekly N. C. (Pa.), 564.

72 Austin v. Coggeshall, 12 R. I., 329; 34 Am. Rep., 648, where the charter recites: "Nothing in this charter shall be construed * * * as giving the power to vote money for any ordinary object except for the regular, ordinary and usual expenses of the city." Greenough v. Wakefield, 127 Mass., 275; Hale v. People, 87 Ill., 72; Cornell v. Guilford, 1 Denio (N. Y.), 510.

73 In such case the town may date its incorporation from the time of its incorporation as a district. Hill v. East Hampton Selectmen, 140 Mass., 381; 4 N. E. Rep.. 811; 13 Am. & Eng. Corp. Cas., 644.

other public purposes.'' Under such statute a city may furnish money for public concerts by a band.⁷⁴

§ 70. Bounties to soldiers. In the absence of legislative authority, a municipal corporation has no power to appropriate money for gratuities, or to raise money by taxation, to give additional wages to the militia, or to men drafted for the military or naval service of the United States or for other purposes of defense, even in time of war and danger of hostile invasion. 75 But that the legislature may confer upon cities. towns, villages and other public corporations, power to raise money by taxation to pay bounties to those who, in time of war, shall enlist in the military or naval service of the United States—in order to induce them to enlist—and also for the repayment of money which had been advanced by such public corporations, or by individuals by contribution to a public fund, for the purpose of procuring enlistment, has been settled by repeated decisions. The essential element of the doctrine is that the sums were authorized to be raised and expended for public purposes, namely, filling of the army and navy for the support and defense of the government.76 So

74 Hubbard v. Taunton, 140 Mass.,467; 5 N. E. Rep., 157.

The statute permits the appropriation on a two-thirds vote of the council, but the mayor or other municipal officers have no power to contract, etc. Morrison v. Lawrence, 98 Mass., 219, 221.

⁷⁵ Booth v. Woodbury, 32 Conn., 118; Crowell v. Hopkinton, 45 N. H., 9, 12, where it is said that "it forms no part of the ordinary duties of towns to encourage the enlistment of soldiers by bounty or otherwise." Fiske v. Hazard, 7 R. I., 438; Stetson v. Kempton, 13 Mass., 272; 7 Am. Dec., 145.

In Maine a town has no legal authority to assess taxes or raise money to pay the commutation of one who had been drafted in pursuance of the act of Congress of March 3, 1863. Barbour v. Camden, 51 Me., 608; Opinion of the Justices, 52 Me., 595.

76 Booth v. Woodbury, 32 Conn., 118; Lowell v. Oliver, 8 Allen (Mass.), 247; Freeland v. Hastings, 10 Allen (Mass.), 570; State ex rel. v. Circleville, 20 Ohio St., 362; Shackford v. Newington, 46 N. H., 415; Hilbish v. Catherman, 64 Pa. St., 154; Speer v. School Directors, 50 Pa. St., 150; Russell v. Providence, 7 R. I., 566; Brohead v. Milwaukee, 19 Wis., 624; 88 Am. Dec., 711.

"It was so held upon the ground that claims for public services, or expenditures founded in equity and justice, in gratitude or charity, will support a tax, which is voluntarily imposed upon a municipality by a majority of the citizens thereof, or by the consent of the municipality, evidenced in some other manner." State *ex rel.* v. Tappan, 29 Wis., 664, 672; 9 Am. Rep., 622.

Legislature may confer power on counties to borrow money on credit

the legislature has the power to ratify and validate bonds issued by municipal corporations of the state, without authority, to raise bounties which they were authorized to pay.77 But the legislature has no power to authorize the appropriation or raising of money for the purpose of refunding sums paid by individuals for substitutes, since this is a private and not a public object.⁷⁸ For in no event can the legislature create a public debt or levy a tax or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. The object for which money is raised by taxation must be public, and such as subserves the common interest and well being of the community required to contribute.79 Therefore, a legislative act authorizing a certain town to pay bounties to soldiers who re-enlisted in a particular regiment in 1864, and were credited to the town, is unconstitutional, as the direct primary object is to benefit individuals and not the public; hence, the payments contemplated are mere gratuities or gifts to individuals.80

An act authorizing towns to raise money to encourage enlistment will not be construed to allow towns to raise money

to pay bounties to volunteers who would thereafter enlist in the military or naval service of the government. Parker v. Saratoga County, 106 N. Y., 392; 22 Am. & Eng. Corp. Cas., 254; Clark County v. Lawrence, 63 Ill., 32.

Legislature may authorize school districts to pay bounties, etc. Grim v. Weissenberg School District, 57 Pa. St., 433; 98 Am. Dec., 237; Tyson v. Halifax Tp. School District, 51 Pa. St., 9.

77 Comer v. Folsom, 13 Minn., 219; Kunkle v. Franklin, 13 Minn., 127; 97 Am. Dec., 226; Sanborn v. Machias Port, 53 Me., 82.

Cities and towns may be required by legislative act to make suitable provision for the support of families of soldiers who, having a residence therein, have enlisted in the service of the United States, whenever such families shall stand in need of assistance. Veazie v. China, 50 Me., 518; Milford v. Orono, 50 Me., 529.

An act which enables towns to raise money to assist needy and destitute families and dependents of those mustered from the State into the military or naval service of the United States to a limited amount is valid. Fiske v. Hazard, 7 R. I., 438.

⁷⁸ Freeland v. Hastings, 10 Allen (Mass.), 570.

⁷⁹ Brohead v. Milwaukee, 19 Wis., 624, 652; 88 Am. Dec., 711; Sharpless v. Philadelphia, 21 Pa. St., 147, 168.

80 Mead v. Acton, 139 Mass., 341;1 N. E. Rep., 413; 8 Am. & Eng. Corp. Cas., 545.

Taxation to pay bounties to volunteers is not for a municipal purpose; neither is taxation to pay the costs and expenses of unsuccessful suits brought to enforce the payment of any such bounty, to be paid to persons who have already enlisted. A vote to pay a bounty to those who have enlisted, or shall enlist, will be held invalid as to those who had enlisted at its passage, and valid as to those who afterwards enlist, notwithstanding the two objects are embraced in the same vote.⁸¹

§ 71. Expenditures to obtain or oppose legislation. Some courts have held that, without express authority, a municipal corporation has no power to expend the public revenue to obtain or oppose legislation before the state legislature or the congress. So On the other hand, such expenditures have been

whether against the town or individuals, and therefore the legislature has no power to compel a town to pay any such bounty or such costs and expenses. State ex rel. v. Tappan. 29 Wis., 664, 688; 9 Am. Rep., 622.

S1 Crowell v. Hopkinton, 45 N. H., 9; Shackford v. Newington, 46 N. H., 415.

A legislative act which attempts to ratify the action of towns in voting money for the payment of the commutation fees of individuals drafted into the public service, is beyond the sphere of constitutional legislation. Thompson v. Pittston, 59 Me., 545; Fiske v. Hazard, 7 R. I., 438.

82 Westbrook v. Deering, 63 Me., 231, where it was held that a town cannot incur expenses in opposing before a legislative committee a division of its territory.

In Frankfort v. Winterport, 54 Me., 250, it was held that, where a statute, after enumerating specific purposes for which the town revenue may be used, recites "and other necessary charges," such words do not authorize a town to raise and expend money to send lobbyists to the legislature.

In Massachusetts, prior to the statute of 1889, it was held that a town could not lawfully expend money in advocating or opposing before the legislature the annexation of a whole or a part of its territory to another town. Minot v. West Roxbury, 112 Mass., 1; 17 Am. Rep., 52; Coolidge v. Brookline, 114 Mass., 592.

A town has no authority to appropriate money for the payment of expenses incurred by individuals, prior to its corporate existence as a town in procuring the passage of its charter. Frost v. Belmont, 6 Allen (Mass.), 152.

Town cannot pay out of its revenues money to persons employed to obtain the passage by the legislature of an act authorizing certain towns to pay bounties to soldiers who re-enlisted in a certain regiment in 1864, and were credited to the town, since such act is unconstitutional. Mead v. Acton, 139 Mass., 341; 1 N. E. Rep., 413; 8 Am. & Eng. Rep. Cas., 545.

In Kentucky it has been held that a municipal corporation has no power to appropriate corporate revenue to pay the expenses of persons sent to the National and state capitals, in order to procure such legislation as might be necessary to authorize the construction of a bridge over a river although such enterprise may prove of great advantage to the city. "The construction of a bridge across the Ohio River to connect the city of

judicially sustained.⁸³ Some state statutes authorize such expenditures. Under the Massachusetts statute authorizing the employment of counsel by "any town interested in a petition to the legislature," to represent it at hearings thereon, a town may employ and pay counsel to oppose its division before a committee of the legislature.⁸⁴

§ 72. Exercise of powers by virtue of usage or custom. Usage has been applied to the manner in which corporate powers are to be exercised, as where an inspector is charged with the duty of weighing and ascertaining the weight of all grain, he may perform this duty by weighing but one bushel in every sixty. 85 But ordinarily courts are slow to invoke usage in considering corporate powers under the charter. This is especially true where its language is clear and free from ambiguity; but where the language is indefinite, uncertain or ambiguous, sometimes the courts will, in determining the mode in which the particular power may be exercised, invoke a well established ancient and universal custom. 86 In

Covington with the neighboring city of Cincinnati, in the State of Ohio, was not, under the charter as it existed a part of the duty of the city council of Covington, nor was the legislation sought by the council necessary to enable it to perform its corporate duties, or to accomplish the purposes for which the corporation was created. True, such an enterprise might be of very great advantage to the city by inviting population, enhancing the value of real estate, and in many other ways." Henderson v. Covington, 14 Bush (Ky.), 312, 314.

83 The Supreme Court of New Hampshire permitted one to recover from a town for services money expended as a member of a committee before the legislature to secure the holding of one term of court a year in the town. Bachelder v. Epping, 28 N. H., 354.

So in Connecticut it has been held that a town has power to

employ and pay counsel to oppose before the general assembly of the state a proposition to divide its territory, where such proposition is not made by the state for motives of policy, but made by certain individuals seeking to promote their own interests. In such case the vote of the town is not necessary to authorize the selectmen to employ counsel, and incur expense to oppose such a proposition before the general assembly. Farrel v. Derby, 58 Conn., 234; 20 Atl. Rep., 460: 34 Am. & Eng. Corp. Cas., 391, and note p. 397, rejecting the conclusions and reasons in the Maine and Massachusetts cases, supra.

84 Connolly v. Beverly, 151 Mass.,437; 24 N. E. Rep., 404.

85 Frazier v. Warfield, 13 Md., 279, 303.

86 Sherwin v. Bugbee, 16 Vt., 439; Smith v. Cheshire, 13 Gray (Mass.), 318. this country, prescription as respects the existence of municipal powers is of but little importance, therefore usage is but a small factor or element in ascertaining the meaning of charter provisions.⁸⁷ But in England, prescription is of much more consequence in interpreting charter powers. There the long continued exercise of corporate rights, which, in theory, presupposes legal grant upon which such rights are based, is said to establish such powers by prescription, although in fact such rights were never legally granted and never could have been so granted.⁸⁸

Under no circumstances will an officer be permitted to recover additional compensation for expenses incurred by him in the absence of express provision of law, on the ground of usage.89 So a city cannot ratify the unwarranted allowance of the payment of unusual salaries or fees or expenses, or for work done, whether provided by contract or ordinance, violative of charter provisions. Thus where the charter provides that no contract shall be binding unless made by some authorized agent and within some appropriation for the purpose, the city is not liable for legal services beneficial to the city performed by counsel retained by a majority of the members of the board of aldermen (the city council consisted of two boards, namely, the board of mayor and aldermen and the common council) without any official action of the city council or of either branch thereof, notwithstanding the usage of the city has been to pay such bills approved by the committee of either boards without any formal vote.90

⁸⁷ Lawson, Usages & Customs, sec. 224.

Farther as to usage, see Willard v. Newburyport, 12 Pick. (Mass.), 227; Benoit v. Conway, 10 Allen (Mass.), 528.

Usage cannot control in the passage of a resolution or the exercise of legislative power in violation of implied provisions of the charter as to procedure. Wetmore v. Story, 22 Barb. (N. Y.), 414, 492, 493.

88 Atty. Gen. v. Foster, 10 Ves.,
335; Clark v. Denton, B. & A., 92;
Chad v. Tilsed, 5 J. B. Moore, 185;
Rex v. Salway, 9 B. & C., 424;

Clark v. LeCrew, 9 B. & C., 52; Rex v. Mashiter, 6 A. & E., 153.

89 Camden v. Varney, 63 N. J. L., 325; 43 Atl. Rep., 889; Demarest v. New Barbadoes, 40 N. J. L., 604, 607.

90 Butler v. Charlestown, 7 Gray (Mass.), 12. Here it was sought to prove the existence of a usage in committees and officers of the city government to make like contracts. Thomas, J., observed (pp. 16 and 17):

1. "The first suggestion to be made on this point is, that in cities where the corporation acts only through officers whose powers are § 73. Same subject. Usage may sometimes be invoked in ascertaining' municipal duties or powers, but "an unlawful expenditure of money of a town cannot be rendered valid by usage, however long continued. Abuses of power and violations of right derive no sanction from time or custom. A casual or occasional exercise of a power by one of a few towns will not constitute usage. It must not only be general, reasonable and of long continuance, but, what is more important, it must also be a custom necessary to the exercise of some corporate power, or the enjoyment of some corporate right, or which contributes essentially to the necessities and conveniences of the inhabitants." 91

"Communis error facit jus is a recognized maxim of the law,

limited and defined by law, the court would be slow to sanction any usage enlarging those powers.

- 2. The power of towns and cities, that have grown up from usage, are powers of the municipality itself, having their origin in the public exigencies, and being measured by them.
- 3. To establish even such a usage, it is not sufficient to show a usage in a single town, but a general usage among like towns and cities, and reasonable in itself.
- 4. The usage here attempted to be established is in violation of general law, and the charter and ordinances of the city. The doing of one wrong does not excuse another.
- 5. There is nothing in the usage attempted to be established, from which an implied contract to pay the plaintiff could be inferred."

⁹¹ Hood v. Lynn, 1 Allen (Mass.), 103, 106.

Relating to power of towns as to voting money under a sweeping clause, "other necessary charges," Shaw, C. J., remarked: "We think it referred to other provisions of law, and well established usage

to ascertain what the object of town charges are, and to provide that towns might raise money for any purpose thus determined. But to bring any particular subject within the description of necessary town charges, it must appear to be money necessary to the execution of some corporate power, the enjoyment of some corporate right, or the performance of corporate duty, as established by law or long usage. For instance, towns are authorized and required to hold meetings; as incidental thereunto they may hire, purchase or build a townhouse. They may prosecute and defend suits; as incident to which, they may appropriate money to retain counsel, to pay costs and to meet and satisfy judgments, which may be recovered against them." He also said: "It is not a casual or occasional exercise of a power by one of a few towns which will constitute such usage, but it must be a usage, reasonable in itself, general amongst all towns of like situation, as to settlement and population, and of long continuance." Spaulding v. Lowell, 23 (Mass.), 71, 76, 79.

but it is seldom applied in the administration of justice, and never without the exercise of the utmost caution." 92 narily the maxim will not be applied in an erroneous interpretation of a statute, injurious to the public interests, or to private rights, which has sprung up within a recent period.93 Sometimes the acquiescence on the part of the municipality respecting a particular construction of its charter powers, if adopted by third persons in good faith under which vested rights are acquired, will establish a precedent or amount to a usage which will close the mouth of the municipality from denying that this construction was a proper one. Of course. this rule is limited to the irregular exercise of corporate power, and cannot be extended to an enlargement of municipal powers so as to include authority which the city did not legally possess.94 A usage of trade defining the meaning of a term or expression need not be ancient; it is sufficient on the part of the contracting parties, to use the expression in the sense thus defined. This rule was applied to an ordinance for street improvements, which called for "a pavement of granite blocks, eight inches deep;" and it was held that the expression could be construed in the light of a custom prevailing at the time of the adoption of the ordinance which defined the dimensions of the granite blocks used.95

92 Booraem v. N. H. C. R. R.,
 44 N. J. Eq., 70, 78; 14 Atl. Rep.,
 106.

Local custom at variance with a general statute cannot control the statute even in that locality. Noble v. Durell, 3 T. R., 271; Godcharles v. Wigeman, 113 Pa. St., 431, 437; 6 Atl. Rep., 354.

98 See dissenting opinion of Thompson, J., in Cole v. Skrainka, 37 Mo. App., 427, 443, where the question under consideration is fully treated.

94 Van Hastrup v. Madison City, 1 Wall. (U. S.), 291; Forry v. Ridge, 56 Mo. App., 615; Endlich on Statutes, sec. 360.

"If any doubts could exist as to the proper construction of this ordinance they are put at rest by the evident construction the city itself placed upon it which appears from the fact that an amendment was deemed necessary." St. Louis Brewing Association v. St. Louis, 140 Mo., 419, 427; 37 S. W. Rep., 525; 41 S. W. Rep., 911.

Contemporaneous construction placed upon an ordinance by the parties themselves, and on which they have acted, and upon which large and important interests have vested, would not be controlling if the language was clearly the other way, yet in doubtful cases it is entitled to and should receive weight. State ex rel. v. Severance, 49 Mo., 401.

95 Cole v. Skrainka, 37 Mo. App.,
427; affirmed in 105 Mo., 303; 16
S. W. Rep., 491. See Soutier v. Kellerman, 18 Mo., 509.

Usage may be invoked in the

§ 74. Miscellaneous illustrations of implied powers. As a result of its power to enter into contracts and of the duty, either legally existing or self-imposed, of providing local needs and conveniences, a municipal corporation may negotiate loans and thereby incur indebtedness.1 But the power to borrow money on the faith and credit of the city is usually conferred in express terms by the charter, and ordinarily there is a defined limit in the state constitution or in general statutes as to the amount of municipal indebtedness that may be created. It has been held that where the power to purchase real estate is given in general terms, a corporation may purchase on credit and issue negotiable bonds.2 Where a city has express charter power "to establish" markets, it possesses by implication authority to purchase market grounds on credit.3 So a city having the general power to build markets is authorized to employ an architect to prepare plans and specifications for their construction. Under the general welfare clause the city may enact a valid ordinance imposing a penalty on all those who cruelly beat any dumb animal.⁵ The

construction of improvement ordinances. Kimball v. Brawner, 47 Mo., 398.

Settled meaning of words used among engineers and contractors will be adopted. Levy v. Chicago, 113 Ill., 650.

In Verdin v. St. Louis, 131 Mo., 26, 135; 33 S. W. Rep., 480; 36 S. W. Rep., 52, the court said "the petition alleges that the board had verbally announced it, that no bid for maintenance would be considered or recommended by the board, which would exceed fifty cents per square. This, it would seem, was well understood by all contractors, and, at least, there is no allegation that all proposed contractors were not fully aware of the existence of the rule. If so, such a rule well known and well understood, would be equivalent to the filing of the specifications in the office of the city clerk and then referring to them in the city ordinance."

114; 19 S. W. Rep., 622, it was held "a custom or usage may be received in evidence to explain the meaning of the parties to a contract, written or parol, where the meaning is not definitely stated in the contract."

Desmond v. Jefferson, 19 Fed. Rep., 483; Mills v. Gleason, 11 Wis., 470; Williamsport v. Com., 84 Pa. St., 487; State ex rel. v. Babcock, 22 Neb., 614; 35 N. W. Rep., 941; Robertson v. Breedlove, 61 Tex., 316.

² Richmond v. McGirr, 78 Ind., 192; Ketchum v. Buffalo, 21 Barb. (N. Y.), 294; affirmed in 14 N. Y., 356.

3 Ketchum v. Buffalo, 21 Barb. (N. Y.), 294; affirmed in 14 N. Y., 356.

4 Peterson v. New York, 17 N. Y., 449. See Sheidley v. Lynch, 95 Mo., 487; 8 S. W. Rep., 434; 24 Am. & Eng. Corp. Cas., 520.

⁵ St. Louis v. Shoenbusch, 95 Mo., In Wolff v. Campbell, 110 Mo., 618: 8 S. W. Rep., 791.

power conferred upon a city to hold an election for authority to contract for the supplying of its streets with water, etc., and no election machinery for holding an election having been provided therefor, carries with it as "an inevitable and indubitable incident" the usual and customary means to put the power conferred into effect. Therefore, under such statute the city has authority to employ the usual and necessary means to put in motion the power granted, namely, the passage of an ordinance and the holding of an election for the purpose of obtaining the assent of the voters to the creation of the indebtedness provided for therein.

Charter power "to remove or confine persons having infectious or pestilential diseases," authorizes the renting and leasing of a house in which to confine smallpox patients. The courts recognize certain other implied or incidental powers, as authority to compromise or settle disputed claims," submit

6 Ex parte Marmaduke, 91 Mo., 228, 251, 262; 4 S. W. Rep., 91; State ex rel. v. Perkins, 139 Mo., 106, 118; 40 S. W. Rep., 650; State ex rel. v. Walbridge, 119 Mo., 383, 394; 24 S. W. Rep., 457; 1 Kent Com., 463, 464; Sutherland, Stat. Construction, sec. 341.

7 "Where express power is given all the power necessary to carry it into effect is implied. That which is implied is as much a part of the statute as if written therein. The statute provides for an election, and requires a two-thirds majority of the qualified voters to ratify the contract. Such contract necessarily involves the creation of indebtedness. The city could not get water without paying for it and the legislature could not have intended it to do otherwise." Per Sherwood, J., in State ex rel. Miller v. M., K. & T. R. R. Co., 164 Mo., 208, 212, 213; 64 S. W. Rep., 187.

Many illustrations of inherent or incidental powers are given in Aurora Water Co. v. Aurora, 129 Mo., 540, 577; 31 S. W. Rep., 946.

In sustaining the power of the legislature to authorize a munici-

pal corporation to supply electricity for illuminating streets and public places, the Supreme Court of Pennsylvania said: "It is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age." Linn v. Chambersburg Borough, 160 Pa. St., 511; 28 Atl. Rep., 842.

8 Anderson v. O'Connor, 98 Ind., 168, 172.

⁹ Unless expressly forbidden by law a municipal corporation has power to settle disputed claims in its favor or against it. People ex rel. v. San Francisco, 27 Cal., 655; People ex rel. v. Coon, 25 Cal., 635; Augusta v. Leadbetter, 16 Me., 45, 47; Baileyville v. Lowell, 20 Me., 178; Bean v. Jay, 23 Me., 117; Prout v. Pittsfield Fire District, 154 Mass., 450.

The capacity to sue and be sued gives such implied power. Petersburg v. Mappin, 14 Ill., 193, 195; 56 Am. Dec., 501, approved in Agnew v. Brall, 124 Ill., 312, 315; 16 N. E. Rep., 230; 20 Am. & Eng. Corp. Cas., 134.

disputed controversies to arbitration, 10 offer rewards for the apprehension and conviction of offenders against local or

Power to release from oppressive contract. Bean v. Jay, 23 Me., 117; Meech v. Buffalo, 29 N. Y., 198, 210.

County may compromise disputed claims. Mills County v. B. & M. R. R. Co., 47 Iowa, 66; Grimes v. Hamilton County, 37 Iowa, 290; Allen v. Cerro Gordo County, 34 Iowa, 54.

Power to compromise. Otsego Lake v. Kirsten, 72 Mich., 1; 40 N. W. Rep., 26; 24 Am. & Eng. Corp. Cas., 456; Olp v. Leddick, 59 Hun. (N. Y.), 627; 14 N. Y. Suppl., 41; Shanklin v. Madison, 21 Ohio St., 575; Boston Iron Co. v. U. S., 118 U. S. 37; article 55 Central Law Journal, 425, et seq.

10 Shawneetown v. Baker, 85 Ill., 563; Brady v. Brooklyn, 1 Barb. (N. Y.), 584; Smith v. Philadelphia, 13 Phila. (Pa.), 177; Faville v. Eastern Counties Ry. Co., 2 Exch., 344; In re Corporation of Brant, 19 Up. Can. Q. B., 450.

Town may submit claims to arbitration. Boston v. Brazer, 11 Mass., 447; Buckland v. Conway, 16 Mass., 395; Commonwealth v. Roxbury, 9 Gray (Mass.), 451.

School district may arbitrate claim. Walnut Tp. v. Rankin, 70 Iowa, 65, 67; 29 N. W. Rep., 806.

Corporation may be compelled to pay the award. Elmendorf v. Jersey City, 41 N. J. L., 135.

Municipal corporation included in the term "persons" in a statute relating to arbitration. Springfield v. Walker, 42 Ohio St., 543, 547.

County court may submit to arbitration. Remington v. Harrison County Court, 12 Bush. (Ky.), 148.

Canal company may arbitrate claim without special charter pow-

er. Alexandria Canal Co. v. Swann, 5 How. (U. S.), 83.

The state may divest itself of its sovereignty and its exemption from suit, and by legislative enactment submit claims against it in dispute to arbitrament. State v. Ward, 9 Heisk. (Tenn.), 100.

Cannot arbitrate the question as to the value of lands taken or condemned for public improvements. Somerville v. Dickerman, 127 Mass., 272, 275; Boylston Market Association v. Boston, 113 Mass., 528; Harvard College v. Boston, 104 Mass., 470; Brimmer v. Boston, 102 Mass., 19; Paret v. Bayonne, 39 N. J. L., 559.

Question of damage of lands taken for highway cannot be submitted to arbitration. Mann v. Richardson, 66 Ill., 481.

Question of price of a bridge and damages for right of way across land for public road cannot be submitted to arbitration. McCann v. Otoe County, 9 Neb., 324; Sioux City & P. R. R. v. Washington County, 3 Neb., 30, 42; Stewart v. Otoe County, 2 Neb., 177. Contra, Schoff v. Bloomfield, 8 Vt., 472.

When award of jury may be set aside and damages fixed by council, see Mobile v. Richardson, 1 Stewart & P. (Ala.), 12.

Claim for damages on the part of property owners against a rail-road company cannot be submitted by the municipal corporation to arbitration. New Haven v. N. H. & D. R. R. Co., 62 Conn., 252; 25 Atl. Rep., 316.

Respecting mode of submitting claims to arbitration, see article, 55 Central Law Journal, page 425 et seq.

municipal regulations,¹¹ and the right to indemnify municipal officers who incur loss for the benefit of the corporation,¹² all

11 People ex rel. v. Holly, 119
Mich., 637, 639, 640; 44 L. R. A., 677; 78 N. W. Rep., 665; Mead v. Boston, 3 Cush. (Mass.), 404;
Freeman v. Boston, 5 Metc. (Mass.), 56; Shaub v. Lancaster City, 156 Pa. St., 362; 26 Atl. Rep., 1067; 21 L. R. A., 691; York v. Forscht, 23 Pa. St., 391, 393.

But in the absence of express authority a municipal corporation may not offer rewards for information leading to the arrest and conviction of violators of state laws although committed within the municipal limits, for the reason that this is not a municipal power but a duty devolving upon the state. Crofut v. Danbury, 65 Conn., 294; 32 Atl. Rep., 365; Hawk v. Marion County, 48 Iowa, 472; Abel v. Pembroke, 61 N. H., 357, 359; Winchester v. Redmond, 93 Va., 711; 25 S. E. Rep., 1001; 57 Am. St. Rep., 822.

Forbidden in cases involving homicide. Baker v. Washington, 7 D. C., 134, reward offered by the city of Washington for the capture of the assassin of President Lincoln held void.

Declared invalid in murder case. Gale v. South Berwick, 51 Me., 174; Hanger v. Des Moines, 52 Iowa, 193; 2 N. W. Rep., 1105; 35 Am. Rep., 266; 9 Cent. Law Journ., 478.

Denied in crime of murder and arson in Murphy v. Jacksonville, 18 Fla., 318; 43 Am. Rep., 323.

Reward offered for the apprehension of one who, through forgery had embezzled city funds, declared unauthorized in Patton v. Stephens, 14 Bush. (Ky.), 324.

Municipal corporation cannot employ counsel to aid in criminal

prosecution on behalf of the state. Butler v. Milwaukee, 15 Wis., 493.

Counties have no power to offer rewards for violators of state laws. Huthsing v. Bousquet, 2 McCrary (U. S. C. C.), 152; Grant County Commissioners v. Bradford, 72 Ind., 455; Ripley County Commissioners v. Ward, 69 Ind., 441; Hight v. Monroe County Commissioners, 68 Ind., 575.

In Illinois by statute counties have limited authority to offer rewards. Butler v. McLean County, 32 Ill. App., 397.

By statute in New Hampshire and Massachusetts municipal corporations may offer rewards. Janvrin v. Exeter, 48 N. H., 83; 2 Am. Rep., 185; Abel v. Pembroke, 61 N. H., 357; Cranshaw v. Roxbury, 7 Gray (Mass.), 374.

The municipal charter of Detroit also authorizes the offering of such rewards. Loveland v. Detroit, 41 Mich., 367.

The New York Consolidated Act (section 259) expressly authorizes the police board to offer reward for the apprehension and conviction of persons guilty of homicide and receiving stolen goods.

In Canada power is given to councils to offer rewards. Biggar, Mun. Manual of Canada, pp. 803, 804, \$\\$ 593-595, and notes.

12 Bancroft v. Lynnfield, 18 Pick. (Mass.), 566; Babbitt v. Savoy, 3 Cush. (Mass.), 530; Hadsell v. Hancock, 3 Gray (Mass.), 526; Nelson v. Milford, 7 Pick. (Mass.), 18; Barnert v. Paterson, 48 N. J. L., 395; 6 Atl. Rep., 15; State v. Hudson, 37 N. J. L., 254; State v. Hammonton, 38 N. J. L., 430; Sherman v. Carr, 8 R. I., 431, approved in Roper v. Laurinburg, 90 N. C.,

of which powers are usually required to be exercised by ordinances.13

EXECUTION OF POWERS.

§ 75. Method of exercise of powers. Where the charter or statute under which the municipal corporation is created, or other legislative act applicable, directs in precise or definite terms the manner in which certain corporate acts are to be executed, and points out the departments, officers or agents who are to perform them, such specification must be substantially followed.14 "The mode in such cases constitutes the measure of their power." "Where a corporation relies upon a grant of power from the legislature for authority to do any act, it is as much restricted to the mode prescribed by the statute for its exercise as to the thing allowed to be done."16 In conferring the power, it is the intention that it shall be exercised by the body and in the mode prescribed, "and any

427: Attorney General v. Norwich, itants of Essex, 4 T. R., 591.

13 METHODS OF COMPROMISE by municipal corporations proper. State ex rel. v. Martin, 27 Neb., 441; 43 N. W. Rep., 244; New Orleans v. L. & N. R. R. Co., 109 U. S., 221; 2 Am. & Eng. Corp. Cas., 156.

Compromise by towns on town vote. Ford v. Clough, 8 Me., 334, 345; 23 Am. Dec., 513; Nelson v. Milford, 7 Pick. (Mass.), 18; Tuttle v. Weston, 59 Wis., 151; 17 N. W. Rep., 12; 2 Am. & Eng. Corp. Cas., 168; Matthews v. Westborough, 134 Mass., 555, 562; Am. & Eng. Corp. Cas., 239,

Compromise by counties. Collins v. Welch, 58 Iowa, 72; 12 N. W. Rep., 121; 43 Am. Rep., 111; Hall v. Baker, 74 Wis., 118; 42 N. W. Rep., 104. See article, 55 Central Law Journ., p. 425 et seq.

A city charter which constitutes the city magistrates "justices of the peace ex officio" does not authorize the city to create an action of debt of which such magistrates

as justices shall have jurisdiction. 2 Mylne & Cr., 406; King v. Inhab- Weeks v. Forman, 16 N. J. L., 237. 14 McCracken v. San Francisco, 16 Cal., 591; Holland v. San Francisco, 7 Cal., 361; Pimental v. San Francisco, 21 Cal., 351; Slessman v. Crozier, 80 Ind., 487; First Presbyterian Ch. v. Ft. Wayne, 36 Ind., 338; 10 Am. Rep., 35; Baltimore v. Porter, 18 Md., 284; 79 Am. Dec., 686; Nevada v. Eddy. 123 Mo., 546; 27 S. W. Rep., 471; Stewart v. Clinton, 79 Mo., 603; Kansas City v. Flanagan, 69 Mo., 22; Thomson v. Boonville, 61 Mo., 282; Saxton v. St. Joseph, 60 Mo., 153: St. Louis v. Clemens, 43 Mo., 395; Ruggles v. Collier, 43 Mo., 353; Knapp v. Kansas City, 48 Mo. App., 485; Sprague v. Coenen, 30 Wis., 209; Ft. Scott v. Eads Brokerage Co., 117 Fed. Rep.,

> 15 Per Field, J., in Zottman v. San Francisco, 20 Cal., 96; 81 Am. Dec., 96.

> 16 Per Welles, J., in Farmers' Loan & Trust Co. v. Carroll, 51 Barb. (N. Y.), 33.

departure from such authority or any attempt by the body to transfer their powers to others is unwarranted." Thus where the charter requires any sale or lease of its real estate to be made at public auction to the highest bidder, a lease of any of its property by ordinance at a fixed rental is unlawful. So where a corporation is empowered to issue bonds "at such times as the board of trustees may, by resolution, direct," a legal issue can only be authorized by resolution. So where the charter provides that a particular power shall be exercised by ordinance, its exercise in any other manner, as by contract or resolution, would not be legal. But where the city has general power to act by and through ordinances, a special power to issue bonds for specified purposes may be exercised by ordinance, submitting the question to a vote of the people. 1

§ 76. Judiciary will not control exercise of discretionary powers. Frequently powers are conferred upon municipal corporations, in general terms, without specification as to the time when, or manner in which, they are to be exercised. Obviously the execution of such powers involves the exercise of judgment and discretion, and therefore the general rule

¹⁷ East St. Louis v. Wehrung, 50 Ill., 28, 31.

"To sanction a contrary doctrine would place the corporation above the law, and would, to say the least, be fraught with dangerous consequences. If such a doctrine should prevail is there not reason to fear that corporations might soon become intolerable nuisances?" Hurford v. Omaha, 4 Neb., 336, 350.

"It is a well established principle that when a new power and the means of executing it are given by statute the power can be executed in no other way." Hovey v. Mayo, 43 Me., 322, 332; Glass v. Ashbury, 49 Cal., 571.

¹⁸ San Francisco, etc., Railroad Co. v. Oakland, 43 Cal., 502.

¹⁹ McCoy v. Briant, 53 Cal., 247. Where the power exists, but is

not executed as prescribed, the act may be subsequently ratified. Lucas v. San Francisco, 7 Cal., 463. See Sec. 120, post.

Unionville v. Martin, 95 Mo.
App., 28, 36; 68 S. W. Rep., 605;
Mills v. San Antonio (Tex. Civ.
App., 1901), 65 S. W. Rep., 1121;
Bryan v. Page, 51 Tex., 532; 32
Am. Rep., 637.

See Secs. 2-6, supra, for distinction between ordinance and resolution.

The power of correcting ward limits must be exercised by ordinance as any ordinary act of legislation and not by resolution. Cascaden v. Waterloo, 106 Iowa, 673; 77 N. W. Rep., 333; McCulley v. Elizabeth, 66 N. J. L., 555; 49 Atl. Rep., 686.

²¹ Mason v. Shawneetown, 77 Ill., 533, 537.

has obtained that, in the absence of collusion or fraud. courts will decline to interfere where an officer or an agent in the execution of the power is acting within the scope of his prescribed authority.22 In such case, any method which is fit and proper, with a due regard to the nature of the power, may be employed.²³ These corporations "must have a choice of means adapted to ends, and are not to be confined to any one mode of operation."24 Thus in the absence of prescribed form, in certain cases the legislative or governing body may act by resolution instead of by ordinance.25 This subject is considered in prior sections.²⁶ So where by law a city may erect an electric plant upon approval of a majority of its electors, and pay for the same by the issuance and sale of bonds, the entire matter of erection of plant and issuance of bonds may be submitted to vote in one proposition.²⁷ So the power to construct water works, upon like majority vote, may be properly exercised by ordinance prescribing the character

²² Des Moines Gas Co. v. Des Moines, 44 Iowa, 505; 24 Am. Rep., 756; St. Louis v. Boffinger, 19 Mo., 15.

Lincoln St. Ry. Co. v. Lincoln,
Neb., 109; 84 N. W. Rep., 802;
Union Pac. R. Co. v. Ryan, 2 Wyo.,
113 U. S., 516; Poillon v.
Brooklyn, 101 N. Y., 132; Heman v.
Schulte, 166 Mo., 409; 66 S. W.
Rep., 163.

²⁴ Bridgeport v. Housatonuc R. R. Co., 15 Conn., 475, 501, as to issue of bonds; Slack v. Maysville & Lexington R. R. Co., 13 B. Mon. (Ky.), 1; State *ex rel.* v. Walbridge, 119 Mo., 383, 394; 24 S. W. Rep., 457, removal of officer.

Power given, without specification as to mode of its exercise, permits the adoption of a reasonable mode, and implies discretion in this respect. Cincinnati v. Gwynne, 10 Ohio, 192, relating to enforcement of a special tax by suit in the nature of an action for debt. Markle v. Akron, 14 Ohio, 586, as to regulating sale of liquor.

Evansville, I. and C. S. L. R. R. Co. v. Evansville, 15 Ind., 395, mode of exercising power and time and mode of payment of subscription to railroad stock held to be discretionary with council; also, same as to power to borrow money.

In Spaulding v. Lowell, 23 Pick. (Mass.), 71, where a town built a market house two stories high and appropriated the lower story for a market, which was bona fide the leading object in erecting the building, it was held that the appropriation of the upper story to other subordinate purposes was not such an excess of authority as to render the erection of the building and the raising of money therefor illegal.

²⁵ Chicago v. McKechney, 91 Ill. App., 442; Lincoln St. Ry. Co. v. Lincoln, 61 Neb., 109; 84 N. W. Rep., 802.

26 Secs. 2-5, supra.

²⁷ Thomson-Houston Electric Co. v. Newton, 42 Fed. Rep., 723.

of such works and the tax to be levied to meet the cost of construction in advance of the election, and then submitting the matter to the voters.²⁸ So where a city council has power to make a lease of real estate at a "reasonable rent," in the absence of fraud or collusion, the council's determination as to rent will not be disturbed by the court.²⁹

§ 77. Same subject. Most municipal corporations possess a large discretion concerning local improvements, as in the opening, grading and repairing of highways, streets and sidewalks, in respect to the time, manner and cost of the same, as well as in the establishment of sewers, drains or other sanitary regulations, and urban necessities and conveniences generally. In the exercise of such discretion the courts will decline to interfere, where the authorities are acting within the scope of their powers.³⁰

²⁸ Taylor v. McFadden, 84 Iowa,262; 50 N. W. Rep., 1070.

²⁹ Schanck v. New York, 69 N. Y., 444.

30 *Illinois*—Brush v. Carbondale, 78 Ill., 74.

Indiana — Fulton v. Cummings, 132 Ind., 453; 30 N. E. Rep., 949. Maine—Hovey v. Mayo, 43 Me.,

322.

Maryland—Methodist Prost. Ch.

v. Baltimore, 6 Gill. (Md.), 391. Missouri—Skinker v. Heman, 64 Mo. App., 441; Estes v. Owen, 90 Mo., 113; 2 S. W. Rep., 133; Farrar v. St. Louis, 80 Mo., 379; McCor-

New York—Wiggin v. New York, 9 Paige (N. Y. Ch.), 16, 23; People v. Supervisors Queens Co., 131 N. Y., 468.

mack v. Patchin, 53 Mo., 33.

Wisconsin—Teegarden v. Racine, 56 Wis., 545; 14 N. W. Rep., 614.

Ordinarily courts will not interfere on the ground that a given improvement is unnecessary and that the ordinance providing for it is, therefore, oppressive and unreasonable. Marionville to use v. Henson, 65 Mo. App., 397.

The passage of the ordinance is

usually conclusive as to the necessity of the work. Seibert v. Tiffany, 8 Mo. App., 33; Bohle v. Stannard, 7 Mo. App., 51.

But Corrigan v. Gage, 68 Mo., 541, holds that an ordinance for a sidewalk in an uninhabited portion of the city and disconnected with any other street or sidewalk was unnecessary and oppressive; and such fact might be shown in an action on the special tax bill.

Water course in highway. Benjamin v. Wheeler, 8 Gray (Mass.), 409.

Repairs in roads and streets. Hovey v. Mayo, 43 Me., 322.

Proceeding to compel city to cover open drain or canal of many years' standing, alleged to be a nuisance, denied. Inhabitants v. New Orleans, 14 La. Ann., 452.

Had power, but neglected to abate nuisance; held private action against city would not lie. Kelley v. Milwaukee, 18 Wis., 83; Leeds v. Richmond, 102 Ind., 372; 1 N. E. Rep., 711; Sullivan v. Phillips, 110 Ind., 320; 11 N. E. Rep., 300; Irving v. Ford, 65 Mich., 241; 32 N. W. Rep., 601; Louisville,

The use of the municipal revenue, except that required for specified purposes, is usually subject alone to the discretion of the local authorities. "No court has a right to control that discretion, "remarked the Supreme Court of the United States, "much less to usurp and supersede it. To do so in a single year would require a revision of the details of every estimate and expenditure, based upon an inquiry into all branches of the municipal service; to do so for a series of years, and in advance, is to attempt to foresee every exigency and to provide against every contingency that may arise to affect the public necessities.''31 And, finally, it may be stated broadly that this immunity from judicial control embraces the exercise of all municipal powers, whether legislative or administrative, which are strictly discretionary. Ample illustration of the doctrine is contained in the cases in the notes and in other appropriate connections throughout the work.³² The observation of Lumpkin, J., is appropriate: "These municipal cor-

etc., R. R. v. East St Louis, 134 Ill., 656.

Extending time (when it is not of the essence of the contract) within which an improvement may be made is discretionary. Jenkins v. Stetler, 118 Ind., 275; 20 N. E. Rep., 788. So, what is "reasonable time." Fass v. Seehawer, 60 Wis., 525; 19 N. W. Rep., 533.

"The city, as a corporation, has control over the public places and highways within its bounds and it is the province of the corporation and not of a judicial tribunal, to determine what improvements shall be made in the streets and canals of the city." Inhabitants v. New Orleans, 14 La. Ann., 452.

Courts may restrain municipal officers from exceeding their jurisdiction, and require them to perform such specific duties as the law imposes upon them. Attorney General v. Board, 64 Mich., 607; 31 N. W. Rep., 539; Coll v. Board, 83 Mich., 367; 47 N. W. Rep., 227; People v. Supervisors, 3 Mich., 475; People v. Auditors, 13 Mich.,

233; Tennant v. Crocker, 85 Mich., 328; 48 N. W. Rep., 577.

³¹ Per Mr. Justice Matthews in East St. Louis v. U. S. *ex rel*. Zebley, 110 U. S., 321, 324.

32 St. Louis v. Weber, 44 Mo., 547, regulating markets; Page v. St. Louis, 20 Mo., 136, involving illegal exemption by ordinance of special sewer tax; Lockwood v. St. Louis, 24 Mo., 20, proceeding to enjoin sale of personal property for payment of taxes illegally assessed. Case explains Deane v. Todd, 22 Mo., 90. Fayetteville v. Carter, 52 Ark., 301; 12 S. W. Rep., 573; 6 L. R. A., 509 (and note), discretion as to fixing amount of license fee.

Where city has no power to let a contract for lighting its streets and public buildings for a term of ten years, the courts will interfere. Garrison v. Chicago, 7 Bissell (U. S. Cir. Ct.), 480. But held in Iowa that a contract for the use of certain rooms for city purposes for twenty years, to be paid by issuing scrip, in the abporations are the germ and miniature models of free government; and their internal police and administration should not be interfered with for slight causes; not unless some great right has been withheld, or wrong perpetrated.'33

§ 78. Limitation of rule of non-judicial interference. While the rule of non-judicial interference in the respects mentioned is well established, certain limitations are recognized. Although alluded to elsewhere, it may be again emphasized that every corporate duty is in the nature of a public trust and should be exercised for the general welfare. Moreover, private property and private rights will receive legal protection. Hence the universal rule: Wanton or unreasonable exercise of power, although discretionary, by corporate authorities, detrimental to public interest, or injurious to private rights, will be redressed by the judiciary, notwithstanding such powers clearly belonged to the municipal corporation and in

sence of proof of fraud, would not be nullified by the judiciary, the court saying: "In the absence of actual fraud, courts cannot interfere with the judgment and discretion of city councils in determining what are and what are not suitable rooms for the purposes of the city and its officers." Moses v. Risdon, 46 Iowa, 251, 253.

Power to purchase land for a poor house, and make the necessary improvements is not subject to judicial control at the suit of a tax payer. Jones v. Pendleton County (Ky., 1892), 19 S. W. Rep., 740.

So discretion in determining who are paupers and furnishing needed aid is not subject to judicial review. Christman v. Phillips, 58 Hun., 282; 12 N. Y. Supp., 338.

Whether a city being only authorized to purchase such lands as might be necessary for the purposes of the corporation, could take lands outside of her limits not necessary for such purposes, "is a question that can only arise in a

proceeding instituted by the state against the city for abusing her right to purchase lands." Chambers v. St. Louis, 29 Mo., 543, 576.

Suit of private citizen to compel forfeiture of franchise granted by city denied. Hovelman v. K. C. H. R. R., 79 Mo., 632, 639.

Failure of city to enforce contract as to sufficient pressure in water mains for fire purposes cannot be subject of private action. Boston S. D. & T. Co. v. Salem Water Co., 94 Fed. Rep., 238.

Borrowing money and issuing bonds. People v. Board of Supervisors, 131 N. Y., 468.

Power of local authorities as to authorizing special election. Friesner v. Charlotte, 91 Mich., 504; 52 N. W. Rep., 19.

Authority as to erecting, maintaining and repairing public buildings. Kitchell v. Commissioners, 123 Ind., 540; 24 N. E. Rep., 366; Rotenberry v. Supervisors, 67 Miss., 470; 7 So. Rep., 211.

33 State v. Swearingen, 12 Ga.,23, 25.

the exercise of them no corruption or fraud appears.³⁴ Thus a power given to a municipal corporation to abate nuisances in any manner it may deem expedient is not an unrestricted power, for such means only are intended as are necessary for the public good. The abatement must be limited by its necessity, and no wanton or unnecessary injury to the property or rights of individuals must be committed.³⁵

Notwithstanding the grant conferring the power is silent as to the mode and time of its execution, the public interest and the law always require a reasonable exercise of municipal powers.³⁶ While the acts of officials will be set aside on the ground of fraud or mistake, ³⁷ every reasonable intendment of

34 See Vincennes v. Citizens Gas Light Co., 132 Ind., 114; 31 N. E. Rep., 573; Jackson County H. R. R. Co. v. Interstate Rapid Transit Co., 24 Fed. Rep., 306; 32 Am. & Eng. R. R. Cas., 216; Sitzinger v. Tamaqua, 187 Pa St., 539; 41 Atl. Rep., 454; Cape May, etc., R. Co. v. Cape May, 35 N. J. Eq., 419; Place v. Providence, 12 R. I., 1.

The power to supply a city with water is usually discretionary in so far as determining when the needs of the community require the supply, but in providing water the power cannot be so exercised as to create a corporate debt beyond that limited by law, or to surrender or suspend legislative powers. Here, it was held that the execution of such contracts is a ministerial act and may be enjoined, etc. Valparaiso v. Gardner, 97 Ind., 1, 3.

35 Babcock v. Buffalo, 56 N. Y., 268, where it was held that the filling up of a canal was not a proper exercise of the power to abate nuisances, and the city could be restrained from so doing. Sheldon, J., elaborately discusses the doctrine in 1 Buffalo Sup. Ct. Rep., 317, which opinion is affirmed.

36 Kirkham v. Russell, 76 Va.,

956, 961, holding void an ordinance as to time of election of certain city officers, the effect of which was to deprive a new council of the right to make the selection, the election having occurred only three days before the new council organized; distinguishing Norfolk v. Ellis, 26 Gratt, (Va.), 224, and Fisher v. Harrisburg, 2 Grant's Cases (Pa.), 291. court said (p. 967): "Such an ordinance is not only unreasonable; it is doubtless safe to say it is unprecedented. Surely, the legislature, had it intended to confer upon the council the power to adopt it, would have said so clearly and unmistakably. That such power was not conferred appears by the provisions of the charter in respect to the terms and election of officers generally." See dissenting opinion on pp. 970-988. Compare § 19, supra.

37 See Morse v. Westport, 136 Mo., 276; 37 S. W. Rep., 932; Fruin Bambrick Construction Co. v. Geist, 37 Mo. App., 509; State v. Board of Public Works, 27 Minn., 442; 8 N. W. Rep., 161; State v. District Court, 33 Minn., 295; 23 N. W. Rep., 222.

good faith and regularity will be indulged where they appear to have acted within the scope of their powers.³⁸

- § 79. When ordinance necessary to exercise power. By far most of the powers exercised by municipal corporations require either an ordinance or resolution, which, as a rule, is to all intents and purposes a legislative act. The legal entity, while purely a governmental institution existing solely for the public good of the local community, is a corporation and may only legally act as such. All of its corporate and political powers, unless lodged elsewhere, are construed as being vested in the council or governing legislative body, which, under the prevailing system in the American municipality, is the most numerous and popular branch of municipal organization. Such vesting of powers would seem to support the legal view that the municipal corporation in most of its important functions is essentially an organ of government, and being such, the inhabitants of the corporation should be directly represented, and through their representatives should direct the affairs of the corporation. In the performance, therefore, of its manifold duties, to validate its acts, ordinances are necessary unless the method of executing the power is sufficiently prescribed by charter or legislative act applicable, or is in the nature of a purely administrative duty. In case of doubt the authority for the act and the manner of its execution, should be directed by the council or governing legislative body in appropriate form. Where the charter requires the passage of an ordinance—a legislative act—by the council, to accomplish the object desired, an ordinance is indispensable; the power cannot be delegated to others.39
- § 80. Same subject—Legislative or executive powers. Charters usually provide that the legislative powers of the corporation shall be vested in the governing legislative body, generally called the council or the common council or municipal

39 Secs. 86-88. post.

Authority to private persons to build a sewer along a *public* street can only be granted by ordinance. State (Hunt) v. Lambertville, 45 N. J. L., 279.

³⁸ St. Joseph to use of Gibson v. Farrell, 106 Mo., 437; 17 S. W. Rep., 497; Aurora Water Co. v. Aurora, 129 Mo., 540; 31 S. W. Rep., 946; Rutherford v. Hamilton, 97 Mo., 543; 11 S. W. Rep., 249; *In re* Episcopal School, 75 N. Y., 324.

assembly, and the executive and administrative powers in the mayor and heads of designated departments and other officers created or to be created by law. Often charters provide either expressly or by implication that neither the legislative body nor any committee or member thereof shall perform any executive business whatever. Executive and administrative duties are such as concern the execution of existing laws. Acts which require the ordaining of new laws are legislative. Thus where it can be shown that the particular act could not have been done without a law or ordinance, such act is to be considered as legislative. Therefore, a resolution of a council, adopting certain plans and specifications directing a market to be built in accordance with them, and awarding the contract at a specific price, was sustained.⁴⁰

§ 81. Same subject—Self-enforcing charter provisions. That all corporate acts must be performed in the mode prescribed, is a general proposition firmly established.⁴¹ As we have seen, certain municipal powers can only be executed legally by the formal enactment of ordinances (as contradistinguished from mere resolutions),⁴² which is essentially a legislative act. Where the grant conferring the power is a complete enactment within itself, the provision, whether charter or statutory, becomes self-enforcing, and therefore legislation by ordinance is not required. Thus where the offense is defined, the penalty and mode of prosecution prescribed, the charter provision may be executed without ordinance.⁴³ But where the provision is merely a grant of power, as authority to license and

40 "It is equally an act of local legislation to fix upon the form and dimensions of a public building. Indeed, anything which enters into the idea of the plan of an edifice may properly be determined by the authority to which the law commits the duty of determining that one should be built. * * * The adoption of the project of building a particular edifice according to a specified plan, was the substantial part of the resolution. The rest was modal." The court found that, although the charter required all contracts to be made by the appropriate heads of departments, the building of a new market (the subject of the resolution) not being among the duties of any of the executive departments, could be provided for by resolution of the council. Peterson v. New York, 17 N. Y., 449, 454. Employment of agents, as attorneys, is often a legislative act. Bryan v. Page, 51 Tex., 532, 535.

^{41 § 75,} supra.

⁴² Secs. 2 to 5, supra.

⁴⁸ Strauss v. Pontiac, 40 III., 301, 303; Ashton v. Ellsworth, 48 III., 299.

regulate trades, occupations, professions, etc., to regulate or suppress or license the sale of liquor,⁴⁴ bawdy houses, gaming and gambling houses, to prohibit and destroy instruments and devices, etc., of gambling,⁴⁵ to abate nuisances,⁴⁶ to employ agents and attorneys,⁴⁷ to make public improvements,⁴⁸ to fix wharfage dues,⁴⁹ to establish water works and public wells,⁵⁰ and to exercise the delegated police power generally,⁵¹ the passage of proper ordinances or resolutions is required, to make the power effective.

§ 82. Distinction between mandatory and discretionary The law recognizes a distinction between mandatory and discretionary powers. Imperative or mandatory duties imposed on the municipality imply no discretion and may be compulsorily required. Whether the duty is discretionary or mandatory is always a question of charter or legislative intention, and each case must be decided largely on its own circumstances and the intention gathered from the nature of the power and the whole law relating to the subject. general rule, as declared by the Supreme Court of Wisconsin, undoubtedly is that, where the power may be classed with the great mass of discretionary powers conferred upon municipal corporations to pass by-laws and ordinances relating to the government of the city, which powers are to be exercised according to the judgment of the authorities as to its necessity or expediency, it is not mandatory. 52 The Supreme Court of Nebraska well says that it "sometimes becomes a very grave question in the construction of statutes whether particular provisions are to be regarded as mandatory or directory. is, however, a familiar principle that statutes relating merely to matters of convenience, or to the orderly and prompt con-

Power to declare and abate nuisances can be exercised only by general ordinance applicable alike to all property similarly circumstanced. American Furniture Co.

⁴⁴ People v. Crotty, 93 III., 180; Bull v. Quincy, 9 III. App., 127; Chapter XIII.

⁴⁵ Ridgway v. West, 60 Ind., 371; 22 Cent. L. J., 319.

⁴⁶ Lake v. Aberdeen, 57 Miss., 260.

v. Batesville, 139 Ind., 77; 38 N. E. Rep., 408; 35 N. E. Rep., 682.

⁴⁷ Bryan v. Page, 51 Tex., 532.

⁴⁸ Delphi v. Evans, 36 Ind., 90, 101; Chapter XVI.

⁴⁰ Muscatine v. Keokuk Packet Co., 45 Iowa, 185.

⁵⁰ Unionville v. Martin, 95 Mo. App., 28, 36; 68 S. W. Rep., 605.

⁵¹ Chapter XIV.

 $^{^{52}}$ Kelley~v. Milwaukee, 18 Wis., 83, 85.

duct of business, and not to the essence of the thing to be done, are generally considered as directory only; but this doctrine has been carried so far in some cases that it seems impossible to reconcile all the cases in which the question has been considered; and if equal force were given to each case found in the books, it would be a fruitless effort to attempt to fix any settled, discriminative point between a mandatory and a directory statute."53

§ 83. Same subject. Where the law imposes the duty and gives the means of performing it, ordinarily its performance is compulsory.⁵⁴ It has often been judicially declared that what a public corporation or officer is empowered to do, and it is beneficial to them to have it done, the law holds it should be done.⁵⁵ Thus where the rights of third persons are involved or the public good requires it, the words "it shall be lawful" or "may," will be construed to mean "must" or "shall," and, therefore, the power mandatory.⁵⁶ But ordi-

⁵³ Hurford v. Omaha, 4 Neb., 336, 349.

"Affirmatives may, and often do, imply a negative of what is not affirmed as strongly as if expressed. So, also, if by the language used, a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise. Affirmative expressions that introduce a new rule imply a negative of all that is not within the purview." Per Wright, C. J., in District Township v. Dubuque, 7 Iowa, 262, 276.

54 Thus a city being by statute "authorized and empowered to make proper provision for the support of the poor," etc., cannot refuse to do so, as the law is mandatory. Veazie v. China, 50 Me., 518; Milford v. Orono, 50 Me., 529.

⁵⁵ Mason v. Fearson, 9 How. (U. S.), 248, 259; Malcom v. Rogers, 5 Cow. (N. Y.), 188.

⁵⁶ "In some cases where an authority is conferred in permissive language merely, it is still held to

be imperative if third persons have an absolute right to have it exercised. But it is obvious that this principle cannot be applied to discretionary powers. For as soon as it is determined that it is discretionary whether to exercise the authority, or not, it follows that there are no persons who have the right to insist on its exercise. To determine whether such a power is discretionary or not, the nature of the power itself, and the rights of individuals in respect to its exercise must be looked at." Kelley v. Milwaukee, 18 Wis., 83, 85.

Word "may" construed as "must" or "shall" when required. State (Kennelly) v. Jersey City, 57 N. J. L., 293; 30 Atl. Rep., 531; 26 L. R. A., 281; Blake v. P. & Co. R. R., 39 N. H., 435; King v. Derby, Skinner, 370.

"May repair" a bridge held "shall" repair. Phelps v. Hawley, 52 N. Y., 23, 27. Same as to sewer, where a statute permissive in terms was construed as mandato-

narily where the language of the law is permissive in its nature and merely confers the power, unless the rights of third persons are involved or the public good requires it, the duty will be held discretionary. Many cases illustrating the general rules are given in the notes.⁵⁷

ry. New York v. Furze, 3 Hill (N. Y.), 612.

Enabling statute held mandatory. People v. New York, 11 Abb. Pr. (N. Y.), 114.

"It shall be lawful" and "may," construed as shall. Mason v. Fearson, 9 How. (50 U. S.), 248, 259; Rex v. Barlow, 2 Salkeld, 609.

Laws providing for submitting question to vote of the people of stock subscription to railroads. Steines v. Franklin County, 48 Mo., 167.

"It is a power given to public officers, and concerns the public interests and the rights of third persons, who have a claim *de jure*, that the power shall be exercised in this manner for the sake of justice and the public good." Leavenworth & D. M. R. R. Co. v. Platte County, 42 Mo., 171, 175.

The language "that the city council shall be, and they are hereby empowered to elect an officer to be known as 'Recorder,'" etc., held mandatory. Vason v. Augusta, 38 Ga., 542, 545.

When whole law construed together, held mandatory, relating to sale of property. Hemmer v. Hustace, 51 Hun. (N. Y.), 457.

57 Under an act empowering city to make sufficient number of reservoirs "to supply water in case of fire," it was held discretionary to construct, and, if constructed, also discretionary to maintain. Grant v. Erie, 69 Pa. St., 420, per Sharswood, J.

Charter authority "to build and erect from time to time, as might

become necessary, sufficient closed culverts in and over the common sewers established in the district," held discretionary. Carr v. Northern Liberties, 35 Pa. St., 324.

Power to remove obstructions and to widen, deepen and straighten the Chicago River and its branches to their source, and to extend one mile into Lake Michigan, conferred by charter Chicago, held discretionary. Goodrich v. Chicago, 20 Ill., 445. Caton, C. J., remarked (p. 447): courts cannot discriminate and say, you shall remove this wreck, but you need not remove that sand bar, or deepen the river in another place, or straighten it in another. The law has either left it to the discretion of the common council to say which of these acts the public good requires them to perform, or it is imperative that they shall perform all. * * * very extent of the power conferred, and the magnitude and expense of the work which they are authorized to perform, in reference to this harbor, show that it was never the intention of the legislature to impose the absolute obligation upon the city to perform it all, and if not all, then no part was imperative; for no authority is vested anywhere except in the common council of the city to say what part it is necessary, expedient and proper that they shall perform."

Courts cannot compel cities to open streets, notwithstanding the power and political obligation ex§ 84. Public powers cannot be surrendered or delegated. The legal conception early obtained that the powers possessed by public and municipal officers "must be viewed as public trusts, not conferred upon individual members for their own emolument, but for the benefit of the community over which

ists to open such streets as the convenience of the community may require. Joliet v. Verley, 35 Ill., 58, 63.

Authority delegated to do certain thing, as subscribe to stock of railroads, which is entirely permissive, as where the language is "shall have power," and no imperative injunction is contained in the law compelling action, held to be discretionary. St. Joseph & Denver City R. R. Co. v. Buchanan County, 39 Mo., 485, 490, per Wagner, J.

An act authorizing a town to erect a bridge across a canal which provided that when constructed, the bridge should be maintained, repaired (and if pivot bridges should be built), opened for the passage of boats by the corporation, was held imperative, and the performance of the duties imposed could be compelled by mandamus. Ottawa v. People ex rel., 48 Ill., 233.

When "must" held discretionary, as applied to court. Spears v. New York, 72 N. Y., 442; Merrill v. Shaw, 5 Minn., 148.

Provision as to publication of proceedings of council held directory in Reed v. Louisville, 22 Ky. Law Rep., 1636; 61 S. W. Rep., 11. When "may" not used in the sense of "shall" Ball v. Fage 67

sense of "shall." Ball v. Fagg, 67 Mo., 481.

The true rule is this: "If from the whole context we gather that the statute was designed to impose the act on the officer as a duty to be performed, then the authority to do it is an obligation to do it. It has been said that when the public welfare demands it or private rights are affected then the power to act is a duty to act. But the private interests, for the protection of which the power will be construed to be a duty, must be such as exist independent of the grant of the power." State ex rel. v. St. Louis, 158 Mo., 505, 506; 59 S. W. Rep., 1101.

"In respect to statutes, the rule of construction seems to be, that the word 'may' means 'must' or 'shall' only in case where public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the power should be exercised." Per Chancellor Kent in Newburgh Turnpike v. Miller, 5 John. Chan. (N. Y.), 100.

When the word "may" construed as "shall" in statute relating to fees. State *ex rel*. v. King, 136 Mo., 309; 36 S. W. Rep., 681; 38 S. W. Rep., 80.

When "may" as addressed to a public officer does not mean shall," see *In re* Goddard, 94 N. Y., 544.

"The interest which entitled a private person to insist upon the execution by an officer of a power conferred upon him, must be a definite and absolute legal right; a mere incidental benefit to accrue to him therefrom will not suffice." Throop, Public Officers, 549.

In Herford v. Omaha, 4 Neb., 336, at page 350, the Supreme Court of Nebraska formulates cer-

they preside." ⁵⁸ Therefore, the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others. ⁵⁹ Thus where the taxing power is committed to the "corporate authorities" it cannot be exercised by others. ⁵⁰ So the power to contract for the erection of public buildings cannot be surrendered to private individuals. ⁶¹ So a municipal corporation has no power to convey a bridge erected by it to trustee by deed of trust, authorizing the charging of toll thereon and pledging the bridge and toll collected thereon for the payment of the debt created for its construction. ⁶² So a city authorized by its charter to erect, repair and regulate public wharves, and

tain propositions in order to determine whether the power is mandatory or discretionary.

Requirements as to time of revision of ordinances, and publication of digest thereof, held directory. Whalin v. Macomb, 76 Ill., 49, 51; Lowrey v. Lexington, 24 Ky. L. Rep., 516; 68 S. W. Rep., 1109.

⁵⁸ Glover, Mun. Corp., pp. 1, 3. Cooley's Const. Lim., 204, 205.

59 California—Menser v. Risdon, 36 Cal., 239; Oakland v. Carpentier, 13 Cal., 540; Chase v. City Treasurer, 122 Cal., 540; 55 Pac. Rep., 414; Knight v. Eureka, 123 Cal., 192; 55 Pac. Rep., 768.

Minnesota—Hennepin County v. Robinson, 16 Minn., 381.

New Hampshire—Attorney General v. Lowell, 67 N. H., 198; 38 Atl. Rep., 270.

New York—Lyon v. Jerome, 26 Wend. (N. Y.), 485, 498; Toppan v. Young, 9 Daly (N. Y.), 357.

Ohio — Ampt v. Cincinnati, 17 Ohio Cir. Ct., 516.

United States—Continental Construction Co. v. Altoona, 92 Fed. Rep., 822; 35 C. C. A., 27; Clark v. Washington, 12 Wheat. (25 U. S.), 40, 54.

A city's legislative authority cannot be construed as conferring upon it power to enlarge, diminish or vary in any substantial manner its municipal functions by ordinance. Jefferson City v. Courtmire, 9 Mo., 692.

A partial surrender of public powers is void. Third Municipality of New Orleans v. Ursuline Nuns, 2 La. Ann., 611.

There is no presumption that the grant of a legislative power to a municipal corporation authorized its surrender. National Waterworks Co. v. Kansas City, 20 Mo. App., 237.

60 The "corporate authorities" has been held to include those who are either directly elected by the population to be taxed, or appointed in some mode to which they have given their assent. Harward v. St. Clair D. Co., 51 Ill., 130; Hessler v. Drainage Com., 53 Ill., 105; Cornell v. People, 107 Ill., 372; Wetherell v. Devine, 116 Ill., 631; 6 N. E. Rep., 24.

⁶¹ Russell v. Cage, 66 Tex., 428,1 S. W. Rep., 270.

62 Mullarky v. Cedar Falls, 19 Iowa, 21.

to fix the rate of wharfage thereat, cannot lease its wharf, or farm out its revenue, or empower any one else to fix the rates of wharfage; and a contract whereby a city undertakes to do these things is void. In every case where the law imposes a personal duty upon an officer in relation to a matter of public interest, he cannot delegate it to others, as by submitting it to arbitration. 4

Contracts and ordinances relating to any municipal function which embarrass in any way the power of regulation of public affairs are ultra vires; for the municipal corporation cannot in any manner divest itself of its power to control and regulate at all times everything within the domain of its jurisdiction. The adjudications present numerous instances of ordinances and contracts in derogation of the police powers which are uniformly declared void under this principle. Such powers belong emphatically to that class of objects which demand the application of the maxim salus populi suprema est lex; and they are to be attained and provided for by such appropriate means as the discretion of those who officially represent and act for the municipal corporation may devise from time to time. "The discretion can no more be bargained away than the power itself." Therefore, when the city, within its charter powers, grants franchises for the use of its streets, wharves, parks and other places for public purposes, the right of control and regulation on the part of the municipal authorities must be reserved so that it may be exercised at any time for the public good.66

⁶³ Matthews v. Alexandria, 68 Mo., 115.

Power to construct piers cannot be abrogated or restricted. Whitney v. New York, 6 Abb. N. C. (N. Y.), 329.

64 Mann v. Richardson, 66 Ill., 481.

65 Beer Company v. Massachusetts, 97 U. S., 25, 33; Boyd v. Alabama, 94 U. S., 645.

66 The following cases well illustrate the text: Glasgow v. St. Louis, 87 Mo., 678; 15 Mo. App., 112; Lockwood v. Wabash R. R. Co., 122 Mo., 86; 26 S. W. kep., 698; Sherlock v. K. C. Belt Ry.

Co., 142 Mo., 172; 43 S. W. Rep., 629; State ex rel. v. Murphy, 134 Mo., 548; 31 S. W. Rep., 784; 34 S. W. Rep., 51; 35 S. W. Rep., 1132.

A contract that in the future a street shall not be opened or extended in a designated part of the city has been adjusted to be an abrogation of legislative powers and therefore *ultra vires*. In reopening of First Street, 66 Mich. 42; 33 N. W. Rep., 15. City cannot alienate power to improve streets. Roanoke Gās Co. v. Roanoke, 88 Va., 810; 14 S. E. Rep., 665.

Where a city has the right to

§ 85. Powers and duties imposed upon particular departments or officers cannot be delegated. The duties and powers imposed upon the mayor, designated departments and officers are considered in the nature of public trusts and cannot be

lease a part of its wharf for the purpose of a warehouse and grain elevator, it must reserve the right to terminate such lease whenever the public interest demand such Belcher Sugar Refining action. Co. v. St. Louis Grain Elevator Co., 101 Mo., 192, 13 S. W. Rep., 822. Henry, J., in Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo., at page 126, said: "In order to meet the demands of commerce. and the changed methods of handling grain and other products the city may license the erection of elevators and warehouses in connection with them, upon the unpaved portion of the wharf, without violating the rights of the owners of the fee, but she has no right to lease any portion of it for a term of years without a reservation of the right to the lease, whenever it should become necessary to pave and extend the wharf so leased. No right to authorize the erection of such buildings as that which it is alleged the defendant is about to erect upon the wharf, without reserving a control over the building, and the uses to which it may be applied." See Matthews v. Alexandria, 68 Mo., 115.

The imposition of a tax on poles erected or maintained in highways is a power of which a municipality cannot divest itself for any period of time by ordinance or contract. Seitzinger v. Tamaqua, 187 Pa. St., 539; 41 Atl. Rep., 454; McKeesport v. M. & R. P. Ry. Co., 2 Pa. Sup. Ct., 242.

A city has no power to enter

into a contract which interferes with its duties to preserve the health and morals of the city. Louisville v. Wible, 84 Ky., 290. It may, therefore, defeat the title of its own grantee when it becomes necessary to do so in order to abate a nuisance or preserve the public health. Western Sav. Fund. Soc. v. Phila., 31 Pa. St., 175, 182; Presbyterian Church v. New York, 5 Cowen (N. Y.), 538, 542.

"If one portion of the legislative power may be sold, another may be disposed of in the same way. If the power to raise revenue may be sold to-day, the power to punish for crimes may be sold to-morrow, and the power to pass laws for the redress of civil rights may be sold the next day. If the legislative power may be sold, the executive and judicial powers may be put in the market with equal propriety. The result to which the principle must inevitably lead proves that the sale of any portion of governmental powers is utterly inconsistent with the nature of our free institutions, and totally at variance with the object and general provisions of the constitution of the state. * * It is a question of constitutional authority, and not a case of confidence in the fidelity of the legislature. Limitations of power established by written constitutions have their origin in a distrust of the infirmity of That distrust is fully justified by the history of the rise and fall of nations." Mott v. Pa. R. R. Co., 30 Pa. St., 9, 27, 28; Penn. R. R. Co. v. Riblet, 66 Pa. St., 164,

delegated or surrendered to other officers or departments. 67 Thus, where the charter imposes upon the mayor the duty to examine and pass upon bills of the legislative branch, in order to decide whether they should be approved or vetoed, such duty cannot be delegated to another, as, for example, the clerk, for the duty calls for the exercise of judgment and experience.68 So the power to establish pounds and to appoint pound keepers conferred upon commissioners cannot be delegated to another officer or person.⁶⁹ So where a charter prescribes that designated officers "shall authenticate all special tax bills," which duty requires the exercise of judgment and discretion, this duty cannot be performed by others.70 Where the charter requires the concurrence of two designated boards for the making of any improvement or the doing of any work or procuring any materials, a ratification by one of the boards of an order for work done in repairing a public sewer by the street and sewer commissioner, by approval of the bill presented therefor, is not sufficient to bind the city.⁷¹ So where the mayor and aldermen must select the sites for

168; Boyd v. Alabama, 94 U. S., 645, 650.

Hence, the state or its duly authorized municipality may compel a street railroad company to do whatever is required for the health, safety and welfare of the community, for the plain reason that the authority to enact measures for this purpose can never pass from the sovereign no matter what grants it may make. St. Louis & S. F. Ry. Co. v. Gill, 156 U. S., 649, 657; Elliott on Roads and Streets. 573.

An agreement of an official to permit one to whom the city has granted a right to lay out a highway to lands owned by him, to defend an injunction suit growing out of the grant, in the name of the officers of city, provided he would save the city harmless, etc., is void as a delegation of discretionary power. Shelby v. Miller, 114 Wis., 660; 91 N. W. Rep., 86; State v.

Geneva, 107 Wis. 1; 82 N. W. Rep., 550.

Reasons for rule. Winter v. Kinney, 1 N. Y., 365; Webb v. Albertson, 4 Barb. (N. Y.), 51.

67 Oakland v. Carpentier, 13 Cal., 540, 545; State v. Fiske, 9 R. I., 94

Delegation of power to construct foot pavement, void. Whyte v. Nashville, 2 Swan. (Tenn.), 364.

68 Lyth v. Buffalo, 48 Hun. (N. Y.), 175.

City council cannot devolve a power conferred upon it on the clerk. Durant v. Jersey City, 25 N. J. L., 309.

60 Dillard v. Webb, 55 Ala., 468. 70 Stifel v. Southern Cooperage Co., 38 Mo. App., 340; McQuiddy v. Vineyard, 60 Mo. App., 610, 618; Eyerman v. Payne, 28 Mo. App., 72, 77; Heman v. McLaren, 28 Mo. App., 654.

⁷¹ Keeny v. Jersey City, 47 N. J.L., 449; 1 Atl. Rep., 511.

public markets, the architect and plans; and commissioners are required to make purchases and contracts, a resolution appointing the commissions to purchase a site and build a public market thereon is void.72 So where certain duties are conferred upon the council and chief engineer of the fire department, they cannot be delegated by ordinance or otherwise So the determination of the kind of mateto a fire board.73 rial with which streets shall be paved or sewers constructed, and the manner and time in which such work shall be done, conferred upon particular officers, boards or departments, cannot be delegated. 74 So where the law confers upon the council, in conjunction with the board of education, power to purchase a site for school purposes, such authority cannot be delegated to the board of public works.75 So where the organic law vests the power of appointment of an attorney in the council, it cannot be transferred to the mayor by ordinance or otherwise.76

Mere ministerial duties may be delegated,⁷⁷ but the general rule is that, if from the nature of things to be done, the officer is required to perform duties involving the exercise of discretion and judgment, he cannot in any manner delegate them.⁷⁸ The question as to where the specific duty rests is one of construction. Usually, where the powers are conferred upon the municipal corporation, without particular designation, the power may be exercised by the corporation itself. Nor can

72 State (Danforth) v. Paterson, 34 N. J. L., 163.

73 Benjamin v. Webster, 100 Ind., 15.

Power of fire department to compel the erection of fire escapes cannot be delegated. N. Y. Fire Department v. Sturtevant, 33 Hun. (N. Y.), 407.

74 King-Hill Brick Mfg. Co. v. Hamilton, 51 Mo. App., 120, 125; St. Joseph v. Wilshire, 47 Mo. App., 125; Galbreath v. Newton, 30 Mo. App., 380. This subject is more fully considered and illustrated elsewhere. Chapter XVI, of Public Improvements Ordinances.

75 Lauenstein v. Fond du Lac, 28 Wis., 336.

76 East St. Louis v. Thomas, 11
 Ill. App., 283; Bryan v. Page, 51
 Tex., 532, 535.

Where the charter confers upon the council the power to appoint and remove certain subordinates by majority vote, the council can not by ordinance or otherwise deprive itself of this power. State (Volk) v. Newark, 47 N. J. L., 117. ⁷⁷ Sec. 89. post.

78 Crutchfield v. Warrensburg, 30 Mo. App., 456; Stifel v. Southern Cooperage Co., 38 Mo. App., 340; McQuiddy v. Vineyard, 60 Mo. App., 610; Lynch v. Forbes, 161 Mass., 302; 37 N. E. Rep., 437; 42 Am. St. Rep., 402; State (Danforth) v. Paterson, 34 N. J. L., 163.

the city relieve its officers from discharging their regular duties, as by contracting by ordinance or otherwise with another to perform part or all of such duties.⁷⁹

- § 86. Legislative authority cannot be delegated. The adjudications present various illustrations of the rule everywhere established that legislative authority cannot be delegated. Under state constitutions the power to make laws, conferred upon the legislatures, may not be delegated to the people of the state or any portion of them. The only apparent exception in this respect is the power of legislation possessed by the municipal corporation. In legal language this authority is said to be delegated by the state. There is a clear distinction to be observed between legislative and ministerial powers. The former cannot be delegated; the latter may. Legislative power implies judgment and discretion on the part of those who confer it. 183
- § 87. Same—Illustrations. In the construction of sewers, where the charter requires the dimensions to be determined by ordinance (the enactment of which is essentially a legislative act), an ordinance leaving this matter to be decided by a city officer is bad.⁸⁴ So where the charter imposes the duty upon the council to determine the manner in which an im-

79 Carroll'v. St. Louis, 12 Mo., 444; Gurley v. New Orleans, 41 La. Ann., 75; 5 So. Rep., 659; Butler v. Sullivan County, 108 Mo. 630; 18 S. W. Rep., 1142.

so Smith v. Morse, 2 Cal., 524; Baltimore v. Scharf, 54 Md., 499; Northern Central Ry. Co. v. Baltimore, 21 Md., 93; In re Wilson, 32 Minn., 145, 148; 19 N. W. Rep., 723; Riley v. Trenton, 51 N. J. L., 498; 18 Atl. Rep., 116; State v. Field, 17 Mo., 529; 59 Am. Dec., 275; State ex rel. v. Haynes, 72 Mo., 377; State ex rel. v. Murphy, 134 Mo., 548; Chillicothe v. Brown, 38 Mo. App., 609; Kansas City v. Cook, 38 Mo. App., 660; Unionville v. Martin, 95 Mo. App., 28, 36; 68 S. W. Rep., 605.

State ex rel. v. Young, 29 Minn., 474, 551, 552; 9 N. W. Rep., 737,

leaving to court when act shall take effect, void.

81 Ex parte Wall, 48 Cal., 279, 313.

82 Lammert v. Lidwell, 62 Mo.,
188; State ex rel. v. Pond, 93 Mo.,
606; 6 S. W. Rep., 469; State ex rel. v. Francis, 95 Mo., 44; 8 S. W.
Rep., 1; State v. Patrick, 65 Mo.
App., 653; St. Louis v. Russell,
116 Mo., 248; 22 S. W. Rep., 470;
Cooley's Constitutional Lim. (5th Ed.), 139, 140.

83 Per Wagner, J., in Ruggles v. Collier, 43 Mo., 353, 365.

Such powers cannot be vicariously exercised. Matthews v. Alexandria, 68 Mo., 115; Thompson v. Booneville, 61 Mo., 282.

84 St. Louis to use v. Clemens, 52
 Mo., 133; 43 Mo., 395; Sheehan v.
 Gleeson, 46 Mo., 100; Neill v.

provement, as a street, shall be made, such duty cannot be delegated by ordinance to a city officer or the street committee of the council.85 So the power conferred by charter upon the council "to erect lamps, and to provide for lighting the city," and "to create, alter and extend lamp districts," cannot be delegated to a committee of the council, so that the determination of the committee will be final, either as to erecting new lamps, or discontinuing those already established.86 The power to grant a franchise to construct and operate street railroads, conferred on the council, must be made by ordinance directly, hence such authority to make the grant cannot be delegated by the council to any officer or board.87 Under particular charters it is held that the power or discretion of fixing fines by money or imprisonment for violation of ordinances is a legislative power and cannot be delegated to the courts; it must be specified in the ordinance.88 Where the assessment and rating of taxes is required to be done by the council, an apportionment made by the clerk in pursuance of resolution of the council, in the absence of council confirmation thereof, is invalid.89 So an ordinance giving the property owners of a block the right to say whether a livery stable shall be located in such block—such power being imposed by charter upon the legislative body—is void.90 So an ordinance

Gates, 152 Mo., 585; 54 S. W. Rep., 460

Power to grade street cannot be delegated. Koeppen v. Sedalia, 89 Mo. App., 648.

85 Thompson v. Schermerhorn, 6 N. Y., 92, 96, followed in Birdsall v. Clark, 73 N. Y., 73; 29 Am. Rep., 105, reversing 7 Hun., 351; Baltimore v. Scharf, 54 Md., 499.

When park board may determine material for sidewalks, etc. Turner v. Detroit, 104 Mich., 326; 62 N. W. Rep., 405.

A city council may adopt a city code compiled by the city attorney, as the adoption, not the compilation, is the legislative act. Western & A. R. Co. v. Young, 83 Ga., 512; 10 S. E. Rep., 197.

86 Minneapolis Gas-Light Co. v.

Minneapolis, 36 Minn., 159; 30 N. W. Rep., 450.

87 State ex rel. v. Bell, 34 Ohio St., 194.

88 Tomlin v. Cape May, 63 N. J.
L., 429; 44 Atl. Rep., 209; Melick
v. Washington, 47 N. J. L., 254;
State v. Zeigler, 32 N. J. L., 262.
But see Chap. V, Of Penalties,
§§ 175 to 177 post.

89 Davis v. Read, 65 N. Y., 566.

90 St. Louis v. Russell, 116 Mo.,
 248; 22 S. W. Rep., 470; 20 L. R.
 A., 721, and note. Contra, State ex rel. v. Beattie, 16 Mo. App., 131.

In Chicago v. Stratton, 162 Ill., 494; 44 N. E. Rep., 853, an ordinance forbidding the location in any block in which two-thirds of the buildings are residence unless the owners of a majority of the lots consent in writing, was

making it a misdemeanor to operate a slaughter house within three hundred feet of a dwelling house, without the written consent of the occupant, is invalid, as attempting to substitute for the sanction of the law the written consent of one or more individuals. So where the charter, or law applicable, commits to the legislative body of the corporation the exclusive authority to provide, by ordinance, additional offices, situations and places of employment in the municipal service and fix the compensation as in its legislative discretion the demands of the several offices or departments may require, such power cannot be delegated in whole or in part.

§ 88. Same subject. Local police regulations are usually made by ordinance, and the power to enact such ordinances is vested in the legislative department. But in Massachusetts it has been held that the state legislature may authorize a city council to empower a police board to regulate the uses of streets in certain respects.¹ So by authority of state law, the New Jersey courts hold that certain of the local police power may be delegated to the excise department of the city.² Where the power to license and fix the rates therefor is vested in the council it cannot be delegated to the mayor or other officer.³

held reasonable. The court distinguished the Russell case. The ordinance related only to certain residence districts which are clearly defined "within such specified districts the city council undoubtedly has the power to prohibit or forbid the location of livery stables, and having the power of total prohibition within these districts, it may impose such conditions and restrictions in relation to these limited areas as it may see fit."

Swift v. People, 162 III., 534, reversing 60 III. App., 395.

Laundry ordinance case, 7 Sawyer (U. S.), 526; Ex parte Sing Lee, 96 Cal., 354; 31 Am. St. Rep., 218

91 St. Louis v. Howard, 119 Mo.,41; 24 S. W. Rep., 770.

92 The power of the legislature imposed by the state constitution to regulate the compensation of all county officers cannot be delegated to the county supervisors. Dougherty v. Austin, 94 Cal., 601; 29 Pac. Rep., 1092.

¹ Commonwealth v. Plaisted, 148 Mass., 375; 19 N. E. Rep., 224.

² State (Riley) v. Trenton, 51 N. J. L., 498; 18 Atl. Rep., 116; State (Paul) v. Gloucester County, 50 N. J. L., 585; 15 Atl. Rep., 272.

³ East St. Louis v. Wehrung, 50 Ill., 28; Naegle v. Centralia, 81 Ill. App., 334; State Center v. Barenstein, 66 Iowa, 249; 23 N. W. Rep., 652; Thurlow Medical Co. v. Salem, 67 N. J. L., 111; 50 Atl. Rep., 475; State v. Fiske, 9 R. I., 94; Lord v. Oconto, 47 Wis., 386; 2 N. W. Rep., 785.

As to delegation to police board of power to license itinerant musicians, see Commonwealth v. Plaisted, 148 Mass., 375; 19 N. E. Rep., 224.

A provision in an ordinance that, "any person desiring to sell by sample in said city may, by paying to the city treasurer the sum of five dollars for every three days, obtain a license from the city clerk," etc., was held void because it delegates to the licensee the power to determine the time for which the license shall be granted. An ordinance authorizing a city clerk to issue a license, provided that the applicant has complied with the law, and who shall not be in arrears for license for any previous year, was held valid against the objection that it conferred judicial powers upon the clerk. The power vested in the council to regulate streets cannot be delegated, by ordinance regulating street processions, by conferring upon a police officer discretionary power as to issuing permit therefor.

A charter provision which requires a recommendation from a board of park commissioners prior to the establishment of a park by ordinance by the municipal council, does not delegate legislative power to such board. Such a provision confers no power on the board to legislate, but simply imposes a limitation on the council. Until the council acts no park can be established. Some charters limit the legislative power by prescribing that all improvement ordinances shall originate with certain boards or officers.

§ 89. Ministerial duties may be delegated. The rule forbidding the delegation of power, stated and illustrated in prior sections, does not apply to the performance of purely ministerial duties. Such duties may be delegated. The law has always recognized and emphasized the distinction between instances in which a discretion must be exercised by the officer or department or governing body in which the discretion

Gregory v. Bridgeport, 41 Conn., 76; 19 Am. Rep., 485, involving an ordinance creating position of superintendent of wharves and giving him "full power to order and regulate * * * the mooring of vessels at such wharf," which was held valid.

⁴ Darling v. St. Paul, 19 Minn., 389.

⁵ Baker v. Lexington, 21 Ky. Law Rep., 809; 53 S. W. Rep., 16. See Chapter XIII, taxation and license tax.

 ⁶ Chicago v. Trotter, 136 Ill., 430;
 26 N. E. Rep., 359. §§ 416, 466 post.
 ⁷ Kansas City v. Bacon, 147 Mo.,
 259, 283; 48 S. W. Rep., 860. See dissenting opinion, pp. 301-309.

⁸ See Ch. XVI, of public improvement ordinances.

⁹ Gillett v. Logan County, 67 Ill., 256, 258; McClaughry v. Hancock County, 46 Ill., 356; Alton v. Mulledy, 21 Ill., 76.

is vested, and the performance of merely ministerial duties by subordinates and agents.10 Therefore, the appointment of agents to carry out the authority of the council is entirely competent and does not violate the rule delegatus non potest delegare. 11 Thus the council may create committees or other bodies to investigate given matters, to procure information, to make reports and recommendations, and not exceed its power in the manner under consideration, 12 but the council alone must finally determine the subject committed to its discretion and judgment.18 To illustrate: Although the charter power imposed upon the council to issue, negotiate and sell municipal bonds cannot be delegated to the city treasurer, or any other officer or person, either by ordinance, resolution or otherwise, if the sale of the bonds is negotiated by the city treasurer under proper ordinance, resolution or other appointment, designating him by name for that purpose, his acts are simply those of an agent of the council.14 So the council may authorize the mayor to make a contract which the council alone is authorized to make, and afterwards ratify such contract and take action, as in issuing bonds, in pursuance of it. In such case the mayor merely acts as the instrument or amanuensis of the council. It is through him that the contract is made. The council by ratification finally determines and thus fulfills the duty imposed by law. 15 So where the council has sole power to cause sidewalks to be constructed, it may, by ordinance, authorize the mayor and chairman of committee on streets and alleys to make, in its behalf and pursuant to its directions, a con-

10 Harcourt v. Asbury Park, 62 N. J. L., 158; 40 Atl. Rep., 690; Edwards v. Watertown, 61 How. Pr. (N. Y.), 463; Hannibal & St. J. R. R. Co. v. Marion Co., 36 Mo., 294. 11 Northern C. Ry. Co. v. Baltimore, 21 Md., 93; State v. Atlantic City, 34 N. J. L., 99, 108.

¹² Burlington v. Dennison, 42 N.
 J. L., 165; Dancer v. Mannington,
 50 W. V., 322; 40 S. E. Rep., 475.

13 Sec. 123, post.

14 State ex rel. v. Hauser, 63 Ind., 155, 178.

15 As stated by the court in this

case: "There can be no doubt that his (Mayor's) act should be regarded as that of the common council." Evansville, I. and C. S. L. R. R. Co. v. Evansville, 15 Ind., 395, 418; Peterson v. New York, 17 N. Y., 449, per Denio, J.

Where the law requires an ordinance or resolution "describing the work," certain details of the work may be submitted to the superintendent of streets for approval. Haughawout v. Hubbard, 131 Cal., 675; 63 Pac. Rep., 1078.

tract for doing the work, and afterwards approve and ratify such contract.¹⁶ So the council by ordering a sidewalk raised to a level, to correspond with the level established by work that had been completed on walks on the same street, does not by committing the execution of the work to the street committee delegate to such committee its discretionary power in the premises.¹⁷

authority to construct the side-walks, involved in it was the right to direct the mayor, and the chairman of the committee on streets and alleys, to make a contract on behalf of the city for doing the work. We spend no time in vindicating this proposition. It is true, the council could not delegate all the power conferred upon it by the legislature, but like every other corporation, it could do its ministerial work by agents. Nothing

more was done in this case. * *

* There was no unlawful delegation of power. But, if there had
been, the contract was ratified by
the council after it had been
made." Per Mr. Justice Strong, in
Hitchcock v. Galveston, 96 U. S.,
341, 348.

17 Harrisonburg v. Roller, 97Va., 582; 34 S. E. Rep., 523.

Work that may be done by council committees, the manner of doing it, reports, etc., is treated in § 123.

CHAPTER III.

OF ENACTMENT OF ORDINANCES.

- MEETINGS AND PROCEEDINGS OF COUNCIL OR GOVERNING LEGISLA-TIVE BODY—RECORDS.
- § 90. Municipal organization where corporate authority yested.
 - 91. Corporate meetings required.
 - 92. Kinds of corporate meetings stated—notice.
 - New England town meetings
 —notice or warning indispensable.
 - 94. Sufficiency of notice or warning.
 - 95. What the notice or warning must specify.
 - 96. Legal governing body—de facto councils and officers.
 - 97. Conflicting councils iniunction.
 - Presiding officer—mayor as member.
 - 99. Signing of bills by presiding officer.
 - 100. When mayor's approval of proceedings necessary.
 - 101. Mayor's approval must be in writing.
 - 102. Casting vote by presiding officer.

QUORUM AND MAJORITY.

- 103. Quorum defined.
- 104. Quorum and majority at common law.
- 105. Quorum and majority of definite body.
- 106. Same—when definite vote required.
- Vote necessary in suspending rules.
- 108. How quorum affected by interest of members.

109. Quorum of joint assemblies of definite bodies.

PROCEEDINGS.

- 110. Special meetings-notice.
- Power to adjourn meetings.
- 112. Business that may be transacted at adjourned meetings.
- 113. Council as continuous body.
- 114. Action of legislative body consisting of two branches.
- 115. Rules for conducting business—Parliamentary law.
- 116. Form of corporate action mandatory and directory provisions.
- 117. Taking yeas and nays.
- 118. Reasons for requiring yeas and nays.
- 119. Reading bills on three different days.
- 120. Ratification of void acts.
- Reconsideration general powers respecting.
- 122. Power to rescind prior acts.
- 123. Committees.

RECORDS.

- 124. Record of proceedings.
- 125. Who to keep municipal records.
- 126. Sufficiency of record—presumptions.
- 127. Same—taking yeas and nays.
- 128. Municipal records as evidence.
- 129. Parol evidence to prove record.

§130. Parol evidence to show omissions.

131. Same subject — imperfect record—rights of creditors.

132. Amendment of record.

§133. Method of amending.

134. Court may order amendment—mandamus.

135. Amendment after lapse of time—estoppel—ex post facto.

§ 90. Municipal organization — Where corporate authority vested. With respect to the enactment of ordinances and by-laws, in this country, corporations invested with the powers of local civil government may be classified under two heads: First, the New England town, in which the inhabitants thereof meet, act and vote as individuals clothed with the full powers of the corporation; second, the municipal corporation proper, in which the inhabitants are represented in their corporate capacity by certain officers or agents constituting the corporate authority. In the latter form these officers or agents are not the corporation, nor do they constitute a corporation of any character. They merely act as the servants and agents of the inhabitants of the place, who, in conjunction with the territory, constitute the corporation. The inhabitants exercise their

¹ United States—Kelly v. Pittsburgh, 104 U. S., 78; Welch v. Ste. Genevieve, 1 Dillon C. C., 130, 134, per Dillon, J.

Illinois—Galesburg v. Hawkinson, 75 Ill., 152, 156.

Indiana—Baumgartner v. Hasty, 100 Ind., 575, 585; 50 Am. Rep., 830; Strosser v. Ft. Wayne, 100 Ind., 443, 449; Valparaiso v. Gardner, 97 Ind., 1, 6; 49 Am. Rep., 416. Iowa—State ex rel. v. Barker, 116 Iowa, 96; 89 N. W. Rep., 204, 206.

Michigan—People ex rel. Shumway v. Bennett, 29 Mich., 451; 18 Am. Rep., 107; Carleton v. People, 10 Mich., 250, 253.

New Hampshire—Wells v. Burbank, 17 N. H., 393, 404.

New York—Clarke v. Rochester, 14 How. Pr. (N. Y.), 193; 5 Abb. Pr. (N. Y.), 107; Lowber v. New York, 5 Abb. Pr. (N. Y.), 325, 329; Brady v. Supervisors, etc., 2 Sandf. (N. Y.), 460, 469.

Pennsylvania—Appeal of Whalen, 16 Pitts. Leg. Journ. (Pa.), 113.

Tennessee—O'Connor v. Memphis, 6 Lea (Tenn.), 730, 736; Luehrman v. Taxing District, 2 Lea (Tenn.), 425.

West Virginia—Brown v. Gates, 15 W. Va., 131.

England—Reg. v. Paramore, 10 Ad. & El., 286; Rex v. Mitchell, 10 East, 511.

1 Dillon, Mun. Corp., § 258; Grant, Corporations, 357; 1 Thompson, Corp., sec. 16; Biggar, Mun. Manual of Canada, p. 36.

There is no legal identity between the corporation and the inhabitants who compose it. The corporate body is a distinct legal entity. Mayhew v. Gayhead, 13 Allen (Mass.), 129, 134.

While the mayor and members of the council are regarded as public trustees in a general sense, they are not so technically, so as

corporate franchises by the selection of the officers who represent them, and the latter constitute the corporate authorities in whom are vested, for the time being, the powers of the corporation. It is by and through such officers and agents that the corporation acts in all things. The executive and administrative affairs are generally in the hands of a chief executive (commonly called a mayor) and other chief officers elected by the people at large or appointed, and in the larger cities usually specified functions, as education, sanitation, public charities, public work, etc., are committed to administrative and executive boards and departments. The legislative powers are conferred upon particular officers, elected by the voters at large, or by wards or municipal sub-divisions, variously designated as aldermen, delegates, councilmen, selectmen, trustees, supervisors, etc., who constitute the legislative or governing body, commonly called the council or common council. This latter body is sometimes composed of two houses, branches or boards, and the concurrence of both is ordinarily required to complete any given corporate action, especially acts considered purely legislative, as in the passage of ordinances, or by-laws, regulations and resolutions of a permanent nature; and to constitute the given act the legal action of the corporation, the approval of the mayor is frequently required. Thus where the charter commits the powers of the corporation to the mayor and council, the latter may not exercise the corporate powers without the concurrence of the mayor in the manner prescribed.² Various forms of municipal organization, showing where corporate authority is vested, are indicated in the notes.3

to subject them to chancery control, as ordinary trustees. Semmes v. Columbus, 19 Ga., 471.

² Saxton v. Beach, 50 Mo., 488. See Sec. 149, *post*.

3 Alabama—In a few states, as in Alabama, the corporate authority of towns is vested in an intendant and aldermen (usually five). Civil Code Ala., 1896, sec. 2942. The intendant has the power and jurisdiction of a justice of the peace in all matters, civil or criminal, arising within the corpo-

rate limits: Civil Code Ala., 1896, sec. 2951.

California—In San Francisco the governing legislative body is denominated the board of supervisors. Charter of San Francisco, art. II., ch. 1, § 1; Statutes and Amendments to Codes of Cal. (1899), p. 244. The board of trustees is the legislative body of municipal corporations of the sixth class in California. Mintzer v. Schilling, 117 Cal., 361; 49 Pac. Rep., 209.

Unless restricted by the constitution, the legislature may confer upon any department of the municipal government, as

Colorado—It seems that the constitution of Colorado does not imperatively require local aldermanic representation in towns or cities. Valverde v. Shattuck, 19 Colo., 104; 34 Pac. Rep., 947; 41 Am. St. Rep., 208.

Massachusetts—In Massachusetts the mayor, aldermen and common council possess all powers of the city as a municipal corporation, except those specially reserved by charter to be exercised by the people. The body may accept a charter. Central Bridge Corporation v. Lowell, 15 Gray (Mass.), 106, 116.

Missouri—In the City of St. Louis the governing legislative body is designated "The municipal assembly," and is composed of two houses, namely the council, elected by the electors at large, and house of delegates, elected by wards. Charter of City of St. Louis, art. III.; The Municipal Code of St. Louis (1901), p. 202 et seq. In Kansas City the common council is composed of two houses known as the upper and lower house. Charter Kansas City, art.

New Hampshire-In New Hampshire, by express statutory provision the administration of all fiscal, prudential and municipal affairs of a city, and the government thereof, are vested in the council, and all powers vested by law in towns, or in the inhabitants thereof, are exercised by the city coun-Perry v. Keene, 58 N. H., 40. These provisions are not modified by a general statute which requires the mayor and aldermen to call a general meeting of the inhabitants for any purpose not unconstitutional or otherwise illegal, when requested to do so in writing by one hundred legal voters. "And there is not sufficient ground for holding this section to be an implied qualification of the sections which transfer to city councils the power of municipal legislation and administration." Kelley v. Kennard, 60 N. H., 1, 3. Even a vote concerning the construction of a highway, passed at a meeting of the inhabitants of a city does not control the action of the city council; it is merely advisory. Ib.

Ohio—In the principal cities of Ohio the legislative body is known as the house of legislation.

Cincinnati—Under the New Municipal Code (Oct. 22, 1902) Cincinnati is entitled to 29 members in the city council, 24 elected by wards, and five at large. Zumstein v. Mullen, 67 Ohio St., 382; 66 N. E. Rep., 140.

Virginia—Kirkham v. Russell, 76 Va., 956, 958.

West Virginia — Richards v. Clarksburg, 30 W. Va., 491; 4 S. E. Rep., 774; 20 Am. & Eng. Corp. Cas., 111.

Town—In the towns of New England the legislative body is usually composed of selectmen, and in the New England cities, of aldermen. McFarland v. Gordon, 70 Vt., 455, 456; 41 Atl. Rep., 507. In Vermont a town agent may employ legal services in behalf of the town. Langdon v. Castleton, 30 Vt., 285.

Township—Under a statute conferring corporate powers in general upon "townships," the power of selecting a site for erecting a township hall thereon was held to be vested in the board of directors and not in the citizens of the

upon the mayor and council, the council alone, or the board of health, board of public works, police board, excise com-

township assembled *en masse*. State *ex rel*. v. Haynes, 72 Mo., 377, 379.

Under the Illinois system of township organization there is no board representing the corporate authorities of the town, but the electors represent themselves as a corporation. Kankakee v. K. & I. R. R. Co., 115 Ill., 88, 90; 3 N. E. Rep., 741.

Village — In villages in some states the chief officer is designated the village president. State ex rel. Shumway v. Bennett, 29 Mich., 451; 18 Am. Rep., 107; Kriseler v. Le Valley, 122 Mich., 576; 81 N. W. Rep., 580.

Aldermen and councilmen are civil officers under the constitution of Rhode Island. *In re* Newport Charter, 14 R. I., 655.

Under a charter which provides that the common council shall have power "to manage, regulate and control the property, real and personal, of the city," the propriety of demolishing and removing or repairing a municipal building is a question exclusively for such con-The fact that the question had been determined otherwise by a majority of the electors of the city upon the submission to them by action of a prior council does not take away the power. Whitney v. New Haven, 58 Conn., 450; 20 Atl. Rep., 666.

The number of councilmen, aldermen, etc., is controlled by the law applicable, its proper construction, etc. Com. v. Omensetter, 9 Phila. (Pa.), 489; Petition of Young, 11 Pa. County Ct. Rep., 209. Com. v. Hastings, 16 Pa. County Ct. Rep., 425; State v. Champlin, 16 R. I., 453; 17 Atl. Rep., 52.

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⁴ Boards of Health have power to enact sanitary ordinances having the force of laws within the districts over which their jurisdiction operates. Polinsky v. People, 73 N. Y., 65; People v. Board of Health, 33 Barb. (N. Y.), 344; Cushing v. Buffalo Board of Health, 13 N. Y. St. Rep., 783.

Where the functions of a board of health are executive and administrative, it has no power to pass resolution declaring nuisances. Marshall v. Cadwalader, 36 N. J. L., 283.

May grant permit by resolution, when. Courter v. Newark Board of Health, 54 N. J. L., 325; 23 Atl. Rep., 949.

Resolution declaring nuisance. Philadelphia v. Houseman, 2 Phila. (Pa.), 349; 14 Leg. Int. (Pa.), 316.

Notice of passage, when not required. Yonkers Board of Health v. Copcutt, 140 N. Y., 12; 35 N. E. Rep., 443.

Veto on ordinance of. In re Board of Health, 14 Pa. Co. Ct. Rep., 116.

Enforcement of "order" of board of health, to which is attached no penalty. New York Health Department v. Knoll, 70 N. Y., 530.

⁵ Boards of Public Works may pass ordinances granting franchises to lay tracks for street railways. State (West Jersey Traction Co.) v. Board of Public Works, 56 N. J. L., 431; 29 Atl. Rep., 163.

⁶ Police Board—In Boston the police board may be empowered by the legislature to regulate the use of streets in certain respects. Com. v. Plaisted, 148 Mass., 375; 19 N. E. Rep., 224.

missioners,⁷ etc.,⁸ or upon other public bodies,⁹ the authority to enact and enforce ordinances. This necessarily results from, and is incidental to, the plenary power to create municipal and other public corporations. Such ordinances may be given the force of law in like manner as ordinances duly enacted by municipal corporations proper.¹⁰

§ 91. Corporate meetings required. All of the public or corporate affairs of the municipal corporation must be transacted in substantially the manner pointed out by the law. In the representative form these matters must be done at a legal meeting of the council or governing body. Where the inhabitants themselves constitute the corporate authorities, as in the New England town, the municipal affairs must be conducted at a legal corporate meeting of such inhabitants. The fundamental principle is that the affairs of a corporate body can be transacted only at a valid corporate meeting. Its legislative and discretionary powers can be exercised only by the coming together of the members who compose it, or those who are its duly constituted representatives—the legal corporate authorities—and its purposes or will can be expressed only by acts or votes embodied in some distinct and definite The existence of the council or governing body is as a board or entity, and the members thereof can do no valid

7 EXCISE DEPARTMENT—Certain of the local police powers may be conferred by the legislature upon certain city departments, as the excise commissioners. State (Riley) v. Trenton, 51 N. J. L., 498; 18 Atl. Rep., 116; State (Paul) v. Gloucester, 50 N. J. L., 585; 15 Atl. Rep., 272; State (Hankinson) v. Trenton, 51 N. J. L., 495; 17 Atl. Rep., 1083.

⁸ Police jury may pass ordinances. Davis v. Caldwell, 28 La. Ann., 860.

^o County board of supervisors. People v. Bailhache, 52 Cal., 310.

State may create metropolitan sanitary districts. Metropolitan Board of Health v. Heister, 37 N. Y., 661.

Police districts. People v. Draper, 15 N. Y., 532.

10 Ordinances of board of health have the force of law. People ex rel. v. Court of Special Sessions Justices, 7 Hun. (14 Sup. Ct.), 214. See Sec. 12, supra.

11 A municipal corporation in legal contemplation is an entity possessing for many purposes the attributes of individuality; and in the exercise of its legitimate powers can only act by and through its agents appointed in the mode prescribed by the law of its cre-The rights of individual corporators can only be enjoyed by and through the agents constituted by law to exercise the corporate powers. "A contrary doctrine carried to its ultimate consequences would require the affirmative consent of each individual corporator to every act done by

act except as a board,¹² and such act, if legislative in character, must ordinarily be by ordinance, by-law or resolution, or something equivalent thereto.¹³

the corpcrate authorities affecting his interest before he could become bound by such act; the result of which would be to render entirely useless and nugatory the corporate government." People ex rel. v. Coon, 25 Cal., 635, 649.

¹² United States—Strong v. District of Columbia, 4 Mackey (15 D. C.), 242; 9 Am. & Eng. Corp. Cas., 568; Leavenworth County Commissioners v. Sellew, 99 U. S., 624.

Arkansas—Little Rock v. Board of Improvements, 42 Ark., 152.

California—San Luis Obispo Co. v. Hendricks, 71 Cal., 242; 11 Pac. Rep., 682; Ex parte Mirande, 73 Cal., 365; 14 Pac. Rep., 888.

Florida—Com'rs v. King, 13 Fla., 451.

Iowa—Independent School District v. Wirtner, 85 Iowa, 387; 52 N. W. Rep., 243; Hull v. Independent District, 82 Iowa, 686; 46 N. W. Rep., 1053; Athearn v. Independent District, 33 Iowa, 105.

Kentucky—Hardin County v. Louisville, etc., R. R. Co., 92 Ky., 412; 7 S. W. Rep., 860; Maddox v. Graham, 2 Metc. (Ky.), 56.

Maryland—Baltimore v. Poultney, 25 Md., 18.

Massachusetts—Coffin v. Nantucket, 5 Cush. (59 Mass.), 269; Central Bridge Co. v. Lowell, 15 Gray (Mass.), 106; Reed v. Lancaster, 152 Mass., 500; 25 N. E. Rep., 974; Butler v. Charlestown, 7 Gray (Mass.), 12; Sikes v. Hatfield, 13 Gray (Mass.), 347.

Missouri—State v. Haynes, 72 Mo., 377; Smith v. Tobener, 32 Mo. App., 601.

New Jersey—Schumm v. Seymour, 24 N. J. Eq., 143, 153; State

v. Jersey City, 35 N. J. L., 404; State v. Van Buskirk, 40 N. J. L., 463; State v. Jersey City, 25 N. J. L., 309.

New York—Delaware Co. Comrs. v. Sackrider, 35 N. Y., 154; People v. Walker, 23 Barb. (N. Y.), 304; Johnson v. Dodd, 56 N. Y., 76; People v. Superior Court, 19 Wend. (N. Y.), 68; People v. Stowell, 9 Abb. N. C. (N. Y.), 456.

North Carolina — Pegram v. Cleveland County Com'rs, 64 N. C., 557.

Ohio—McCortle v. Bates, 29 Ohio St., 419; Young v. Rushsylvania, 8 Ohio Cir. Ct. Rep., 75.

Pennsylvania—Rittenhouse's Estate, 140 Pa. St., 172, 176; 21 Atl. Rep., 254; Commonwealth v. Howard, 149 Pa., 302; 24 Atl. Rep., 308; Jefferson County v. Slagle, 66 Pa. St., 202.

Wisconsin—State v. Madison Council, 15 Wis., 30, 37; Deischel v. Maine, 81 Wis., 553; 51 N. W. Rep., 880.

County commissioners can only bind the county for legal services when acting as a board, and not severally. Cass Co. Comrs. v. Ross, 46 Ind., 404; Rankin v. Jauman (Idaho, 1895), 39 Pac. Rep., 1111; Conger v. Commissioners (Idaho, 1896), 48 Pac. Rep., 1064.

A committee chosen by a town for a particular purpose may act by agreement of the individual members separately obtained. Shea v. Milford, 145 Mass., 528; 14 N. E. Rep., 764; Haven v. Lowell, 5 Metc. (Mass.), 35.

13 Dey v. Jersey City, 19 N. J.
 Eq., 412, 416; Halsey v. Rapid
 Transit R. R. Co., 47 N. J. Eq.,
 380; 20 Atl. Rep., 859.

How the council or governing body shall be constituted, its powers and the method of executing them are usually specified in the municipal charter. The functions of the governing body are chiefly legislative, but these bodies sometimes perform administrative, ministerial and judicial duties.

§ 92. Kinds of corporate meetings stated—Notice. Corporate meetings may be (1) regular or stated, (2) special or called, and (3) adjourned. Regular meetings are usually prescribed by charter. They are sometimes provided for by ordinance, resolution or motion, under legal authority. Special or called meetings are convened by the mayor or chief executive of the corporation, the presiding officer of the corporate body, or in some other definite way, upon due notice to all of the members.¹⁴

A legal notice to all of those composing or representing the corporate body of every meeting is requisite, since it is not only the duty but the right of each member to be present and participate in the deliberations and proceedings. Thus where the law requires that the meeting be duly called and notified, omission to do this will invalidate the proceedings where the meeting is not attended by all of the members composing the body. The mere attendance of a quorum under such circumstances does not make a legal meeting, but every member has

14 A stated meeting is one appointed by the council. A special meeting is called by the mayor or three aldermen. State v. Jersey City, 25 N. J. L., 309, 311.

By statute, in Illinois the council may prescribe, by ordinance, the times and places of the meetings, and the manner in which special meetings may be called. 1 Starr & Curtis Ill. Stat., p. 685, par. 38.

CORPORATE MEETINGS AT COMMON LAW—According to the ancient English law there were two kinds of corporate meetings: One consisted of the body at large or those of them who thought proper, or were considered by their fellow freemen most proper, to attend. In legal supposition this was the com-

mon council, but in fact the common council became in almost every instance a select body in which the freemen had little or no inter-This was denominated the corporate assembly. The other was the select assembly and was composed of one or more of the governing class and of which the largest became prior to the Municipal Corporation Act of 1835 a sort of common council. Willcock. Mun. Corp., 51, 52, 62, 63; Glover, Mun. Corp., 146, 147; Rex v. Morris, 4 East, 26; Rex v. Bellringer, 4 Term Rep., 823.

By the early English law not only the nature of the organization of the local corporation under its charter largely determined the validity of its corporate meetings, a right to be present and participate in its action.¹⁵ The notice must be issued and served by the proper authority, giving the time and place of the meeting, unless held at the usual place. In ancient England the place of meeting was generally fixed, as at the guild hall; in this country, at the town or city hall. Whenever the meeting is held at an unusual place, intimation of that circumstance must be contained in the notice, to prevent fraud or surprise.¹⁶ Unless the meeting is convened for a special purpose, its object need not be specified in the notice.¹⁷ When required by law, personal notice must be given where it can be done, but where a member of a board is absent from the state and beyond reach of actual notice, such notice is not necessary, but constructive notice will do.¹⁸

If the charter or law fixes the time of the regular meetings, of course, notice is not necessary unless expressly required, as each member is charged with knowledge therefor.¹⁹ If the charter makes no provision respecting the manner in which the time for the holding of a stated meeting shall be fixed, the council may, upon mere motion, prescribe such time, notwith-standing the time for holding such meetings had been previously fixed by a formal resolution, approved by the mayor and published.²⁰ So where the charter provides that the

but prescription and usage were constantly invoked and the result was much uncertainty and confusion prior to the reforms wrought by the Municipal Corporation Act of 1835.

¹⁵ Beaver Creek v. Hastings, 52
Mich., 528; 18 N. W. Rep., 250;
State ex rel. v. Guiney, 26 Minn.,
313; 3 N. W. Rep., 977; Peay v.
Schenck, 1 Woolw. C. C. (U. S.),
175, 187.

16 Willcock, Mun. Corp., 51.

"All acts done at another than the usual place bear the stamp of contrivancy, secrecy and fraud and the court will suspect an improper motive." Glover, Mun. Corp., 152.

"The board shall not adjourn to any other place than to its regular place of meeting, except in case of great necessity or emergency." Charter San Francisco, art. II., ch. 1. § 6; Statutes and Amendments to Codes of Cal. (1899), p. 244.

17 Section 110, post.

18 Where the mayor is ex officio a member of a board he must be notified of a meeting. State ex rev. Harty v. Kirk, 46 Conn., 395, 398. As to notice at common law see Glover, Mun. Corp., 148, 151.

19 People v. Batchelor, 22 N. Y., 128, 146; Hudson County v. State, 24 N. J. L., 718; Rex v. Hill, 4 Barn & Cress., 441, 443; Gildersleeve v. Board of Education, 17 Abb. Pr. (N. Y.), 201, 208; Willcock, Mun. Corp., 42; Glover, Mun. Corp., 148.

2º State v. Kantler, 33 Minn., 69;6 Am. & Eng. Corp. Cas., 169;21N. W. Rep., 856.

council shall meet at such time and place as it, by resolution, may direct, a meeting held at any other time than that fixed for a regular meeting, under a resolution of the council, is a legal meeting if all of the members actually attended and participated in the proceedings, and it is otherwise regular, there being nothing in the charter expressly or impliedly forbidding such meeting.²¹ The charter prescribed that "stated" meetings should be held once each month. Pursuant thereto, by rule, the council appointed stated times for meetings. Here it was held such appointment continued in force in each succeeding council till duly changed.²²

§ 93. New England town meetings—Notice or warning indispensable. The rule of law is firmly established that a town may only legally act in its corporate capacity in town meeting duly notified or warned and holden. The notice or warning of the meeting cannot be legally waived even by unanimous consent.²³ Unless the meeting is legally convened, all votes

21 "The powers conferred, and the duties imposed, upon the common council were obviously with the view of their being exercised whenever occasion required, and no limitation or restriction upon its right voluntarily to meet at any time for such purpose can be inferred from the fact that it is made obligatory upon it to provide by resolution for a regular time and place of meeting, or the fact it may be convened at any time upon call of the mayor." State ex rel. Parker v. Smith, 22 Minn., 218, 222, 223.

22 North v. Cary, 4 Thomp. & C.(N. Y.), 357.

Where a council meeting might have been regularly held, in the absence of proof to the contrary, the court will presume it to have been so held. People ex rel. v. Rochester, 5 Lans. (N. Y.), 11, 15. Acts done by a corporation which presupposes the existence of other acts to make them legally operative, are presumptive proof of the latter. Bank of U. S. v. Dandridge,

12 Wheat. (U. S.), 64, 70; Nelson v. Eaton, 26 N. Y., 410, 415.

Where the charter provides that a majority "shall constitute a quorum to do business," a majority of those elected can organize and act at the first meeting, as well as at any subsequent meeting. Oakland v. Carpentier, 13 Cal., 540, 550.

²³ Connecticut — Congregational Society of Bethany v. Sperry, 10 Conn., 200.

Maine—Ford v. Clough, 8 Me., 334; 23 Am. Dec., 513; Lander v. School District, 33 Me., 239; Moor v. Newfield, 4 Me., 44.

Massachusetts — Stoughton v. Atherton, 12 Metc. (Mass.), 105; Reynolds v. New Salem, 6 Metc. (Mass.), 340; Perry v. Dover, 12 Pick. (Mass.), 206; Little v. Merrill, 10 Pick. (Mass.), 543; Hayward v. School District, 2 Cush. (Mass.), 419; Stone v. School Dist., 8 Cush. (Mass.), 592; Rand v. Wilder, 11 Cush. (Mass.), 294.

New Hampshire—Giles v. School District, 31 N. H., 304; Northwood

and acts done thereat are void.24 As stated by the Supreme Court of Vermont, the votes of a town meeting held on insufficient notice are no more binding upon the town than if the meeting had been held without notice, or had been a mere fortuitous assembling of any portion of the inhabitants of the town.25 "A town cannot make a contract, or authorize any officer or agent to make one in its behalf, except by vote in a town meeting duly notified and warned."26 There cannot be a legal town meeting unless it be originally held at the time and in the place appointed in the warrant calling the meeting, and where a meeting is called at a school house it must be understood to mean within its walls.²⁷ Where the meeting is appointed in the basement of a building, and all of the voters and officers, by unanimous consent, but without a vote, go out into the open air, and in front of the place of the meeting, where they can more conveniently vote on a proposition, and there vote without objection on the part of any person, the action is legal.28

Following the rule of the common law applied to indefinite corporate bodies, where the meeting has been duly warned and called, those who attend and participate in its proceedings, notwithstanding they may be less than a majority of all of the inhabitants legally qualified, have full power to act for and bind the town; the absence of the others is equivalent in law to their consent to any legal action.²⁹

§ 94. Sufficiency of notice or warning. The notice or warn-

v. Barrington, 9 N. H., 369; Brewster v. Hyde, 7 N. H., 206.

Vermont—Sherwin v. Bugbee, 17 Vt., 337; Hunt v. School District, 14 Vt., 300; Hunneman v. Fire District, 37 Vt., 40.

Wisconsin—Rule applied to town meetings in other states. Tuttle v. Weston, 59 Wis., 151; 17 N. W. Rep., 12; 2 Am. & Eng. Corp. Cas., 168.

24 Haines v. Readfield, 41 Me., 246; Jordan v. School District, 38 Me., 164.

²⁵ Pratt v. Swanton, 15 Vt., 147, 151.

26 Per Mr. Justice Gray, in refer-

ring to the towns of Connecticut, in Bloomfield v. Charter Oak Bank, 121 U. S., 121, 129.

²⁷ Chamberlain v. Dover, 13 Me., 466.

²⁸ Brown v. Winterport, 79 Me., 305: 9 Atl. Rep., 844.

Declaring vote, polling, etc., of town meetings—proceedings. Kimball v. Lamprey, 19 N. H., 215.

²⁹ Commonwealth v. Ipswich, 2 Pick. (Mass.), 70; Damon v. Granby, 2 Pick. (Mass.), 345, 355; First Parish v. Stearns, 21 Pick. (Mass.), 148; Williams v. Lunenburg, 21 Pick. (Mass.), 75.

ing must be issued and served by the proper authority.30 Thus where the warrant for the meeting is required to be under the hands of the selectmen, or of a majority of them, a meeting held in pursuance of a warrant signed by one selectman only, "by order of the selectmen," is void.31 where the law requires that, in order to constitute a legal town meeting for the passing of by-laws, there must have been a notification in writing, signed by the selectmen and set upon the sign post five days before the meeting, specifying such by-laws among the objects of the meeting, all by-laws passed without such previous notification are void.32 The object of the warrant is to give previous notice to the inhabitants of the subjects to be acted on, and, if this is done substantially, it is sufficient.33 The notice or warning is required to be served by posting or otherwise, returned and recorded in the corporate records as served. If it does not appear that the notices were not posted as required by law (as at three public places), usually they will be held sufficient, for, in the absence of evidence to the contrary, the presumption will be indulged that the law in this respect was followed.³⁴ The return of the warrant that the officer has "posted the within warrant according to law" is sufficient, without specifying the manner of posting.35

30 Giles v. San Bornton, 31 N. H., 304.

Power given to the body to prescribe the mode of warning its meetings does not enable it to dispense with a warning. Congregational Society of Bethany v. Sperry, 10 Conn., 200, 208.

Mandamus brought by individuals to require the calling of a special meeting of a borough denied, the court holding that such action should be instituted by and in the name of the State. Peck v. Booth, 42 Conn., 271.

31 Reynolds v. New Salem, 6 Metc. (Mass.), 340; Westminster v. Bernardston, 8 Mass., 104.

32 Hayden v. Noyes, 5 Conn., 391,
 395, 396; Willard v. Killingsworth,
 8 Conn., 247, 254.

33 Per Shaw, C. J., in Torrey v. Millbury, 21 Pick. (Mass.), 64, 68; Jones v. Andover, 9 Pick. (Mass.), 146.

34 Stoddard v. Gilmann, 22 Vt., 568, 572.

35 Rand v. Wilder, 11 Cush. (Mass.), 294.

Amendment of return of service allowed. Northwood v. Barrington, 9 N. H., 369, 376; Fossett v. Bearce, 29 Me., 523.

Record of warning of meeting. Sherwin v. Bugbee, 17 Vt., 337.

The return must be sufficient or the meeting will be illegal. State v. Williams, 25 Me., 561.

As to sufficiency of notice or warning and record of meeting, see Brownell v. Palmer, 22 Conn., 107; State v. Taff, 37 Conn., 392; Is-

§ 95. What the notice or warning must specify. The notice or warning must specify the matters to be acted on, in order that the inhabitants (whose property will be subject to be taken on execution to satisfy the obligations of the town) may know in advance what business is to be transacted at the meeting. If the subject of the vote is not specified in the notice or warning, the vote has no legal effect and binds neither the town nor the inhabitants.36 Where a meeting is held for a special purpose, ordinarily it is sufficient if the notice is so expressed that the inhabitants concerned may fairly understand the purpose for which they are to be convened.37 Hence, in order to render valid a vote of a town granting money for a particular object it is not necessary that the warrant for the meeting should state specifically that the inhabitants will be called to act on the question of granting money for that purpose, if the subject to be acted on is distinctly stated, and it is one which will be likely to require a grant of money.38

bell v. N. Y. & N. H. R. R., 25 Conn., 556; Society for Savings v. New London, 29 Conn., 174; Baldwin v. North Branford, 32 Conn., 47; N. H., M. & W. R. R. v. Chatham, 42 Conn., 465; Brooklyn Trust Co. v. Hebron, 51 Conn., 22, 29, 30; Fletcher v. Fuller, 120 U. S., 534; Avery v. Stewart, 1 Cush. (Mass.), 496.

36 "No one can rely upon a vote as giving him any rights against the town without proving a sufficient notice or warning of the meeting at which the vote was passed." Per Mr. Justice Gray, in Bloomfield v. Charter Oak Bank, 121 U. S., 121, 130.

Connecticut—Willard v. Killingworth, 8 Conn., 247, 254.

Maine—Moor v. Newfield, 4 Me., 44; Cornish v. Pease, 19 Me., 184; Lander v. Smithfield, 33 Me., 239; Drisko v. Columbia, 75 Me., 73.

Massachusetts—Stone v. Hamilton, 8 Cush. (Mass.), 592; Hay-

ward v. North Bridgewater, 2 Cush. (Mass.), 419; Little v. Merrill, 10 Pick. (Mass.), 543; Stoughton v. Atherton, 12 Met. (Mass.), 105; Rideout v. Dunstable, 1 Allen (Mass.), 232.

New Hampshire—Brewster v. Hyde, 7 N. H., 206.

Vermont—Hunt v. Norwich, 14 Vt., 300; Schoff v. Bloomfield, 8 Vt., 472.

³⁷ South School District v. Blakeslee, 13 Conn., 227.

³⁸ Per Parker, C. J., in Blackburn v. Walpole, 9 Pick. (Mass.), 97.

In Wisconsin under the general powers conferred by statute, the electors at a town meeting may vote to allow a certain sum in settlement of a claim for the support of a pauper, although no previous notice has been given that such claim will be presented or acted upon. Tuttle v. Weston, 59 Wis., 151; 2 Am. & Eng. Corp. Cas., 168.

Farther illustrations respecting the specification in the notice or warning appear from the cases in the note.³⁹

§ 96. Legal governing body—De facto councils and officers. Unless corporate acts are done by the body of officers legally authorized to act, they will be declared invalid. The offices must be filled, the council or governing body constituted and the corporate acts performed as prescribed in the law appli-

39 ILLUSTRATIVE CASES AS TO SPECIFICATION IN NOTICE OR WARRANT. A notice is sufficiently definite which states the object of the meeting to be "to see what sum of money the town will vote to raise for the support of schools, of the poor, repairing bridges and highways, for the payment of the just debts of the town, and for other legal purposes." Tucker v. Aiken, 7 N. H., 113, 125.

Under a warrant "to see if the town will make an appropriation towards purchasing a fire engine," the town may pass a vote "to raise and appropriate" a sum for that Torrey v. Millbury. object. Pick. (Mass.), 64, 68. So, under a warrant "to see if the town will determine to build a town house and raise and appropriate money for the same," a vote to build a town house will be valid. Hadsell v. Hancock, 3 Gray (Mass.), 526, So a warrant convening a meeting, to see if the town would vote to pay a number of town notes, which specifies each note and gives the name of the payee, amount and date, is sufficient. Brown v. Winterport, 79 Me., 305.

A notice "to see if the town will accept and adopt the report of the committee to alter school districts" is sufficient, to authorize the making of such alteration as the committee recommended and no other. "It would be an unwarranted construction, and in violation of all rules, to sever the last four words,

'to alter school districts,' from what precedes in the sentence, and hold that the alteration of school districts in any and every possible way was before the town for action." Per Ross, J., in Wyley v. Wilson, 44 Vt., 404, 409.

But where the annual meeting was warned, to choose town officers "and to do any other business then thought proper by said meeting," a by-law passed at such meeting to regulate the shell fisheries of the town is void, as this purpose was not specified in the warning. Hayden v. Noyes, 5 Conn., 391, 395, 396; Willard v. Killingsworth, 8 Conn., 247, 254.

Under an article in a warrant "to choose selectmen, assessors and all other officers that the law requires, or, may be thought necessary," at a legal meeting of the town a fish committee may be legally chosen. Spear v. Robinson, 29 Me., 531.

So under a warrant "to choose all such town officers as the law directs," the town may lawfully pass a vote authorizing the several school districts to choose their prudential committees. Kingsbury v. Quincy School District, 12 Met. (Mass.), 99, 104; Williams v. Lunenburg School District, Pick., 75. Article in the warrant "to choose all necessary town officers," is sufficient to authorize choice of an agent to build a road. Baker v. Shephard, 24 N. H., 208, 212, per Bell, J.

cable to the corporation.40 Thus a city organized and existing under a special charter cannot elect its officers and constitute its governing body under the provisions of the general incorporation act of the state where the officers are different and are elected at different times than provided in its special charter. As applied to the particular corporation, the offices to which the officers were elected were held not to exist de jure, for the reason that there can be no office de facto where no officer de jure is provided for.41 But where offices de jure exist they may be filled by those whose official titles are defective. Hence, where a majority of the members of a council have been unlawfully elected and the council is thus illegally constituted, it is notwithstanding competent to exercise the functions of a lawful body.42 So the vote of one ineligible to legally act as a member of the council is nevertheless valid as he is a de facto member.43

§ 97. Conflicting councils—Injunction. The Supreme Court

40 San Luis Obispo v. Hendricks, 71 Cal., 242; 11 Pac. Rep., 682.

⁴¹ Decorah v. Bullis, 25 Iowa, 12; Ex parte Snyder, 64 Mo., 58, 62; State v. O'Brian, 68 Mo., 153, 154.

To say that an officer is one *de facto* when the office itself is not created or authorized is a political solecism, having no foundation in reason nor supported in law. Per Dillon, J., Welch v. Ste, Genevieve, 1 Dillon, C. C., 130, 136.

⁴² Such body may legally elect or appoint city officers. State *ex rel*. Mitchell v. Tolan, 33 N. J. L., 195.

De facto councilmen. State ex rel. v. Gray, 23 Neb., 365; 36 N. W. Rep., 577; Magneau v. Fremont, 30 Neb., 843; 27 Am. St. Rep., 436; 9 L. R. A., 786; 47 N. W. Rep., 280; Perkins v. Fielding, 119 Mo., 149; 24 S. W. Rep., 444; 27 S. W. Rep., 1100.

De facto board of chosen freeholders. State ex rel. Bownes v. Meehan, 45 N. J. L., 189; State ex rel. Dugan v. Farrier, 47 N. J. L., 383; 1 Atl. Rep., 751. Acts of members of board of town trustees held illegal where they did not proceed to qualify as prescribed by charter. Dinwiddie v. Rushville, 37 Ind., 66.

43 In a New Jersey case an ordinance granting certain franchises to a street railway was passed by the vote of a disqualified member who had become ineligible by reason of appointment to an office in the army. The charter provided that no one of the governing body "shall accept or hold any other place of public trust or emolument within the elective franchise, nor any appointment to public office unless he shall first resign his said office, and if he shall so accept, his office shall thereupon become vacant." The validity of the ordinance was questioned on ground. Here it was held:

1. That his term not having expired, and no successor having been appointed, and as he, in good faith, continued to perform the duties of his office, he was an officer de facto.

of Pennsylvania restrained by injunction a body claiming to be the legally organized council at the instance of another body making a like claim and which proved to have the prima facie right to act for the corporation; the court saying that it was not necessary in such proceeding for the attorney general of the state to file the bill or be made a party, and that "it is right for those to whom public functions are entrusted to see that they are not usurped by others. Either of these bodies has the right to demand of the courts that it and the interest of the public, alleged to have been committed to it, shall be protected against usurpation of the others." The question of title between the conflicting bodies was not determined. It appears that the injunction was awarded on the sole ground of public necessity, as the facts appeared to the court.44 The general rule is that injunction will not lie to determine the title to a public office.45 This jurisdiction belongs exclusively to the courts of law, and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto or information in the nature of a writ of quo

- 2. That his official acts were valid so far as third persons were concerned.
- 3. That upon acceptance of the second office his *de jure* title to the first ends, and his successor may be appointed at once.
- 4. That where the former occupant refuses to vacate the office his successor will be compelled to take the necessary legal steps to oust him.
- 5. Where an action is begun the object of which is only to determine the validity of an act or thing done by an officer, and not involving his integrity or want of good faith, the officer himself is not a necessary party to the suit. Oliver v. Jersey City, 63 N. J. L., 96, 634; 42 Atl. Rep., 782; 44 Atl. Rep., 709; 48 L. R. A., 412.

Charter provided that council shall meet for organization on the first Monday of January at 10 a. m., and that all officers shall hold their respective offices until their successors shall be elected and qualified. Held, old council had no authority to hold a meeting after time named for organization of new council, except to act in case the new members failed to qualify. Fitzgerald v. Pawtucket Av. Ry. (R. I., 1902); 52 Atl. Rep., 887.

A charter providing that a majority of the members of the council shall constitute a quorum, authorizes a majority to meet and organize the first time. Oakland v. Carpentier, 13 Cal., 540.

⁴⁴ Kerr v. Trego, 47 Pa. St., 292, 296, et seq.

See comments of Judge Dillon on this case, 1 Dillon, Mun. Corp. (4th Ed.), p. 354, n. 1 to sec. 275.

⁴⁵ Updegraff v. Crans, 47 Pa. St., 103; Attorney General v. Utica Ins. Co., 2 Johns Ch. (N. Y.), 371; Demarest v. Wickham, 63 N. Y., 320.

warranto, according to the circumstances of the case and the mode of procedure established by the common law or by local statute.⁴⁶

§ 98. Presiding officer — Mayor as member. Municipal charters in this country, as formerly in England, do not always agree in the constituents of the council or governing body. Whether the mayor shall be the presiding officer, or shall be regarded as a member, depends upon the proper construction of the charter, or the law under which the corporation is organized.⁴⁷ Frequently the mayor or chief executive

46 "No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. In the courts of the several states such a power in a court of equity has been denied in many well-considered cases." Per Gray, J., in rc Sawyer, 124 U. S., 200, 212.

Equity has no jurisdiction to adjudicate the right to an office. State *ex rel.* v. Aloe, 152, Mo., 466; 54 S. W. Rep., 494.

The right to preside cannot be determined by injunction. Cochran v. McCleary, 22 Iowa, 75, 86. But held that where one undertakes to preside, without color of right, to subserve public interests, injunction may prevent. Carline v. Shallenberger, 13 Pa. County Ct. Rep., 145; 23 Pittsb. Leg., J., 386.

Injunction to restrain *de facto* mayor and aldermen from acting as such. Campbell v. Wolfender, 74 N. C., 103.

Right of incumbent of an office cannot be tried in a collateral action between third persons. Facey v. Fuller, 13 Mich., 527.

Special statutory provision. State ex inf. v. Bland, 144 Mo., 534; 46 S. W. Rep., 440.

Where the incumbent of an office holds it by color of right, though he is not an officer de jure, his

right will not be inquired into on habeas corpus. Ex parte Strahl, 16 Iowa, 369.

Quo warranto will lie to prevent officers illegally appointed or elected from performing the duties of the office. Updegraff v. Crans, 47 Pa. St., 103; People ex rel. v. Utica Ins. Co., 15 John (N. Y.), 358.

Rex v. Williams, 1 Burr., 402; Rex v. Hartford, 1 Ld. Raym., 426; Mozley v. Alston, 1 Phill., 790; Lord v. Governor, etc., 2 Phill., 739; Willcock, Mun. Corp., 456, par., 337.

Councilmen superseded by others elected under void porceedings may be restored by due process of law, by action of quo warranto brought by de jure councilmen against de facto councilmen. State ex rel. v. Gray, 23 Neb., 365, 370; 36 N. W. Rep., 577; Demarest v. Wickham, 63 N. Y., 320.

⁴⁷ Cochran v. McCleary, 22 Iowa, 75, where the observation is made by Dillon, J., that, "if it had been true that, in England mayors had, in virtue of their office a prescriptive or uniform right to preside at corporate meetings, it would not follow that they would necessarily have that right in this country." Mills v. Gleason, 11 Wis., 470.

IN ENGLAND prior to the municipal corporations act of 1835, the right of the mayor to preside de-

officer of the corporation is made the presiding officer of the council or governing body, and oftentimes he is a member of it,⁴⁸ and when such member he is to be regarded as a member

pended upon the particular charter, usages and customs. The whole matter is now regulated there by statute. Per Dillon, J., in Cochran v. McCleary, 22 Iowa, 75, 81, 83; Ex parte Mayor of Birmingham, 3 Ellis & E., 222.

AT COMMON LAW the legal head officer, although not required by the charter, must be present or the corporate assembly is incomplete. The head officer must preside, to validate the corporate acts, and such officer must be the legal officer, that is, the officer de jure. Acts done at a meeting presided over by a de facto head officer who is subsequently ousted on a writ of quo warranto will be held void. "This is a common law privilege attached to his office, that no corporate acts done in his absence is valid." Willcock, Mun. Corp., 53, 54, 55; Glover, Mun. Corp., 153, 154, 155; Rex v. Carter, Cowp., 59; Rex v. Smart, 4 Bur., 2243; Rex v. Ipswich, 2 Ld. Raym., 1237; Rex v. Thornton, 4 East., 308; Rex v. York, 5 Term Rep., 72; Rex v. Dawes, 4 Bur., 2279; Rex v. Hebden, Andr., 391.

To convene and elect a principal officer in the absence of the mayor or head officer, and without his permission, is an offense indictable at common law. The court of the King's Bench will not only compel a mayor to convene the corporation at any time when a sufficient cause is shown, by issuing the writ of mandamus, but will chastise him when his abuse of office tends to the hindrance of the administration of justice in the municipality, or is otherwise detrimental to the public interest, by allowing a crim-

inal information to be filed against him. Willcock, Mun. Corp., 53, 54; Glover on Mun. Corp., 153, 154; Rex v. Atkyns, 3 Mod., 23; Rex v. Trew, 2 Barnard, 370.

According to the doctrine of the ancient law, the presence of the mayor is not necessary at a select assembly, whether composed of one or more classes to whom a particular kind of business is delegated, unless it is expressly required. Willcock on Mun. Corp., 59; Rex v. Corry, 5 East, 379, 380; Rex v. Varlo, Cowp., 250; Rex v. Monday, Cowp., 539; Rex v. Bellringer, 4 Term Rep., 822; Rex v. Bower, 1 Barn. & C., 498.

48 Hecht v. Coale, 93 Md., 692; 49 Atl. Rep., 660; State v. Mott, 111 Wis., 19; 86 N. W. Rep., 569; Woodruff v. Stewart, 63 Ala., 206.

In Illinois the mayor is the presiding officer. 1 Starr v. Curtis Ill. Stat., p. 681, § 20. In San Francisco the mayor is the presiding officer of the board of supervisors. In his absence the board appoints a presiding officer pro tempore from its own members, who has the same right to vote as other members. Charter of San Francisco, art. II, Ch. 1, § 5; Statutes and Amend. to Codes of Cal. (1899), p. 244.

The mayor is not a member in the sense in which an alderman is. Garside v. Cohoes, 34 N. Y. St., 234; 12 N. Y. Supp., 192, 195; People v. Mount, 186 Ill., 560, 573; 58 N. E. Rep., 360; Winter v. Thristlewood, 101 Ill., 450, 452; Carrolton v. Clark, 21 Ill. App., 74; Price v. Beale, 5 Pa. County Ct. Rep., 491; Darrach v. Kenney, 12 Pa. County Ct. Rep., 391; Com. v.

for all purposes, though only voting in event of a tie.49 Under a charter providing "that the mayor, recorder and aldermen when assembled together and organized shall constitute the common council," etc., the mayor is thus made a member of the council.50 In one case the charter recited that "the mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided, and none other," and also required "a concurrence of a majority of the whole number of members elected to the council, to pass any by-law, ordinance," etc. Here it was held that an ordinance required the concurrent vote of a majority of all of the councilmen elected. Thus where the council consists of four members and two vote vea and two fail to vote, and the mayor votes yea, this is not sufficient, the court saying that "the vote of the mayor added nothing to the significance of the proceeding."51 Under substantially the same charter provisions a contrary conclusion has been reached. 52 The fact that the

Kempsmith, 13 Pa. County Ct. Rep., 667; Zane v. Rosenberry, 153 Pa. St., 38; 25 Atl. Rep., 1086; 32 Wkly. Notes Cases, 73; 12 Pa. County Ct. Rep., 382.

"In some cases there is a separate council which is only one of the parts of the legislature, and requiring the approval of another board, or of the mayor, acting separately, as the governor does, to complete their action. But most of our cities in their earlier stages, if not permanently, have had a council where the mayor sits in person and over whose action he has no veto. And in all such cases he has been deemed a member as clearly as the aldermen." Campbell, C. J., in People ex rel. v. Harshaw, 60 Mich., 200, 202, 26 N. W. Rep., 879. The minutes need not affirmatively recite the mayor's presence at the council meeting. Aurora Water Co. v. Aurora, 129 Mo., 540, 578; 31 S. W. Rep., 946.

49 Griffin v. Messenger, 114 Iowa, 99; 86 N. W. Rep., 219; People v. Batchelor, 22 N. Y., 128.

50 People ex rel. v. Harshaw, 60 Mich., 200; 26 N. W. L. Rep., 879. Under a charter provision "that the intendent of police shall have a seat in the board of commissioners, and when present shall preside therein; in his absence the board shall appoint a chairman pro tempore," held that the intendant is thus constituted a member. Raleigh v. Sorrell, 1 Jones (46 N. C.), 49.

51 State ex rel. v. Gray, 23 Neb.,365, 369; 36 N. W. Rep., 577.

52 The charter provisions were: "The mayor shall preside at all meetings of the city council but shall not vote except in case of a tie, when he shall give the casting vote." "The concurrence of a majority of all the members in the city council shall be necessary to the passage of any ordinance." Here it was held that the mayor is constituted a member of the council, and as such is entitled to vote in case of a tie on the question of the passage of an ordinance. Carrollton v. Clark, 21 Ill. App., 74.

mayor is required to approve certain ordinances before they take effect does not make him a member of the governing body.⁵³

In some instances the council or governing body elects its own presiding officer.⁵⁴ In the absence of express provision a majority vote of a legal quorum will be sufficient to elect.⁵⁵ Where the body has the power to choose its own presiding officer from its own members, the office is held at the will and authority of a majority of the members, and hence the body has the inherent power to remove such officer at any time, unless prohibited by some express constitutional or statutory provision.⁵⁶

The presiding officer is not entitled to vote by virtue of his office, but of course if he is a member of the body he may vote as such member. He may also vote the second time in case of a tie if the charter confers this privilege.⁵⁷

The ordinary powers of a corporation do not vest until the body is organized by the selection of a presiding officer. But acquiescence of the members in the presidency of one who has color of right—a *de facto* officer—is tantamount to electing him *pro hac vice*, and so the actual organization is complete.⁵⁸

58 Jacobs v. San Francisco, 100
 Cal., 121; 34 Pac. Rep., 630.

54 Cochran v. McCleary, 22 Iowa, 75, 81; Achley's Case, 4 Abb. Pr. (N. Yr), 35; Commonwealth v. Kepner, 10 Phila. (Pa.), 510.

Where a board of aldermen had power to elect its own presiding officer and the power of removal is vested in the mayor and aldermen, an act removing a police officer by the board is not invalid because the mayor did not preside. Lowrey v. Central Falls, 23 R. I., 354; 50 Atl. Rep., 639.

Election and term of presiding officer under particular provisions. People v. Strack, 1 Hun. (N. Y.), 96; 3 Thomp. & C., 165; Armatage v. Fisher, 74 Hun. (N. Y.), 167; Com. v. Angle, 14 Pa. County Ct. Rep., 538,

55 State ex rel. v. Farr, 47 N. J. L., 208. 56 State ex rel. Fox. v. Alt., 26 Mo. App., 673, 675, 676; State ex rel. v. Kiichli, 53 Minn., 147; 54 N. W. Rep., 1069; 19 L. R. A., 779, citing Cushing's Law and Practice of Legislative Assemblies, secs. 294 to 299, and In re Speakership of the House of Representatives, 15 Colo., 520; 25 Pac. Rep., 707; 11 L. R. A., 241.

57 Carleton v. People, 10 Mich., 250; Launtz v. People, 113 Ill., 137; 55 Am. Rep., 405; Carrolton v. Clark, 21 Ill. App., 74; Carroll v. Wall, 35 Kans., 36; 10 Pac. Rep., 1; Hildreth v. McIntyre, 1 J. J. Marsh. (Ky.), 206; People v. White, 24 Wend. (N. Y.), 520; Rex v. Westwood, 4 Barn. & Cress., 799; Parry v. Berry, Comyns., 269; Rex v. Croke, Cowp., 26; Green v. Durham, 1 Burr., 131; Rex v. Head, 4 Burr., 2513.

58 Dugan v. Farier, 47 N. J. L.,383, 385; 1 Atl. Rep., 751,

§ 99. Signing of bills by presiding officer. Some charters provide that before a bill shall become an ordinance it shall be signed by the presiding officer of the council, or, where the legislative department consists of two branches, by the presiding officer of each house. Before the signature is affixed, the bill is read at length, and if no objections are made the presiding officer in the presence of the house in open session signs it and the fact is noted in the record. Substantially the same provision exists in the constitutions of most of the states. The mere signature of the presiding officer must not be confounded with the approval of the legislation on the part of the mayor which is frequently required. This subject is considered in subsequent sections. 60

An entry that the presiding officer signed the bill in open session is sufficient.⁶¹ If no objections are noted in the journal, the presumption will be indulged that all provisions were observed.⁶² Where a bill has passed the body in accordance with charter provisions, the presiding officer must sign it, if no objections are made and sustained in the mode specified in the charter. The mere physical act of signing is simply ministerial and not an exercise of legislative discretion, and mandamus will lie to compel its performance. To hold other-

Where a city charter provided that the mayor should be ex officio a member of the board of railroad commissioners and preside at its meetings when present, but should have no vote unless there be a tie, it was held that it was necessary to the legality of a meeting of the board that the mayor should be notified of the meeting, and therefore, that an officer appointed by the board at a meeting of which the mayor was not notified was not legally appointed, although there was a majority of the votes of the members in his favor, making a case in which the mayor would have no vote. State ex rel. Harty v. Kirk, 46 Conn., 395.

One not a member of a board cannot preside and declare the vote. State ex rel. Harty v. Kirk, 46 Conn., 395.

President is "absent" when he vacates his seat, and refuses to act, and a president pro tempore may be chosen to preside, though the regular president remains in the room. Keith v. Covington, 22 Ky. L. Rep., 1414; 60 S. W. Rep., 709.

⁵⁰ Charter St. Louis, Mo., art. III., § 22; The Municipal Code of St. Louis, p. 207; 2 R. S. Mo. (1899), p. 2483, § 22.

60 & 149, post.

61 Heman Construction Co. v. Loevy, 64 Mo. App., 430.

⁶² Barber Asphalt Paving Co. v.
Hunt, 100 Mo., 22, 26; 13 S. W.
Rep., 98; State ex rel. v. Mead, 71
Mo., 266; State ex rel. McCaffery
v. Mason, 155 Mo., 486; 55 S. W.
Rep., 636.

wise would be practically to invest the presiding officer with a power of veto upon the legislation of the council, not granted in the charter, or, in effect, reduce the membership of the body to one, namely, the presiding officer.⁶³

§ 100. When mayor's approval of proceedings necessary. The ancient common law doctrine that the head officer or mayor is an integral part of the corporation, and hence all corporate acts done in his absence, unless otherwise provided in the charter, are invalid, has never been applied to the office of mayor in this country.64 Here the powers and duties of the mayor depend almost entirely upon the proper construction of the charter, and the ordinances or by-laws and municipal regulations passed in pursuance of such authority. As pointed out by the Supreme Court of Indiana, properly and primarily the powers and duties of the mayor are executive and administrative and not judicial or legislative; but other powers may be, and often are, conferred upon him.65 Whether the mayor's signature is essential to the validity of the proceedings depends upon the charter, but unless it is made essential it has generally been held merely directory. Charter provisions requiring ordinances to be recorded and the records signed by the presiding officer, mayor, recorder or clerk are generally held directory. This is regarded as a mere ministerial duty, and hence its omission will not invalidate the proceedings.66

63 State ex rel. v. Meier, 143 Mo., 439, 447, 448; 45 S. W. Rep., 306, affirming 72 Mo. App., 618. Although this case appears entirely sound it is criticised in a later decision by the same court and perhaps overruled. Albright v. Fisher, 164 Mo., 56; 64 S. W. Rep., 106, with two judges dissenting. Compare Ex parte Echols, 39 Ala., 698; State ex rel. v. Stone, 120 Mo., 428; 25 S. W. Rep., 376; State ex rel. v. Bolt, 151 Mo., 362; 52 S. W. Rep., 262.

Where a reeve of a township (Canada) refuses to sign, and put the seal on a by-law duly passed at a council meeting at which he

is presiding he may be directed to leave the chair, and the deputy-reeve may be directed to preside and sign and seal the by-law. Preston and Manvers, 21 U. C. Q. B., 626.

Ordinance held valid although not signed by the presiding officer as required by charter. Saleno v. Neosho, 127 Mo., 627; 48 Am. St. Rep., 653; 27 L. R. A., 769; 30 S. W. Rep., 190.

641 Dillon, Mun. Corp. (4th Ed.), 271; Welch v. Ste. Genevieve, 1 Dillon C. C., 130.

65 Martindale v. Palmer, 52 Ind., 411

66 Stevenson v. Bay City, 26

§ 101. Mayor's approval must be in writing. The approval of the mayor must be in writing. It will not do to leave the validity to depend upon the uncertainty of parol evidence.67 The Supreme Court of Connecticut held void the practice of treating votes of the council as approved unless disapproved. In this case the mayor testified that he was in favor of the resolution in question and would have approved it in writing had he deemed it necessary, but this was held immaterial, the court observing that the word "approve" means more than expressed mental acquiescence of the mayor in the propriety of what has been done; "it means that the officer in his official capacity as the guardian of the interest of the community, having in view its welfare, and not his personal wish or advantage, shall consider the proposed legislation and determine that it is proper, and make that fact known to all men with absolute certainty, by some visible, unmistakable and enduring mark, to-wit, by written declaration attested by his signature. It is not enough that in the future when the question is made, Is such an act of * * * the common council binding upon the * * * municipality, that it should depend for decision on the memory and testimony of an officer as to what was his unexpressed thought, at a former time, concerning it. Such uncertainty would be unendurable, and therefore we must assume it to be outside of the meaning of any constitution or law."68

Mich., 44; Conboy v. Iowa City, 2 Iowa, 90; Blanchard v. Bissell, 11 Ohio St., 96, 103; Opelousas v. Andrus, 37 La. Ann., 699.

Minutes of council need not be signed by the clerk who records them unless so required by charter. State ex rel. v. Badger, 90 Mo. App., 183, 188; Brophy v. Hyatt, 10 Colo., 223; 15 Pac. Rep., 399.

Where the charter provides that "all by-laws and ordinances shall within a reasonable time after their passage, be recorded in a book kept for that purpose, and shall be signed by the presiding officer of the city, and attested by the clerk," and the mayor is the presiding officer, the signature of

the mayor is not essential to the validity of an ordinance properly passed by the corporation, however necessary it may be to the authentication of an ordinance in its book of records. Martindale v. Palmer, 52 Ind., 411, 414.

67 "Most mischievous results might follow from the adoption of a contrary rule; large powers are entrusted to these municipal corporations, powers liable to abuse, and often greatly abused and stringent rules should be applied to their proceedings." State v. Newark, 25 N. J. L., 399, 408; *In re* Standiford, 5 Mackey, (16 D. C.), 549.

68 Per Pardee, J., in New York& N. E. R. Co. v. Waterbury, 55

§ 102. Casting vote by presiding officer. Where the presiding officer or mayor is a member of the council or governing body, unless expressly forbidden by law, it is generally held that he may not only vote on all questions as a constituent member, but where the charter gives him a casting vote in event of a tie he may vote the second time. 69 The Vice-President of the United States, not being a member of the Senate, as presiding officer of the Senate has no vote unless the vote be equally divided.⁷⁰ The same rule generally applies to the lieutenant governors of the various states who are the presiding officers of the several state senates. But the speaker of the National House of Representatives, and also the speakers of the houses of representatives of the several state legislatures, have a vote as a member of the body over which they preside, and also, where the law so provides, a second or casting vote in event of equal division.

Here, as in other proceedings of the council or legislative body, the casting vote must be given in such a way as to indicate clearly the intention of the presiding officer. Where no mandatory charter provision prescribing the form in which it shall be cast exists, any form clearly indicating the will of the mayor will suffice. Thus where the votes are equally di-

Conn., 19, 23, 24; 10 Atl. Rep., 162.

69 Whitney v. Hudson, 69 Mich.,
189; 37 N. W. Rep., 184; 30 Am.
& Eng. Corp. Cas., 453, n.

A statute relating to religious corporations required the rector to preside at every meeting of the board of trustees, "and have the casting vote." Held that the term "casting vote" is to be construed as authorizing the chairman, after having first voted with the rest, upon a tie occurring, to give a second vote. Under the law the chairman was made a member of the body corporate. The statute "first vests the power of election in a body of which the chairman is a constituent member of a right to vote. It then contains another grant of power to the presiding officer, virtute officii, in the words, 'he shall have the casting vote.' What is the legal effect of the latter grant? By the common law, a casting vote sometimes signifies the single vote of a person who never votes; but in the case of an equality, sometimes the double vote of a person who first votes with the rest, and then upon an equality, creates a majority by giving a second vote. 1 Bl. Com., 181, n., 478, n." People ex rel. v. Rector, etc., 48 Barb. (N. Y.), 603, 606.

Where the mayor is not a member he cannot vote to make a tie, and then give the casting vote. Bousquet v. State, 78 Miss., 478; 29 So. Rep., 399.

70 U. S. Constitution, Art. 1, Sec. 3.

vided, a declaration by the presiding officer that a motion or resolution carried has been held to be a casting vote.⁷¹ Likewise if the presiding officer declares the motion or resolution as lost he will be deemed to have given the casting vote.⁷²

QUORUM AND MAJORITY.

§ 103. **Quorum defined.** The quorum of a body may be defined to be that number of the body which when legally assembled in their proper place will enable them to transact their proper business, or, in other words, that number that makes a lawful body and gives them power to pass a law or ordinance or do any other valid corporate act.⁷³

71 Launtz v. People, 113 Ill., 137; Rushville Gas Co. v. Rushville, 121 Ind., 206; 6 L. R. A., 315; 23 N. E. Rep., 72; 16 Am. St. Rep., 388; Small v. Orne, 79 Me., 78, 81; 8 Atl. Rep., 152. S. P. State v. Armstrong, 54 Minn., 457; 56 N. W. Rep., 97.

When not, see Hornung v. State, 116 Ind., 458; 19 N. E. Rep., 151; Lawrence v. Ingersoll, 88 Tenn., 52; 12 S. W. Rep., 422; 17 Am. St. Rep., 870; 6 L. R. A., 308.

⁷² People *ex rel.* v. Rector, etc., 48 Barb. (N. Y.), 603, 607.

Mayor to cast vote in event of tie. Wooster v. Mullins, 64 Conn., 340; 30 Atl. Rep., 144; 25 L. R. A., 694; Gostin v. Brooks, 89 Ga., 244; 15 S. E. Rep., 361; Carrollton v. Clark, 21 Ill. App., 74.

Mayor can only vote in case of tie. Reynolds v. Baldwin, 1 La. Ann., 162; Brown v. Foster, 88 Me., 49; 33 Atl. Rep., 662; 31 L. R. A., 116; Lake Shore & M. S. R. Co. v. Dunkirk, 65 Hun. (N. Y.), 494, affirmed 143 N. Y., 660; 39 N. E. Rep., 21.

When president of council cannot vote even in case of tie, see People v. Bresler, 171 N. Y., 302; 63 N. E. Rep., 1093.

In the election of officers the casting vote may be given only when there is an equal division of votes between the candidates. It

cannot be given to make a majority in favor of one candidate when the other votes are scattered among other candidates. State v. Mott, 111 Wis., 19; 86 N. W. Rep., 569. Where three vote yea, two do not vote and one votes for another. the latter three being recorded as voting no, and the mayor declares a tie, and casts his vote with the three yea votes, there is no election. State ex rel. v. Alexander. 107 Iowa, 177; 77 N. W. Rep., 841. Where there are four votes for and four votes against, the mayor may give the casting vote. Court v. Beam (Oregon, 1902), 69 Pac. Rep., 990. Casting vote in deciding election. State ex rel v. Kramer, 150 Mo., 89; 51 S. W. Rep., 716; 47 L. R. A., 551.

Casting vote by mayor to confirm his own appointee. He may—State ex rel. v. Pinkerman, 63 Conn., 176, 191; 28 Atl. Rep., 110; Hecht v. Coale, 93 Md., 692; 49 Atl. Rep., 660; State ex rel. v. Yates, 19 Mont., 239; 37 L. R. A., 205; 47 Pac. Rep., 1004; Carroll v. Wall, 35 Kan., 36; 10 Pac. Rep., 1. Contra. State ex rel. v. Whitehead, 67 N. J. L., 405; 51 Atl. Rep., 472.

73 Heiskell v. Mayor of Baltimore, 65 Md., 125, 149; 4 Atl. Rep., 116

A QUORUM is such a number of

§ 104. Quorum and majority at common law. At common law, in corporations consisting of an indefinite number, a major part of those who are existing at the time, when legally convened, are competent to act for the corporation. This rule is applicable to New England towns.⁷⁴ But when the body is definite there must be a major part of the whole number of members composing it, and not merely a major part of its existing members. When such body is legally assembled a majority thereof may do valid acts for the corporation.⁷⁵

members of a body as is competent to transact business in the absence of the other members. State v. Wilkesville Tp., 20 Ohio St., 288.

A word used to denote a certain number of persons whose presence is requisite at meetings of public or private bodies for the transaction of business. Burrill's Law Dict., tit. "Quorum;" Century Dict. & Cyc., tit. "Quorum."

Origin-The term arose from the Latin words, Quorum aliquem vestrum * * * unum esse volumus (of whom we wish some one of you to be one), which were used in the commission formerly issued to justices of the peace in England, by which commission it was directed that no business of certain kinds should be done without the presence of one or more of certain justices specially designated. 1 Bl. Com., 351; Burrill's Law Dictionary, title "Quorum;" Century Dict. & Cyc., tit. "Quorum."

74 Damon v. Granby, 2 Pick. (Mass.), 345, 355; Com. v. Ipswich, 2 Pick. (Mass.), 70; Williams v. Luenburg, 21 Pick. (Mass.), 75; First Parish v. Stearns, 21 Pick. (Mass.), 148.

75 English — Rex v. Varlow, Cowp., 250; Rex v. Monday, Cowp., 530; Rex v. Bellringer, 4 Term Rep., 822; Gosling v. Veley, 7 Q. B., 406; New Haven Local Board v. School Board, 30 Ch. Div., 350; Rex v. Gaborian, 11 East., 87, note; Cotton v. Davis, 1 Strange, 53; Cortis v. Kent Waterworks, 7 Barn & C., 314; Blackerr v. Blizard, 9 Barn & C., 851; King v. Miller, 6 Durnf. & East (6 Term Rep.), 268, 278; Rex v. Bower, 1 Barn & Cress., 492; King v. Greet, 8 Barn & Cress., 363; Rex v. Devonshire, 1 Barn & Cress., 609; Rex v. Headley, 7 Barn & Cress., 496.

United States—St. Joseph Tp. v. Rogers, 16 Wall. (U. S.), 644.

California—Smith v. Los Angeles I., etc., Assn., 78 Cal., 289; 12 Am. St. Rep., 53; 20 Pac. Rep., 677.

Iowa—Buell v. Buckingham, 16 Iowa, 284; 85 Am. Dec., 516.

Louisiana—Warnock v. Lafayette, 4 La. Ann., 419.

Maine—Cram v. Bangor House, 12 Me., 354.

Massachusetts—Sargent v. Webster, 13 Metc. (Mass.), 497; First Parish v. Stearns, 21 Pick. (Mass.), 148.

Michigan—Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.), 124; 43 Am. Dec., 457; Ten Eyck v. Pontiac R. R., etc., Co., 74 Mich., 226; 16 Am. St. Rep., 633; 41 N. W. Rep., 905.

Missouri — Columbia Bottom Levee Co. v. Meier, 39 Mo., 53; State v. Binder, 38 Mo., 450.

§ 105. Quorum and majority of definite body. Ordinarily municipal charters specify the number of votes required to constitute legal action of the council or governing body in any given case. The enacting ordinances or resolutions of a permanent character a majority of the constituent members of the body is generally required, but in passing resolutions or motions of a temporary or mere ministerial nature a majority vote of a legal quorum is usually sufficient.⁷⁷ Following the rule of the common law, in the absence of charter or statutory provision applicable, a majority of the governing body of the corporation, as the board of directors, the board of aldermen, the council, etc., consisting of a definite number, when duly met, constitute a quorum for the transaction of business, and the vote of a majority of those present (there being a quorum) is all that is requisite for the adoption or passage of an ordinance or by-law or motion, or the doing of any other act which the body has power to do.78 Where the law is silent

New Hampshire—Despatch Line v. Bellamy Mfg. Co., 12 N. H., 205; 37 Am. Dec., 203.

New Jersey—Barnert v. Paterson, 48 N. J. L., 395; 6 Atl. Rep., 15; Cadmus v. Farr, 47 N. J. L., 208; McDermott v. Miller, 45 N. J. L., 251.

New York—Madison Ave. Baptist Church v. Baptist Church, 5 Robt. (N. Y.), 649; Field v. Field, 9 Wend. (N. Y.), 394; Ex parte Willcocks, 7 Cow. (N. Y.), 402; 17 Am. Dec., 525.

Pennsylvania — Craig v. First Presbyterian Church, 88 Pa. St., 42; 32 Am. Rep., 417.

South Carolina—State v. Deliesseline, 1 McCord (S. C.), 52.

Utah—Leavitt v. Oxford, etc., Silver Min. Co., 3 Utah, 265; 4 Am. & Eng. Corp. Cas., 234.

Wisconsin—Walker v. Rogan, 1 Wis., 597, 614.

This rule of the common law has often been declared by statute. Horton v. Garrison, 23 Barb. (N. Y.), 176; People ex rel. v. Rector, etc., 48 Barb. (N. Y.), 603, 606.

⁷⁶ Outwater v. Borough of Carlstadt, 66 N. J. L., 510; 49 Atl. Rep., 533.

77 Acts done by less than a legal quorum will be held void. State
v. Wilkesville, 20 Ohio St., 288;
Logansport v. Legg, 20 Ind., 315;
Price v. R. R., 13 Ind., 58;
Ferguson v. Crittenden Co., 6 Ark., 479.

When *de facto* officer may be created by less than quorum, see Dingwall v. Detroit, 82 Mich., 568; 46 N. W. Rep., 938.

Presumption respecting quorum. Insurance Co. v. Sortwell, 8 Allen (Mass.), 217, which was a case relating to a private corporation.

78 Connecticut — Williams v. Brace, 5 Conn., 190.

Iowa—Buell v. Buckingham, 16 Iowa, 284.

Kentucky—Covington v. Boyle, 6 Bush. (Ky.), 204.

Maryland—Zeiler v. Central Ry. Co., 84 Md., 304; 35 Atl. Rep., 932. Massachusetts—Dartmouth v. Commissioners, 153 Mass., 12; 26 on the subject the common law rule will prevail and cannot be changed by the council, as by fixing the quorum necessary for the transaction of its business at two-thirds of the members elected.⁷⁹ In determining a legal quorum, if the mayor is a member of the body, of course he is to be counted.80 But if he is not a member he is not to be counted.81 Ordinarily the whole membership of the body is to be counted. Thus where the seat of a member becomes vacant by resignation, or by removal of an alderman from the ward for which elected, it is error merely to count the remaining members in making up the quorum.82 So where the charter provided that a majority of those elected should constitute a quorum, and eight members were elected of whom one was disqualified, it was held that five eligible members were indispensable to form a quorum.83 In the absence of organic provision to the con-

N. E. Rep., 425; Sargent v. Webster, 13 Met. (Mass.), 497; First Parish v. Stearns, 21 Pick. (Mass.), 148.

Missouri—Columbia, etc., Co. v. Meier, 39 Mo., 53.

New Jersey—Barnert v. Paterson, 48 N. J. L., 395, 400; 6 Atl. Rep., 15; Wells v. Rahway River Co., 19 N. J. Eq. (4 C. E. Green), 402.

New York—Dawes v. N. R. Ins. Co., 7 Cowen (N. Y.), 462, 464.
Ohio—State v. Green, 37 Ohio

Ohio—State v. Green, 37 Ohio St., 227.

Rhode Island—Lockwood v. Mechanic's Nat. Bk., 9 R. I., 308.

South Carolina—State v. Deliesseline, 1 McCord (S. C.), 52, 62,

Virginia—Booker v. Young, 12 Gratt. (Va.), 303, 305.

A majority may assemble, organize and act. Oakland v. Carpentier, 13 Cal., 540.

"In all matters of public concern, the voice of the majority must govern." Per Duncan, J., in McCready v. Guardians, 9 Serg & R. (Pa.), 94, 99.

⁷⁰ Heiskell v. Baltimore, 65 Md., 125; 4 Atl. Rep., 116; 57 Am. Rep.,

308; 12 Am. & Eng. Corp. Cas., 347; Barnert v. Paterson, 48 N. J. L., 395; 6 Atl. Rep., 15; Coles v. Williamsburg, 10 Wend. (N. Y.), 659; Blackett v. Blizard, 9 Barn. & Cress., 851.

80 Griffin v. Messenger, 114 Iowa,99; 86 N. W. Rep., 219.

81 Atty. Gen'l v. Shepard, 62 N.
H., 383; 13 Am. St. Rep., 576;
Somerset v. Smith, 20 Ky. L. Rep.,
1488; 49 S. W. Rep., 456;
State v.
Porter, 113 Ind., 79; 14 N. E. Rep.,
883.

s2 Pimental v. San Francisco, 21 Cal., 351, 362; McCracken v. San Francisco, 16 Cal., 591; San Francisco v. Hazen, 5 Cal., 169; State v. Orr, 61 Ohio St., 384; 56 N. E. Rep., 14.

As to what constitutes a quorum, see note to Lawrence v. Ingersoll, 6 L. R. A., 308; Smith v. Proctor (N. Y., 1891), 14 L. R. A., 403; State v. Vanosdal, 131 Ind., 388; 31 N. E. Rep., 79; 15 L. R. A., 832. Particular case, Bybee v. Smith, 22 Ky. Law Rep., 467, 1684; 61 S. W. Rep., 15.

83 Saterlee v. San Francisco, 23 Cal., 314. trary, members present though not voting may be counted to constitute the quorum.⁸⁴ The Supreme Court of the United States has held this rule applicable to the National House of Representatives.⁸⁵

While it is undoubtedly true that no legislative body can act legally without the presence of a quorum, a less number than a quorum have the power to adjourn.⁸⁶

§ 106. Same—When definite vote required. The law governing the body often provides that certain acts may be done

s4 State ex rel. v. Green, 37 Ohio St., 227, 234; Launtz v. People ex rel., 113 Ill., 137, 142; Booker v. Young, 12 Gratt. (Va.), 303, 307; State ex rel. v. Yates, 19 Mont., 239; 47 Pac. Rep., 1004; 37 L. R. A., 205; Rushville Gas Co. v. Rushville, 121 Ind., 206, 209; 23 N. E. Rep., 72; 16 Am. St. Rep., 388; 6 L. R. A., 315; Atty. Gen. v. Shepard, 62 N. H., 383; 13 Am. St. Rep., 576.

ss In February, 1890, the rule was adopted by the House, providing that, members present and not voting should be counted in determining a quorum. An act was passed by a majority vote of the members present, the quorum being counted in accordance with the rule. The validity of the act was questioned. Mr. Justice Brewer in delivering the opinion of the court observed: "All that the Constitution requires is the presence of a majority, and when that majority are present the power of the house arises.

"But how shall the presence of a majority be determined? The constitution has prescribed no method of making this determination, and it is, therefore, within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of

members between tellers, and their count as the sole test: or the count of the speaker or the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact. and as there is no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the house may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question; and all that that rule attempts to do is to prescribe a method for ascertaining the presence of a majority and thus establish the fact that the house is in a condition to transact business. As appears from the journal, at the time this bill passed the house there was present a majority, a quorum, and the house was authorized to transact any and all business." U. S. v. Ballin, 144 U. S., 1.

Where majority present refrain from voting, act held void. Gosling v. Veley, 4 H. of L. Cas., 679, 740.

Majority and casting vote. 6 L. R. A., 308, note.

86 Smith v. Law, 21 N. Y., 296;
Kimball v. Marshall, 44 N. H.,
465; 1 Starr & Curtis Ill. Stat., p.
685, par. 37.

only by a majority of the members appointed or elected to the body. Under such provisions it is apparent that the acts specified may not be done legally by a bare majority of a quorum.⁸⁷ In the enactment of certain ordinances, as for the sale of corporate property, or for the creation of offices and positions, or improvement ordinances where the improvements are to be paid for by special taxation, especially in event of remonstrance or protest on the part of the property owners, or where the improvement ordinance does not originate on petition of the property owners, charters often require a two-thirds or three-fourths vote of the entire membership of the body. Of course, the vote of a less number than specified is insufficient, and the record of the proceedings must show that the measure received the vote prescribed.⁸⁸ Where any particular act is required to be done by a specified vote, the

87 Edgerly v. Emerson, 23 N. H., 555; 55 Am. Dec., 207; Pimental v. San Francisco, 21 Cal., 351; McCracken v. San Francisco, 16 Cal., 591; State v. Dickie, 47 Iowa, 629.

A resolution purporting to fix the salary of an official, held to be a resolution for the appropriation of money under a particular charter requiring such resolution to be passed by a majority vote. Fournier v. West Bay City, 94 Mich., 463; 54 N. W. Rep., 277.

ss Illinois—Carrollton v. -Clark, 21 Ill. App., 74; Schofield v. Hudson, 56 Ill. App., 191; People v. Maxton, 38 Ill. App., 152; Lindsay v. Chicago, 115 Ill., 120; 3 N. E. Rep., 443; Chicago Dock Co. v. Garrity, 115 Ill., 155; 3 N. E. Rep., 448; Belknap v. Miller, 52 Ill. App., 617; Rich v. Chicago, 59 Ill., 286; Barr v. Auburn, 89 Ill., 361.

Indiana—Moberry v. Jeffersonville, 38 Ind., 198; Pittsburg, etc., R. R. Co. v. Crown Point, 150 Ind., 536; 50 N. E. Rep., 741; Brookbank v. Jeffersonville, 41 Ind., 406; Rushville Gas Co. v. Rushville, 121 Ind., 206; 23 N. E. Rep., 72; 16 Am. St. Rep., 388; Logansport v.

Legg, 20 Ind., 315; Fralich v. Barlow, 25 Ind. App., 383.

Iowa—Horner v. Rowley, 51 Iowa, 620; 2 N. W. Rep., 436.

Kentucky—Lexington v. Headley, 5 Bush. (Ky.), 508; Louisville v. Hyatt, 2 B. Mon. (Ky.), 177; 36 Am. Dec., 594.

Michigan—Whitney v. Hudson, 69 Mich., 189; 30 Am. & Eng. Corp. Cas., 453; 37 N. W. Rep., 184; Tennant v. Crocker, 85 Mich., 328; 48 N. W. Rep., 577; Fournier v. West Bay City, 94 Mich., 463; 54 N. W. Rep. 277.

Minnesota—State v. Priester, 43 Minn., 373; 45 N. W. Rep., 712.

New Jersey—Mueller v. Egg Harbor City, 55 N. J. L., 245; 26 Atl., Rep., 89; Clark v. Elizabeth, 61 N. J. L., 565; 40 Atl. Rep., 616, 737.

Ohio—Resolution awarding a contract is not of a "general or permanent nature," and therefore does not require a two-thirds vote. Cincinnati v. Bickett, 26 Ohio St., 49

Washington—Cline v. Seattle, 13 Wash., 444; 43 Pac. Rep., 367.

question has often arisen whether such provision means a majority or two-thirds or three-fourths of the whole number of members composing the body, or whether it means a majority or two-thirds or three-fourths of a legal quorum. The rule as applied to state legislatures is generally held to be that proportion of votes of those constituting the quorum to do business. Thus where the constitution requires the act to receive "the vote of two-thirds of each house," it is held to be two-thirds of the members present, there being a quorum.89 Adopting such construction, where the power of amotion was conferred upon a city council to be exercised "by a vote of two-thirds of that body," two-thirds of a legal quorum, and not two-thirds of the whole number of members composing the council, was considered to be meant.90 "unanimous consent of the council," as used in a council rule, was construed in like manner.91 But where the act must be done by a distinct proportion "of all the members elected," or "of all of the members of the council," it is manifest that the law should be construed by counting the whole membership of the body in question.92 Where vacancies occur the whole num-

89 State v. McBride, 4 Mo., 303, 208; Southworth v. P. & J. R. R., 2 Mich., 287; Whitney v. Hudson, 69 Mich., 189; 37 N. W. Rep., 184; 30 Am. & Eng. Corp. Cas., 453, n.; Green v. Weller, 32 Miss., 650, 700; Morton v. Comptroller Gen., 4 S. C., 430, 463.

90 Warnock v. Lafayette, 4 La. Ann., 419.

A charter provision requiring a two-thirds vote of the city council to do a specified act, held to import a two-thirds vote of a quorum present and voting. English v. State, 7 Tex. App., 171.

91 Atkins v. Phillips, 26 Fla.,
281, 296; 8 So. Rep., 429; Zeiler v.
Central R. R. Co., 84 Md., 304; 35
Atl. Rep., 932.

92 Florida—Atkins v. Phillips, 26 Fla., 281, 298; 8 So. Rep., 429.

Nebraska—State ex rel. v. Gray, 23 Neb., 365, 369; 36 N. W. Rep., 577.

New Hampshire—Atty. Gen. v. Shepard, 63 N. H., 383; 13 Am. St. Rep., 576.

New Jersey—State v. Bayonne, 54 N. J. L., 125; 22 Atl. Rep., 1006; Mueller v. Egg Harbor City, 55 N. J. L., 245; 26 Atl. Rep., 89; State ex rel. Schermerhorn v. Jersey City, 53 N. J. L., 112; 20 Atl. Rep., 829; State ex rel. v. Paterson, 35 N. J. L., 190.

West Virginia—Davis v. Davis, 40 W. Va., 464; 21 S. E. Rep., 906. "Concurrence of a majority of all of the trustees," construed (arguendo) as a majority of all of the trustees of which the body was composed, but such was held not to be required in the passage of a resolution proposing a change in the corporate boundaries under another charter provision. Strohm v. Iowa City, 47 Iowa, 42, 45, 46. The punctuation employed was disregarded. Shriedley v. State, 23

ber entitled to membership must be counted and not merely the remaining members.⁹³ Where the charter provides definitely the number that shall constitute a quorum, this cannot be changed by the body.⁹⁴ Thus, where the charter prescribes that three councilmen and the mayor shall constitute a quorum, a resolution passed by a vote of three councilmen and the mayor, who had a vote in case of a tie, was held legally passed, although a by-law provided that no resolution should pass without the votes of two-thirds of all the members.⁹⁵

§ 107. Vote necessary in suspending rules. It is within the power of all deliberative bodies to abolish, modify or waive their own rules, as those requiring certain ordinances to be read on two or three different days, or that certain corporate acts shall receive a two-thirds or three-fourths vote.¹ In ac-

Ohio St., 130, 139; Randolph v. Bayue, 44 Cal., 366.

Where a street being vacated by ordinance, on condition, it was held that a subsequent resolution declaring the vacation absolute is sufficient notwithstanding such resolution was passed by a majority instead of two-thirds as required in passing the ordinance. Wirt v. McEnery, 21 Fed., 233.

Under a particular charter provision it was held that, the requirement of a six-eighths vote on appropriations applied only to expenditures outside of the necessary expenses. Gardner v. New Bern, 98 N. C., 228; 3 S. E., 500.

Under a charter providing that a tax must be voted by two-thirds of the members elected; held that a vote of eight aldermen in a council consisting of 12 would be sufficient. Mills v. Gleason, 11 Wis., 470; 78 Am. Dec., 721.

98 Pimental v. San Francisco, 21 Cal., 351; McCracken v. San Francisco, 16 Cal., 591; San Francisco v. Hazen, 5 Cal., 169; Pollasky v. Schmid, 128 Mich., 699; 55 L. R. A., 614; 87 N. W. Rep., 1030; 8 Detroit Leg. N., 845. Contra, State ex rel. v. Orr, 61 Ohio St., 384; 56N. E. Rep., 14.

The vote of one, who is ineligible to act as councilman, but who was elected and sworn into office, was counted in one case. Satterlee v. San Francisco, 23 Cal., 314.

94 Malloy v. Board of Education, 102 Cal., 642; 36 Pac. Rep., 948.

95 Outwater v. Carlstadt, 66 N. J.
 L., 510; 49 Atl. Rep., 533.

¹ Holt v. Somerville, 127 Mass., 408, 411; Bennett v. New Bedford, 110 Mass., 433, 437; Brown v. Lutz, 36 Neb., 527; 54 N. W. Rep., 860.

Only one ordinance can be passed under a suspension of the rules. If two are enacted under one suspension, the second is void. Bloom v. Xenia, 32 Ohio St., 461; Campbell v. Cincinnati, 49 Ohio St., 463; 31 N. E. Rep., 606.

Where a by-law required certain corporate acts to be done in a prescribed form and that amendment or repeal of such by-law should only be made by a vote of two-thirds of the members, it was held that a majority might repeal the by-law, or might, even without specific repeal do valid acts not as required by the by-law, by a bare

cordance with the principle stated in the last section, the rule permitting suspension of rules on "two-thirds vote of the members of the branch," (the council consisting of two branches), will be construed to mean two-thirds of those present, not being less than a legal quorum and not two-thirds of the entire membership of the branch.² So a charter provision which permitted a suspension of the rule requiring ordinances to be read on three different days unless three-fourths of "the council" shall dispense with the rule, was held sufficiently complied with where there were present four councilmen, all of whom voted for the suspension—the entire council consisting of six members, of whom one had resigned and another was absent when the suspension took place.3 But where a charter required ordinances levying special assessments to be read on three successive days unless three-fourths of the council shall vote to dispense with the rule, a vote of five members of the council composed of six councilmen and the mayor is insufficient to suspend the rule and an ordinance so passed is void.4

majority vote. Opinion of Gibson, C. J., in Commonwealth v. Lancas- Swindell v. State ex rel. Maxey, 143 tor, 5 Watts (Pa.), 152. S. P. Chariton v. Holliday, 60 Iowa, 391; 14 N. W. Rep., 775.

Rules adopted by the council itself and not prescribed by any superior power, may be suspended by unanimous consent. Greeley v. Hamman, 17 Colo., 30; 28 Pac. Rep., 460.

Council rule cannot be amended by a majority vote without previous notice, when the law so re-Armatage v. Fisher, 74 Hun. (N. Y.), 167; 26 N. Y. Suppl.

² Zeiler v. Central Railroad Co., 84 Md., 304; 35 Atl. Rep., 932.

An ordinance providing that all ordinances shall be read three times before being passed, and that no ordinance shall pass or be read the third time on the same day in which it was introduced unless the rule be suspended by a two-thirds vote, cannot be annulled or repealed by a mere majority vote. Ind., 153; 42 N. E., 528; 35 L. R. A., 50.

3 In the passage of ordinances a vote of a majority "of all members elected to the council" was required, but three-fourths of "the council," without the qualifying words had power to suspend the rule. North Platte v. North Platte Water Works Co., 56 Neb., 403; 76 N. W. Rep., 906.

A charter provision which required ordinances to be read on three different days unless the reading is "dispensed" with by a vote of three-fourths of the council, is observed by a three-fourths vote to "suspend" the rule, as there is no substantial difference between the words. Bayard v. Baker, 76 Iowa, 220, 222; 40 N. W. Rep., 818; 23 Am. & Eng. Corp. Cas., 126.

4 Griffin v. Messenger, 114 Iowa, 99: 86 N. W. Rep., 219,

So where the council consists of seven members, under like provision, the rules cannot be suspended by an affirmative vote of four members.⁵

§ 108. How quorum affected by interest of members. Many charters expressly provide that the officers of the corporation shall not be directly or indirectly interested pecuniarily in contracts of any character with the corporation. So members of the legislative body should not be permitted to act in matters before them, as a body, in which they are either directly or indirectly pecuniarily interested. Such persons are generally excluded in counting a quorum. In a New Jersey case, four members of the city council were stockholders in a water company which the city council voted to purchase, and it was held that such purchase was unlawful. In this case it was aptly said: "The rule is one of policy, which, without regard to intention inexorably reaches all contracts

⁵ Horner v. Rowley, 51 Iowa, 620; 2 N. W. Rep., 436.

Passage under suspension of rules in particular cases:

Florida — Atkins v. Philips, 26 Fla., 281; 8 So. Rep., 429; 10 L. R. A., 158.

Iowa—Cutcomp v.·Utt, 60 Iowa, 156; 14 N. W. Rep., 214.

Kentucky—Nevin v. Roach, 86 Ky., 492; 5 S. W. Rep., 546.

Louisiana — New Orleans v. Brooks, 36 La. Ann., 641.

Minnesota—State v. Priester, 43 Minn., 373; 45 N. W. Rep., 712.

Missouri—Aurora Water Co., v. Aurora, 129 Mo., 540; 31 S. W. Rep., 946.

Ohio—Campbell v. Cincinnati, 49 Ohio St., 463; 31 N. E. Rep., 606.

Pennsylvania—Barton v. Pittsburg, 4 Brewst. (Pa.), 373.

Presumption that rule was legally suspended. State v. Vail, 53 Iowa, 550; 5 N. W. Rep., 709.

⁶ Contracts between the city and members of the council held void. Smith v. Albany, 61 N. Y., 444; Berka v. Woodward, 125 Cal., 119; 57 Pac. Rep., 777; 45 L. R. A., 420.

7 Ft. Wayne v. L. S. & M. S. Ry.
Co., 132 Ind., 558; 32 N. E. Rep.,
215; 18 L. R. A., 367, note; Woodruff v. N. Y. & N. E. R. R. Co., 59
Conn., 63; 20 Atl. Rep., 17; Oconto
County Supervisors v. Hall, 47
Wis., 208; 2 N. W. Rep., 291; United Brethren Church v. Van Dusen, 37 Wis., 54; Pickett v. School
District, 25 Wis., 551; Walworth
Bank v. F. L. & T. Co., 16 Wis.,
629; Hewison v. Tp. of Pembroke,
6 Ont. Rep., 170.

Rule of council forbidding members to vote upon question in which they are interested, which is violated, held to invalidate an ordinance. Buffington Wheel Co. v. Burnham, 60 Iowa, 493; 15 N. W. Rep., 282.

Cases in which it was held that the prohibition did not apply to municipal officers. Concordia v. Hagaman, 1 Kan. App., 35; 41 Pac. Rep., 133; Call Pub. Co. v. Lincoln, 29 Neb., 149; 45 N. W. Rep., 245.

which contravene the purposes of the law.''s In a Pennsylvania case, the majority of the members of the council were stockholders in a water company with which the council made a contract to supply the city with water and it was held void. After quoting the law forbidding members to be interested in contracts with the corporation, the court observed: "It is almost needless to say that a contract so prohibited by law is utterly void, and there is no power that can breathe life into such a dead thing." In a Michigan case, it was held that the fact that two of the aldermen who attended the meeting and who were necessary to form the quorum were signers of the petition for the improvement and owners of the land subject to special assessment for the improvement, did not invalidate the council proceedings in ordering the improvement.10 So it has been held that a member is not disqualified from voting on an ordinance establishing a sewer district because

Stroud v. Consumers' Water
Co., 56 N. J. L., 422; 28 Atl. Rep.,
578. To same effect is Gregory v.
Jersey City, 34 N. J. L., 390.

⁹ Milford Borough v. Milford Water Co., 124 Pa. St., 610; 17 Atl. Rep., 185.

10 Steckert v. East Saginaw, 22 Mich., 104, per Cooley, J., who said that the proceedings would have been held invalid had the members of the council acted as commissioners in determining the amount of the special assessment that each piece of property was to bear or as commissioners in confirming the report.

A vote of confirmation of an assessment passed at a meeting of a board consisting of five, at which only four members attended, and in which vote but two concurred, the others being interested declining to vote, is not a valid act although the two who did not vote assented to the vote of their colleagues. Coles v. Williamsburgh, 10 Wend. (N. Y.), 659, 666. S. P. State (Winans) v. Crane, 36 N. J. L., 394.

Where a by-law related to a road and it appeared that C. was the only one interested; held where his vote was necessary to pass the by-law such by-law was void, as his interest, which was apart from that of the public, disentitled him from voting. *In re* Vashon & Tp. of Hawkesbury, 30 Up. Can. Com. Pleas Rep., 194.

A member of a municipal board who is either a stockholder or director in a corporation is disqualified to act in a transaction with such corporation. San Diego v. San Diego & L. A. R. Co., 44 Cal., 106.

What constitutes interest that will disqualify according to Cushing's Law and Practice of Legislative Assemblies, see State v. Pinkerman, 63 Conn., 176; 28 Atl. Rep., 110.

Member cannot vote to confirm his own appointment to office. State ex rel. v. Whitehead, 67 N. J. L., 405; 51 Atl. Rep., 472. Contra, cases in note to § 102, supra.

he owns property within the district.¹¹ So the fact that a member would be benefited by the widening of a street does not disqualify him from voting on the proposition. 12 But a member is disqualified from voting for an ordinance, granting the use of streets to a corporation in which he is a stockholder or otherwise interested. In such case the member cannot remove the disability by, in form, assigning the stock to a rela-The fact that the vote of the interested member is not necessary to pass an ordinance seems to be immaterial. in a New Jersey case, a member of a board of public works voted for an ordinance, authorizing a railroad company, in which he was a stockholder, to lay its tracks in the streets and the ordinance was held voidable. It appeared that there was no necessity for the action of the interested member, for there were others who could act without him. "The fact that there were a sufficient number of votes, apart from his vote, to pass the ordinance, is no answer to the objection taken upon this point. The infection of the concurrence of the interested persons spreads so that the action of the whole body is voidable."14

§ 109. Quorum of joint assemblies of definite bodies. In order to constitute a legal meeting for the transaction of business of a body composed of two or more definite bodies it is necessary that a majority of each of the separate bodies should be present.¹⁵ When the meeting has once been duly organized the identity of the component bodies forming it, in legal contemplation, disappears and the vote of the majority of those constituting the joint body who are present controls, even though one of the body should leave before the vote is taken.¹⁶

Personal interest—effect on vote. 18 L. R. A., 367, note.

14 State (West Jersey Traction Co.) v. Board of Public Works, etc., 56 N. J. L., 431, 440; 29 Atl. Rep., 163.

The general rule is that no man can be a judge of his own case.

Broom Maxims, 111; Foot v. Stiles, 57 N. Y., 399; Regina v. Aberdeen Canal Co., 14 Ad. & E. (N. S.), 854; Matter of Ryers, 72 N. Y., 1, 11, per Folger, J.

15 State ex rel. v. Paterson, 35 N. J. L., 190, 194; Gildersleeve v. Board of Education, 17 Abb. Pr. (N. Y.), 201; Commonwealth v. Hargest, 7 Pa. Co. Ct., 333.

16 Gildersleeve v. Board of Education, 17 Abb. Pr. (N. Y.), 201; Whiteside v. People, 26 Wend. (N. Y.), 634, reversing 23 Wend. (N.

¹¹ Topeka v. Huntoon, 46 Kan., 634; 26 Pac. Rep., 488.

¹² Goff v. Nolan, 62 How. Pr. (N. Y.), 323.

¹³ Jolly v. P. N. I. & C. Ry. Co.,25 Pittsb. Leg. J. (N. S.), 259.

The rule in England is otherwise. There a majority of each of the definite bodies must be present, to constitute a valid joint meeting, and remain until the business is finished. If one of the integral parts withdraws from the meeting while action is incomplete no further action thereon can be taken legally by those remaining.¹⁷

PROCEEDINGS.

§ 110. Special meetings—Notice. Provision is usually made for calling special meetings. Generally this duty devolves upon the mayor or the presiding officer, and sometimes such meetings may be convened at the instance of a certain number of the members of the body itself. In the absence of express provision a municipal corporation possesses the incidental or implied power to call special meetings of its legislative body. Unless the law otherwise provides notice to each member of the body is required. A special meeting will

Y.), 9; Ex parte Humphrey, 10 Wend. (N. Y.), 612, per Savage, C. J.

The two bodies voted to meet jointly on a specified day. On such day a minority of one body were present but those present constituted a majority of both branches. The meeting was held legal. Beck v. Hanscom, 29 N. H., 213, 223, 226, per Gilchrist, C. J., reviewing the English cases.

Election by joint ballot of two branches. Belfast v. Morrill, 65 Me., 580; Saunders v. Lawrence, 141 Mass., 380; 5 N. E. Rep., 840; Schmulbach v. Speidel, 50 W. Va., 553; 55 L. R. A., 922; 40 S. E. Rep., 424; Kimball v. Marshall, 44 N. H., 465, 468.

¹⁷ King v. Williams, 2 Maule & Sel., 141; King v. Buller, 8 East, 389; King v. Miller, 6 Durnf. & East. (6 Term Rep.), 268, 278; King v. Bower, 1 Barn and Cress., 492; Rex v. Varlo, 1 Cowp., 248; Rex v. Bellringer, 4 Term Rep., 810; Willcock, Mun. Corp., 52, 53, 54; Glover, Mun. Corp., 148.

¹⁸ Special meeting held valid. Douglas v. Baker County, 23 Fla., 419; 2 So. Rep., 776; Board of Supervisors v. Horton, 75 Iowa, 271; 39 N. W. Rep., 394.

In Illinois, the council may prescribe, by ordinance, the manner in which special meetings thereof may be called. 1 Starr & Curtis Ill. Stat., p. 685, § 38. So the mayor or any three aldermen may call. *Ib.*, § 46.

¹⁹ Aurora Water Co. v. Aurora,129 Mo., 540, 577; 31 S. W. Rep.,946.

²⁰ California—Harding v. Vandewater, 40 Cal., 77.

Connecticut—Stowe v. Wyse, 7 Conn., 214; State v. Kirk, 46 Conn., 395.

Kansas— Rogers v. Slonaker, 32 Kan., 191; 4 Pac. Rep., 138; Paola, etc., R. R. Co. v. Commissioners, 16 Kan., 302.

Maryland — Burgess v. Pue, 2 Gill. (Md.), 254.

Massachusetts—Wiggin v. Freewill Baptist, 8 Met. (Mass.), 301.

New York-Downing v. Rugar,

be held invalid unless all of the members have been duly notified as required by law or unless they were all, or at least all who were not properly notified, present at the meeting.²¹

21 Wend. (N. Y.), 178; Ex parte Rogers, 7 Cowen (N. Y.), 526.

Texas—Cassin v. Zavalla County, 70 Tex., 419; 8 S. W. Rep., 97.

Statutory requirements as to calling special meeting to be observed, to validate meeting. White v. Fleming, 114 Ind., 560; 16 N. E. Rep., 487; Board of Supervisors v. Horton, 75 Iowa, 271, 39 N. W. Rep., 394; Scott v. Union County, 63 Iowa, 583; 19 N. W. Rep., 667; Scott v. Paulen, 15 Kan., 162; Donough v. Dewey, 82 Mich., 309; 46 N. W. Rep., 782; Whiteside v. People, 26 Wend. (N. Y.), 634; People v. Walker, 23 Barb. (N. Y.), 304; Goedgen v. Supervisors, 2 Biss. C. C. (U. S.), 328.

Failure of member of a board of fire and police commissioners to attend a meeting after reasonable notice thereof does not render the proceedings void. State v. Bemis, 45 Neb., 724; 64 N. W. Rep., 348.

21 Illinois — Thomas v. Citizens Horse R. R. Co., 104 Ill., 462; Schofield v. Tampico, 98 Ill. App., 324, 326; People v. Frost, 32 Ill. App., 242; Lawrence v. Traner, 136 Ill., 474; 27 N. E. Rep., 197.

Indiana — Tombaugh v. Grogg, 146 Ind., 99; 44 N. E. Rep., 994.

Iowa—If all members are present, failure to give notice of meeting as required is immaterial. Moore v. Perry (Iowa, 1903), 93 N. W. Rep., 510.

Michigan—Beaver Creek v. Hastings, 52 Mich., 528; 18 N. W. Rep., 250.

Minn., 176; 30 N. W. Rep., 550; State v. Smith, 22 Minn., 218.

Missouri—Aurora Water Co. v. Aurora, 129 Mo., 540, 577; 31 S. W. Rep., 946. Nebraska—Magneau v. Fremont, 30 Neb., 843; 47 N. W. Rep., 280; 27 Am. St. Rep., 436; 9 L. R. A., 786.

New York—People v. Batchelor, 28 Barb. (N. Y.), 310.

A special meeting where some of the members have not been notified, and were not present is not valid, nor is any action taken thereat. Land Co. v. Jellico, 103 Tenn., 320; 52 S. W. Rep., 995.

Where a member is absent from the state and his exact whereabouts are unknown and it is therefore impracticable to give him actual notice, such notice is not necessary. State ex rel. v. Kirk, 46 Conn., 395; Knoxville v. Knoxville Water Co., 107 Tenn., 647; 64 S. W. Rep., 1075.

METHOD OF CALLING. Under a charter providing that the mayor call special meetings of the council "by causing notice to be left at the usual residence of each member" personal notice to the members will be sufficient. Russell v. Wellington, 157 Mass., 100; 31 N. E. Rep., 630.

Under a charter, authorizing special meetings to be convened by the mayor in pursuance of law, that the mayor shall call special sessions by proclamation, which shall be published as may be provided by ordinance, it was held that in the absence of such ordinance, special meetings of the council called by proclamation of the mayor, and all acts of the council at such meetings were illegal. Forry v.- Ridge, 56 Mo. App., 615.

As to sufficiency of notice under particular provision, see Caniff v. New York, 4 E. D. Smith (N. Y.), 430.

Where the charter is silent as to stating the purpose of the special meetings, the judicial decisions present some conflict as to such requirement.²² If the charter requires that the notice shall specifically state the business for which the body has been convened, the special meeting may only act on subjects so stated.²³

§ 111. Power to adjourn meetings. In the absence of pro-

In one case the charter authorized special meetings on notice to each member served personally or left at his usual place of abode. Here it was held that where each member of the council had actual notice of a special meeting and of certain adjournments of it, and of their purpose, and in good faith met and transacted public business, the meeting and ordinance passed thereat were valid though no written notice of such meeting and adjournments were served. Young v. Rushsylvania, 8 Ohio Cir. Ct. Rep., 75.

PRESUMPTIONS AS TO REGULARITY of meeting.

Indiana — Stoddard v. Johnson, 75 Ind., 20; Prezinger v. Harness, 114 Ind., 491; 16 N. E. Rep., 495; Torr v. Corcoran, 115 Ind., 188; 17 N. E. Rep., 286; Jussen v. Commissioners, 95 Ind., 567.

Kansas — State v. Francis, 26 Kan., 724; Downing v. Miltonvale, 36 Kan., 740; 14 Pac. Rep., 281.

Kentucky—Elliott v. Louisville, 101 Ky., 262; 40 S. W. Rep., 690.

Michigan—Board of Supervisors v. Judges, 106 Mich., 166; 64 N. W. Rep., 42; Newaygo County Mfg. Co. v. Echtinaw, 81 Mich., 416; 45 N. W. Rep., 1010; Harding v. Bader, 75 Mich., 316, 321; 42 N. W. Rep., 492.

Minnesota—Duluth v. Krupp, 46 Minn., 435; 49 N. W. Rep., 235.

Mississippi — Tierney v. Brown, 65 Miss., 563; 5 So. Rep., 104; 7 Am. St. Rep., 679.

New Jersey—State (Staats) v. Washington, 45 N. J. L., 318; 2 Am. & Eng. Corp. Cas., 39.

Magneau v. Fremont, 30 Neb.,
843; 47 N. W. Rep., 280; 27 Am.
St. Rep., 436; 9 L. R. A., 786;
Whitney v. New Haven, 58 Conn.,
450, 461; 20 Atl. Rep., 666; Gilmore v. Utica, 131 N. Y., 26; 29
N. E. Rep., 841.

The purpose of the meeting must be stated. Bergen v. Clarkson, 1 Halst. (6 N. J. L.), 352; Smith v. Tobener, 32 Mo. App., 601.

23 St. Louis v. Withaus, 90 Mo., 646; 3 S. W. Rep., 395; 16 Mo. App., 247; McQuiddy v. Vineyard, 60 Mo. App., 610; Forry v. Ridge, 56 Mo. App., 615; Allen v. Rogers, 20 Mo. App., 290; Mills v. San Antonio (Tex. Civ. App., 1901); 65 S. W. Rep., 1121.

If the notice specifies a particular purpose, any act of the meeting "wholly beside the special purpose of the meeting as stated" will be held void. Bergen v. Clarkson, 1 Halst. (6 N. J. L.), 352, citing Rex v. Liverpool, 2 Burr., 735.

No vote shall be reconsidered or rescinded at a special meeting, unless there be present as large a number of aldermen as were present when such vote was taken. 1 Starr & Curtis Ill. Stat., p. 685, par. 43.

Business that may be transacted. Sommercamp v. Kelly (Idaho, 1902), 71 Pac. Rep., 147. vision to the contrary, when a regular or stated or called corporate meeting is once duly organized at the time and place appointed it possesses the incidental power to adjourn to a future time.24 And after such adjournment no legal action can be taken by the meeting.²⁵ In one case at a regular meeting a quorum was not present and all business, including an ordinance returned vetoed, was laid over until the next regular meeting to be held at 9 a. m. the next day. At 9:35 a. m. the president declared the meeting adjourned for want of a quorum. At 10 a.m. all of the members of the council meet except the president and passed the ordinance over the mayor's veto. The action was held void, as no quorum had appeared within the hour named and hence the meeting expired by its limitation of adjournment.²⁶ An adjournment beyond the time permitted by law is unauthorized. Thus where the charter provides, in case of a double legislative board, that one board shall not adjourn without the concurrence of the other board for a longer period than twenty-four hours, and that if they cannot agree on adjournment, the mayor shall adjourn them to a day, not beyond the regular time of meeting. In event of disagreement the mayor adjourned one board beyond the time allowed. It was held that the adjournment was a nullity and that both boards were left in session with the right to meet next day.27 Where the adjournment is legal the members are bound to take notice of the time to which

24 California—Ex parte Mirande, 73 Cal., 365; 14 Pac. Rep., 888. Florida—Stockton v. Powell, 29

Fla., 1; 10 So. Rep., 688.

Illinois—People *ex rel.* v. Fairbury, 51 Ill., 149.

Maine — Chamberlain v. Dover, 13 Me., 466.

Massachusetts — Attorney General v. Simonds, 111 Mass., 256, 260.

Michigan—Donough v. Dewey, 82 Mich., 309, 312; 46 N. W. Rep., 782; Hubbard v. Winsor, 15 Mich., 146, 152.

Minnesota — State ex rel. v. Smith, 22 Minn., 218, 223.

Nebraska — Ex parte Wolf, 14 Neb., 24; 14 N. W. Rep., 660; 6 Am. & Eng. Corp. Cas., 153.

New Hampshire — Kimball v.

Marshall, 44 N. H., 465, 468.

New York—In re Newland Ave., 38 N. Y. St. Rep., 796; People v. Rochester, 5 Lans. (N. Y.), 142, 147

Law may limit power of adjournment. Grimmett v. Askew, 48 Ark., 151; 2 S. W. Rep., 707.

 25 Kimball v. Lamprey, 19 N. H., 215.

²⁶ Fitzgerald v. Pawtucket St. Ry. Co. (R. I., 1902), 52 Atl. Rep., 887.

²⁷ Tillman v. Otter, 93 Ky., 600; 29 L. R. A., 110; 20 S. W. Rep., 1036. the meeting has been adjourned.²⁸ Provision is usually made in the organic law of the corporation for the place of meeting. Where the law provides that the meeting shall be at such place as shall be appointed by the voters from time to time the meetings may be adjourned to a different place within the discretion of those present.²⁹ The adjournment may only be proved by the record.³⁰

§ 112. Business that may be transacted at adjourned meetings. If a regular meeting is adjourned, any business which would have been proper for the body to consider at that meeting may be considered and acted upon at the adjourned meeting, but if it is a special or called meeting which is adjourned nothing can be done at such adjourned meeting unless it could have been considered and acted upon at the special or called meeting.³¹ An adjourned meeting of either a regular or stated or special or called is but a continuation of the same meeting.³² The point is well illustrated in a New Jersey case where the charter provided that no ordinance should be enacted unless the same had been introduced at a previous meeting. An ordinance was passed, but it did not appear from the record whether the meeting at which it was passed

²⁸ "The law holds members of deliberative bodies, parties attending courts of justice and public meetings, bound to take notice of the time of adjournment, and to be present at the time and place of adjournment without special notice." Per Bell, C. J., in Kimball v. Marshall, 44 N. H., 465, 468; Nugent v. Wrinn, 44 Conn., 273; People v. Batchelor, 22 N. Y., 128, 146; London v. Vanacre, 12 Mod., 272.

²⁹ Goodel v. Baker, 8 Cowen (N. Y.), 286; People ex rel. v. Martin,
 5 N. Y., 22.

30 Taylor v. Henry, 2 Pick. (Mass.), 397; State v. Jersey City, 25 N. J. L., 309.

31 Ex parte Wolf, 14 Neb., 24, 29, 30; 14 N. W. Rep., 660; 6 Am. & Eng. Corp. Cas., 153; Hickok v. Shelburne, 41 Vt., 409; New Orleans v. Brooks, 36 La. Ann., 641.

A school district, after having chosen one person as prudential committee at its annual meeting and adjourned, may choose additional members of such committee at the adjourned meeting. Kingsbury v. Centre School Dist., 12 Met. (Mass.), 99, 105.

32 State (Staates) v. Washington, 45 N. J. L., 318; 2 Am. & Eng. Corp. Cas., 39; Rutherford v. Hamilton, 97 Mo., 543; 11 S. W. Rep., 249: Tierney v. Brown, 65 Miss., 563; 5 So. Rep., 104; 7 Am. St. Rep., 679; Magneau v. Freemont, 30 Neb., 843; 47 N. W. Rep., 280; 27 Am. St. Rep., 436; 9 L. R. A., 786; Smith v. Law, 21 N. Y., 296; People v. Martin, 5 N. Y., 22; Warner v. Mower, 11 Vt., 385; In re opening Robin Street, 1 La. Ann., 412; New Orleans v. Brooks, 36 La. Ann., 641; Hubbard v. Winsor, 15 Mich., 146; Carter v. McFarwas an adjourned meeting of a special or regular meeting. "If it was the former," remarked the court, "the adjournment was but a continuance of the special meeting, and the ordinance being introduced at such special meeting was never legally before the council. This may seem like a very technical exception; but bringing it to the test of the governing rules in these cases, it is nevertheless well taken. For it does not appear upon the face of the record, or in any other way, that the provision of the charter was complied with; it does not appear that the power has been strictly pursued." ²³³

§ 113. Council as continuous body. Under the usual municipal organization the members are elected to the council annually or biennally, and thus a part of the membership (one-third or one-half) is renewed at such times. Sometimes the entire legislative body is renewed at municipal elections. Frequently the question is presented whether the council is a continuous body or whether each new council is to be considered a distinct legislative organization. The rule as applied to the English Parliament, the Congress of the United States, and the various state legislatures, (which bodies are composed of two houses), is that the newly constituted organization is incapable of carrying on proceedings initiated and not completed by its predecessor, but all proceedings are required to be commenced de novo. This rule was early applied in New York in a case where the common council consisted of two boards.34 It obtained also in Canada until changed by stat-In an Iowa case a contrary rule was announced.

land, 75 Iowa, 196; 39 N. W. Rep., 268; State v. Vanosdal, 131 Ind., 388; 31 N. E. Rep., 79; 15 L. R. A., 832; State v. Harrison, 67 Ind., 71; Sackett v. State, 74 Ind., 486; Cassidy v. Bangor, 61 Me., 434, 441; Hudson County v. State, 24 N. J. L., 718. Ordinance passed at an adjourned meeting held valid. Cutcomp v. Utt, 60 Iowa, 156; 14 N. W. Rep., 214.

33 State v. Jersey City, 25 N. J.
L., 309, 312; State (Staates) v.
Washington, 44 N. J. L., 605; 45
N. J. L., 318; 2 Am. & Eng. Corp.
Cas., 39; Hudson County v. State,
24 N. J. L., 718.

Ordinance passed at an adjourned meeting under a suspension of the rules is valid, although at the prior regular meeting a proposition to suspend the rules respecting this ordinance was voted down. Madden v. Smeltz, 2 Ohio Cir. Ct., 168, 173.

Presumption as to presence of quorum. Moore v. Perry (Iowa, 1903), 93 N. W. Rep., 510.

34 Wetmore v. Story, 22 Barb.
(N. Y.), 414, 3 Abb. Pr. (N. Y.),
262; Beekman's Case, 11 Abb. Pr.
(N. Y.), 164.

35 Township of East Nissouri v. Horseman, 16 Up. Can. Q. B., p. charter required that ordinances of a general or permanent nature should be fully and distinctly read on three different days. One-half of the council was renewed every year. The bill in question received two readings before the election and a third reading after a new mayor and half of the council were officially installed. The ordinance was held valid. The court declined to "regard the analogy between a state legislature and a city council sufficiently strong to be of controlling importance. If there be a sense in which there is a succession of city councils (which we do not determine) there is such immediate succession as to involve a substantial continuity when taken with the fact that one-half of the aldermen hold over; and we have no doubt that a continuity was contemplated by the legislature. We believe that the proper conduct of municipal affairs demands it."

§ 114. Action of legislative body consisting of two branches. Municipal legislative departments are frequently composed of

583; The Canadian Atlantic R. W. Co. v. Ottawa, 8 Ontario Rep., 183; 12 Ontario App. Rep., 234; 12 Sup. Ct. of Can., 365.

Because of the delay and inconvenience of the old rule, it is now expressly provided by statute in Canada that, "a municipal council shall be deemed and considered as always continuing and existing, notwithstanding any annual or other election of the members composing the same, and, after any such election and the organization of the council for the current year, may take up and carry on to completion all proceedings commenced but not completed prior thereto" Biggar, Mun. Manual of Canada, p. 338, sec. 327.

36 "All that the statute prescribes is three readings. The position that all the readings should be before the same persons is based upon an inference drawn from the supposed object of the provision.

* * We cannot think that it was intended that all unfinished business should be dropped at each

council election and taken up again entirely anew, if at all." McGraw v. Whitson, 69 Iowa, 348; 28 N. W. Rep., 632; 34 Alb. Law Journ., 59. No authorities at all are cited or referred to.

The Iowa case was followed by a nisi prius judge in a case wherein the facts, in substance, were the same. Smith v. Columbus & L. S. Ry. Co., 8 Ohio N. P. Rep. 1. The case distinguishes Wetmore v. Story, 22 Barb. (N. Y.), 414 and Beekman's case, 11 Abb. Pr. (N. Y.), 164; approves Tiedman, Mun. Corp., sec. 148, and dissents from Horr and Bemis, Municipal Police Ordinances, sec. 47.

The power of the council over streets is a continuing one, and bids for work thereon presented to the council may be acted on by that body notwithstanding an election had intervened in which one-half of the members thereof were to be voted for. State (Booth) v. Bayonne, 56 N. J. L., 268; 28 Atl. Rep., 381.

two houses or branches. Certain corporate acts are required to be done in joint session, but most of the legislative functions are performed by each house or branch, acting separately as in the case of the state legislatures. A concurrence of both branches in the enactment is required.³⁷ In a New York case, where the charter vested the legislative powers in a board of aldermen and board of assistant aldermen, who together formed the common council, it was held to have adopted by implication, so far as applicable, the universally recognized principle of legislative bodies consisting of two independent branches. Therefore, a resolution adopted by the board of assistants in one year, cannot be concurred in by the board of aldermen in another year so as to make it, without consulting the existing body of assistants, an ordinance of the common council, and thus a corporate act of the city. The court held that it must, as in the case of unfinished business in other legislative bodies, be taken up de novo.38

§ 115. Rules for conducting business—Parliamentary law. Where the charter or law applicable does not prescribe rules for the government of the proceedings of councils, the municipal boards etc., the body is at liberty to determine its own rules of proceedings from time to time as occasion may require.³⁹ Oftentimes the organic law provides that the council

³⁷ Kittinger v. Buffalo Traction Co., 160 N. Y., 377; 54 N. E. Rep., 1081.

Where a charter provides that the board of aldermen and the common council "in their joint capacity shall be denominated the city council;" requires all petitions to be first acted on by the mayor and aldermen, and gives the right of appeal to "any person aggrieved by any proceeding of the mayor and aldermen or of the city council," it will be held that the charter does not contemplate action by the board of aldermen and council in joint convention. Here the action was first passed by the aldermen and then by the common council in concurrence, and not in joint convention. was held legal. Foley v. Haverhill, 144 Mass., 352; 11 N. E. Rep., 554; 17 Am. & Eng. Corp. Cas., 604.

38 Wetmore v. Story, 22 Barb.
(N. Y.), 414, 489-495; 3 Abb. Pr.
(N. Y.), 262; Beekman's Case, 11 Abb. Pr. (N. Y.), 164.

Compare cases cited in previous section.

Selection of officer by concurrent vote of both branches under particular circumstances, see Saunders v. Lawrence, 141 Mass., 380, 384.

39 A county board may make reasonable rules for its government. Higgins v. Curtis, 39 Kan., 283; 18 Pac. Rep., 207. In the absence of proof to the contrary any action taken will be presumed to have been in conformity therewith. Masters v. McHolland, 12 Kan., 17, 24.

or representative body may adopt its own rules of action.40 However, mere failure to conform to parliamentary usage will not invalidate the action when the requisite number of members have agreed to the particular measure.41 So the council may abolish, modify or waive its own rules.42 But of course it cannot disregard mandatory charter provisions.43 Hence, where an ordinance is enacted in compliance with the charter it will not be held void because in its passage one of the parliamentary rules of the council was violated.44 Where a parliamentary question has been determined by the council, ordinarily the courts will not reverse such ruling.45 The action of municipal bodies exercising legislative functions should not be overthrown upon technical rules or strict construction of parliamentary law where the facts of such action can be gathered from the record; however, it cannot be established from testimony of members as to their understanding of

40 Atkins v. Phillips, 26 Fla.,
281; 8 So. Rep., 429; Wheeler v.
Commonwealth, 98 Ky., 59; 32 S.
W. Rep., 259; 1 Starr & Curtis Ill.
Stat., p. 684, par. 36; Boyd v. Chicago, B. & Q. R. R. Co., 103 Ill.
App., 199.

Ordinarily, rules adopted by council are binding upon that body. State v. Hoyt, 2 Oreg., 246.

⁴¹ Mann v. Lemars, 109 Iowa, 244, 251; 80 N. W. Rep., 327; State v. Archibald, 5 N. D., 359; 66 N. W. Rep., 234; Madden v. Smeltz, 2 Ohio Cir. Ct. Rep., 168; Hutcheson v. Storrie (Tex. Civ. App., 1898); 48 S. W. Rep., 785.

⁴² Holt v. Somerville, 127 Mass., 408, 411; Bennett v. New Bedford, 110 Mass., 433, 437; Greely v. Hamman, 17 Colo., 30; 28 Pac. Rep., 460; Chariton v. Holliday, 60 Iowa, 391; 14 N. W. Rep., 775; Commonwealth v. Lancaster, 5 Watts (Pa.), 152.

43 See Sections which follow.

Council rules can be amended only on notice, when. Armatage v. Fisher, 74 Hun. (N. Y.), 167; 26 N. Y. Suppl., 364.

44 McGraw v. Whitson, 69 Iowa, 348; 28 N. W. Rep., 632.

"There are few, if any, branches of the law on which there is less to be found in the way of direct adjudications than on the law governing representative or deliberative bodies which is usually denominated parliamentary law. Most of the decisions which have touched upon questions of this kind have been made in recent years." Note to State ex rel. v. Kiichli, 19 L. R. A., 779.

⁴⁵ Davies v. Saginaw, 87 Mich., 439; 49 N. W. Rep., 667.

Review of decisions of councils permitted. Swann v. Cumberland 8 Gill (Md.), 150; Walsh v. Johnston, 18 R. I., 88; 25 Atl. Rep., 849.

Presumption in favor of legal action. State v. Smith, 22 Minn., 218.

Council decision of discretionary matters is conclusive. Schank v. New York, 10 Hun. (N. Y.), 124; affirmed 69 N. Y., 444; Indianapolis v. Consumer's Gas Trust Co., 140 Ind., 246; 39 N. E. Rep., 943,

what was intended to be done. 46 In reference to the action of county boards the Supreme Court of Wisconsin has timely observed: "It will not do to apply to the orders and resolutions of such bodies nice verbal criticism and strict parliamentary distinctions, because the business is transacted generally by plain men not familiar with parliamentary law. Therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body."47 In like manner liberal construction is often applied to the action of councils in enacting ordinances. 48

§ 116. Form of corporate action—Mandatory and directory provisions. The general rule that, where the charter or law under which the corporation is organized specifies a particular manner in which the given action is to be taken, such manner must be substantially followed, is specially applicable to the proceedings of the council or governing legislative body. ⁴⁹ But where no particular method of action is pointed out, as, for example, where the law confers the power and enjoins the

46 Whitney v. Hudson, 69 Mich.,
189; 37 N. W. Rep., 184; 30 Am. &
Eng. Corp. Cas., 453. See § 292 post.

⁴⁷ Hark v. Gladwell, 49 Wis., 172, 177; 5 N. W. Rep., 323; Wisconsin Central R. R. v. Ashland County, 81 Wis., 1; 50 N. W. Rep., 937.

⁴⁸ "The mayor and councilmen, or other officers of a municipal corporation, are not usually selected because of their learning in the law, their observance of its forms, or their instruction in fine distinctions. If their action is to be subjected to rigid criticism much of it done in good faith, and in the spirit of their defined authority, would be avoided." Woodruff v. Stewart, 63 Ala., 206, 215.

"It is not to be expected that the technical rules of parliamentary law, which are enforced for the convenience in governing and controlling legislative bodies, should be vigorously applied to the proceedings of a village council." Medden v. Smeltz, 2 Ohio Cir. Ct., 168, 174,

Where the charter is silent as to the mode of voting in the organization of the council, any mode not forbidden by law which insures to each member the right to vote and by which the will of the majority can be fairly ascertained may be adopted. The vote may be either by yeas and nays on motion or by ballot. It is essential to a valid election that all who are present and are constituent members of the elective body shall have an opportunity to vote. They all in this respect stand upon equal footing. State ex rel. v. Green, 37 Ohio St., 227, 230. Compare § 116 and cases therein.

⁴⁹ Where the law requires certain acts to be done by ordinance they may only be done by ordinance and not by mere resolution, order or motion. State *ex rel.* v. Green, 37 Ohio St., 227, 230.

This subject is fully considered in prior sections. Secs. 2 to 5, supra.

duty upon the council to fix the salaries of certain officers. any form of procedure which the council may adopt in expressing its determination as to what the salaries shall be, will be a substantial compliance with the charter, if such action is made to appear in the record of the proceedings in some written permanent form, as by the record in the minutes of an oral motion on the vote thereon.⁵⁰ The council generally acts by vote. In the absence of express provision, the vote may be given in any form which clearly expresses the will of the members. It may be by ballot, by resolution, by the adoption of a verbal motion or in any other manner.⁵¹ "A vote is but the expression of the will of a voter; and whether the formula to give expression to such law be a ballot or viva voce the result is the same; either is a vote."52 parture from the form prescribed for corporate action, as in the passage of an ordinance, will not affect the validity of such action unless the charter or governing law makes such formality vital,53 as by declaring the action or ordinance void unless the form prescribed be followed.54

It is to be observed that some courts seem disposed to hold municipal legislative bodies to a stricter course of regularity in proceedings, in so far as charter provisions are involved,

⁵⁰ Green Bay v. Brauns, 50 Wis., 204; 6 N. W. Rep., 503.

51 State ex rel. v. Barbour, 53Conn., 76, 81; 55 Am. Rep., 65.

⁵² Per Davies, J., in People ex rel. v. Pease, 27 N. Y., 45, 57, quoted with approval in State ex rel. v. Green, 37 Ohio St., 227, 230.

Where charter requires certain officers to be appointed by the council, this may be done by ballot, instead of a vote by ayes and nays. Boehme v. Monroe, 106 Mich., 401; 64 N. W. Rep., 204.

Charter provided the election should be by ballot if called for. Ballot was requested but refused, and a committee appointed who reported names, which were declared accepted. Election held illegal. State v. Harris, 52 Vt., 216.

Method of balloting, secret or viva voce, in particular case. Good-

loe v. Fox, 96 Ky., 627; 29 S. W. Rep., 433.

Provisions as to election of officers by ballot sometimes only apply to principal officers. Williams v. Gloucester, 148 Mass., 256; 19 N. E. Rep., 348.

Invalid election of officers by council cannot be ratified. Lawrence v. Ingersoll, 88 Tenn., 52; 12 S. W. Rep., 422; 17 Am. St. Rep., 870; 6 L. R. A., 308.

Election by resolution held valid. Low v. Pilotage Com'rs, R. M. Charlt. (Ga.), 302.

53 Rockville v. Merchant, 60 Mo. App., 365, 371; St. Louis v. Stern, 3 Mo. App., 48; Tarkio v. Cook, 120 Mo., 1; 25 S. W. Rep., 202; Trustees etc., v. Erie, 31 Pa. St., 515.

54 St. Louis v. Foster, 52 Mo., 513, than state legislatures. This undoubtedly grows out of the fact that a municipal corporation has no inherent right of legislation, but acts wholly under delegated authority and can exercise no power which is not in express terms or fair implication conferred upon it.⁵⁵ The policy of the law is to concede power to the legislature and ordinarily to recognize that which has been done as rightly done, but the general principle applied to the municipal corporation is that it must make its powers apparent and show regularity, and a fair and substantial compliance with all mandatory legal provision.⁵⁶ Therefore, the validity of any given corporate act, as the passage of an ordinance or resolution or the making of a contract for an improvement, depends upon the fact that it was regularly passed by the council.⁵⁷

§ 117. Taking yeas and nays. Charters often provide that whenever a vote is taken on certain propositions, as in the passage of an ordinance, by-law, resolution, or contract for work, the yeas and nays shall be taken and recorded.⁵⁸ As heretofore mentioned, frequently the word "shall" as employed in a law is held to be directory merely, the essential requisite being the determination of the corporation, and not the form or manner of expressing that determination.⁵⁹ This

55 Thomson v. Lee County, 3 Wall. (U. S.), 327, 330; Clark v. Davenport, 14 Iowa, 494; Nichol v. Mayor, 9 Humph. (Tenn.), 252; Altoona v. Bowman, 171 Pa. St., 307; 37 Wkly. Notes Cas. (Pa.), 102; 33 Atl. Rep., 187.

⁵⁶ Bloom v. Xenia, 32 Ohio St., 461, 465.

⁵⁷ Blanchard v. Bissell, 11 Ohio St., 96, 101. Compare Sec. 115, supra, and cases cited therein.

58 Illinois—Chicago Dock Co. v. Garrity, 115 Ill., 155; 3 N. E. Rep., 448; Ryan v. Lynch, 68 Ill., 160; Supervisors, etc., v. People, 25 Ill., 181; Hackman v. Staunton, 42 Ill. App., 409; Belknap v. Miller, 52 Ill. App., 617; Knight v. Thompsonville, 74 Ill. App., 550, 555; Chicago v. Fraser, 60 Ill. App., 404, 409.

Indiana-Martindale v. Palmer,

52 Ind., 411, 413; Delphi v. Evans, 36 Ind., 90; 10 Am. Rep., 12.

Iowa—Indianola v. Jones, 29 Iowa, 282.

Massachusetts—Morrison v. Lawrence, 98 Mass., 219.

New York—In re Carlton St., 16 Hun. (N. Y.), 497, 499.

Ohio—State ex rel. v. Green, 37 Ohio St., 227, 230; Sullivan v. Pausch, 5 Ohio C. C., 196.

General law not applicable to cities with special charters. Preston v. Cedar Rapids, 95 Iowa, 71; 63 N. W. Rep., 577.

59 Secs. 82 and 83, supra; St. Louis v. Foster, 52 Mo., 513, per Wagner, J.; In re Mount Morris Square, 2 Hill (N. Y.), 14, 20; Elmendorf v. New York, 25 Wend. (N. Y.), 693.

The effect of mere departure from the prescribed form is elab-

doctrine has been applied to the charter requirement that votes on certain propositions shall be taken by year and nays. 60 Where the law declares the action void if the yeas and nays are not taken and recorded, the provision is always construed as mandatory. However, notwithstanding the absence of such declaration, the weight of the judicial view appears to be that such provision is mandatory and cannot be disregarded.⁶¹ A separate vote by yeas and nays for each specific corporate act is required usually. Hence it has been held that ordinances cannot be legally passed by voting for two or more at one and the same time. 62 Although the charter provides in general terms that the vote in all cases shall be taken by ayes and noes, and every vote shall be entered at large on the journal, it has been held that it does not apply to a vote upon a motion to adjourn.63 So the vote on the passage of a resolution, to carry out the provisions of a prior ordinance, need not be by yeas and nays, as required in case of an ordinance.64

orately considered in Pac. Ry. Co. v. Governor, 23 Mo., 353.

⁶⁰ Striker v. Kelly, 7 Hill (N. Y.), 9, 24, affirmed 2 Denio (N. Y.), 323; Belknap v. Miller, 52 Ill. App., 617. See Barr v. Auburn, 89 Ill., 361.

61 United States—Coffin v. Portland, 43 Fed. Rep., 411.

Arkansas—Cutler v. Russellville, 40 Ark., 105; 4 Am. & Eng. Corp. Cas., 414.

Colorado—Sullivan v. Leadville, 11 Colo., 483; 18 Pac. Rep., 736; Tracey v. People, 6 Colo., 151; 4 Am. & Eng. Corp. Cas., 373; Brophy v. Hyatt, 10 Colo., 223; 15 Pac. Rep., 399.

Illinois—Rich v. Chicago, 59 Ill., 286; Hackman v. Staunton, 42 Ill. App., 409; Spangler v. Jacoby, 14 Ill., 297; 58 Am. Dec., 571.

Indiana—Logansport v. Crockett, 64 Ind., 319; New Albany Gas Light, etc., Co. v. Crumbo, 10 Ind. App., 360; 37 N. E. Rep., 1062,

Iowa—Olin v. Meyers, 55 Iowa, 209; 7 N. W. Rep., 509.

New York—In re South Market St., 76 Hun. (N. Y.), 85; 27 N. Y. Suppl., 843.

North Dakota—O'Neil v. Tyler, 3 N. Dak., 47; 53 N. W. Rep., 434. Ohio—Campbell v. Cincinnati, 49 Ohio St., 463; 31 N. E. Rep., 606.

62 Sullivan v. Pausch, 5 Ohio Cir. Ct. Rep., 196; Campbell v. Cincinnati, 49 Ohio St., 463; 31 N. E. Rep., 606; Wright v. Forrestal, 65 Wis., 341; 27 N. W. Rep., 52. Examine Parker v. Catholic Bishop, 146 Ill., 158; 34 N. E. Rep., 473; Daflinger v. Pittsburgh, etc., T. Co., 31 Pittsb. Legal J. (Pa.), 37.

Where five members of a council, composed of eight, are present, and voting in favor of the action, as record shows, it is immaterial that the nays do not appear to have been called. Bayard v. Baker, 76 Iowa, 220; 40 N. W. Rep., 818.

63 Green Bay v. Brauns, 50 Wis., 204, 208; 6 N. W. Rep., 503.

⁶⁴ Grimmell v. Des Moines, 57 Iowa, 144; 10 N. W. Rep., 330.

Restricted to certain class of or-

§ 118. Reasons for requiring yeas and navs. Two principal reasons may be suggested in favor of the requirement under consideration. First, the most important is to obtain a definite and accurate record of the corporate action in order to determine whether all of the mandatory provisions of the charter have been observed. Only in this way may it be ascertained whether the particular act is legal or illegal. Second, another purpose is to make the members of the body feel the responsibility of their action and to compel each member to bear his share in the responsibility by making a permanent written record of his action which should not be afterwards open to dispute.65 It is well known that men acting in a body, especially when under cover of corporate privilege, will often do what no one of them would be willing to do if acting alone and upon his individual responsibility: and they will sometimes say "aye," or permit a matter to pass sub silentio when they would not venture to record their names in favor of the measure.66 The inhabitants of the municipality are, as of right, entitled to know clearly the act and vote of every member, of their agents and servants, on every proposition relating to public duties, and a record of such acts and votes should be plainly made in a permanent form so that every inhabitant may have definite information.67

§ 119. Reading bills on three different days. Many charters prescribe that certain ordinances and resolutions shall be

dinances. Mackin v. Wilson, 20 Ky. L. Rep., 218; 45 S. W. Rep., 663; Argus Co. v. Albany, 55 N. Y., 495; 7 Lans. (N. Y.), 264.

65 Per Cooley, J., in Steckert v. East Saginaw, 22 Mich., 104, 107, 108; Logansport v. Dykeman, 116 Ind., 15, 18; 17 N. E. Rep., 587; Brophy v. Hyatt, 10 Colo., 223, 226; 15 Pac. Rep., 399.

66 "To guard against such evils, and protect the citizens against the impositions of unnecessary burdens it was provided * * * that the ayes and noes should be called and published whenever a vote should be taken on any proposed improvement involving a tax or assessment on the citizens,

The language is imperative—the ayes and noes shall be called. When the particular mode in which the corporation is to act is thus specifically declared by its charter, I think it can only act in the prescribed form. The contrary doctrine wants the sanction of legal authority and is fraught with the most dangerous consequences. It would place corporations above the law, and there is reason to fear that they would soon become an intolerable nuisance." Dissenting opinion of Bronson, J., in Striker v. Kelly, 7 Hill (N. Y.), 9, 29. 67 As to sufficiency of record of

yeas and nays, see § 127, post,

read a certain number of times before passage; the most usual provision being that they shall be read on three different days. Some charters permit the reading a specified number of times to be dispensed with on a two-thirds or three-fourths vote of the body. In the absence of charter provision, council rules often require certain bills and resolutions to receive two or three several readings on different days before final passage. The method of dispensing with the number of readings as prescribed by vote or suspension of rules is stated in another section. Charter or statutory provisions of this character are generally held to be mandatory, and, hence, failure to observe them invalidates the action. Where under the charter the council is a continuous body, an ordinance which had been read on two separate days before the regular

68 Florida—Atkins v. Phillips, 26 Fla., 281; 8 So. Rep., 429.

Iowa—Bayard v. Baker, 76 Ia., 220; 40 N. W. Rep., 818; Cutcomp v. Utt, 60 Ia., 156; 14 N. W. Rep., 214; Horner v. Rowley, 51 Ia., 620; 2 N. W. Rep., 436.

Kentucky—Nevin v. Roach, 86 Ky., 492; 5 S. W. Rep., 546.

Nebraska—Brown v. Lutz, 36 Neb., 527; 54 N. W. Rep., 860.

Ohio—Elyria Gas, etc., Co., v. Elyria, 57 Ohio St., 374; 49 N. E. Rep., 335; Campbell v. Cincinnati, 49 Ohio St., 463; 31 N. E. Rep., 606; Bloom v. Xenia, 32 Ohio St., 461; Cincinnati v. Johnson, 17 Ohio Cir. Ct., 291; 9 Ohio Cir. Dec., 736; Kerlin Bros. Co. v. Toledo, 20 Ohio Cir. Ct., 603; 11 Ohio Dec., 56; Smith v. Columbus L. & S. Ry. Co., 8 Ohio (N. P.), 1.

Two readings sufficient. Zeiler v. Central R. R. Co., 84 Md., 304; 35 Atl. Rep., 932.

The third reading of the ordinance may be by merely reading its title. Anderson v. Camden, 58 N. J. L., 515; 33 Atl. Rep., 846.

69 Bloom v. Xenia, 32 Ohio St., 461; Griffin v. Messenger, 114 Iowa, 99; 86 N. W. Rep., 219. 70 Holt v. Somerville, 127 Mass., 408; Bennett v. New Bedford, 110 Mass., 433.

⁷¹ Sec. 107, *supra*; Nevin v. Roach, 86 Ky., 492; 5 S. W. Rep., 546.

⁷² California—Herzo v. San Francisco, 33 Cal., 134; Weill v. Kenfield, 54 Cal., 111.

Illinois—Ryan v. Lynch, 68 Ill., 160.

Indiana—Swindell v. State, 143 Ind., 153; 42 N. E. Rep., 528.

Iowa—Griffin v. Messenger, 114 Iowa, 99; 86 N. W. Rep., 219.

New Jersey—State (Gregory) v. Jersey City, 34 N. J. L., 429.

Ohio—Campbell v. Cincinnati, 49 Ohio St., 463; 31 N. E. Rep., 606; Thatcher v. Toledo, 19 Ohio Cir. Ct. Rep., 311; Bloom v. Xenia, 32 Ohio St., 461.

election for councilmen may, after the annual organization of the council following such election, be read a third time and passed. The court was of the opinion that the unfinished business of the council should not be regarded as dropped with each council election.⁷³

Contrary to the current of authority, the rule of the Supreme Court of Missouri is that, a charter provision that "all bills shall be read three times before their final passage," is directory merely. The court said: "It is to be observed that the above section does not declare a sentence of nullity against a bill which is not read three times before its final passage." It has been held that a charter provision requiring all ordinances or resolutions of "a permanent or general nature" to be read on three distinct days, does apply to a resolution awarding a contract for the improvement of a street, to the preliminary resolution declaring a proposed improvement necessary.

It is clear that the same bill or ordinance must be read the

73 McGraw v. Whitson, 69 Iowa,
348; 28 N. W. Rep., 632; 34 Alb.
L. J., 59; Smith v. Columbus L. &
S. Ry. Co., 8 Ohio (N. P.), 1.

The new council can take up the proceedings where they were left off by the old council, as the body is continuous. Booth v. Bayonne, 56 N. J. L., 268; 28 Atl. Rep., 381. See § 113, supra.

74 "There are authorities to the contrary but we shall adhere to our own decisions." Per Sherwood, J., Aurora Water Co. v. Aurora, 129 Mo., 540; 31 S. W. Rep., 946; Rockville v. Merchant, 60 Mo. App., 365. Similar views were held in State ex rel. v. Mead, 71 Mo., 266, and Barber Asphalt Paving Co. v. Hunt, 100 Mo., 22; 13 S. W. Rep., 98; Barton v. Pittsburgh, 4 Brewster (Pa.), 373.

Presumption. It has been held in Illinois that it is not necessary that the journal should show that the bill was read the number of times prescribed by the constitution, for this will be presumed to

have been done unless the journal affirmatively shows that it was not done. Here the constitution was silent as to the entry of reading on the journal. The court said: "It is then left to the discretion of either house to enter it or not, and the silence of the journal on the subject ought not to be held to afford evidence that the act was not done. In such case we must presume it was done, unless the journal affirmatively shows that it was not done." Per Caton, C. J., in Supervisors of Schuyler Co. v. People ex rel., 25 Ill., 181, 184. S. P. Chicago Tel. Co. v. N. W. Tel. Co., 100 Ill. App., 57.

The above Illinois decisions relate to the reading of bills in the State legislature; the requirement does not apply to municipal council in that State.

75 Cincinnati v. Bickett, 26 Ohio St., 49.

76 Upington v. Oviatt, 24 OhioSt., 232, 240.

number of times prescribed. Thus, where a charter requires certain ordinances, as those providing for improvements which are to be paid for by special taxation, to be published between their second and third readings, a material amendment (as, for example, changing the character of the proposed improvement or streets to be improved) cannot be made after the second reading, without the notice required.⁷⁷ But an immaterial change in the title or body of the ordinance will not invalidate it.⁷⁸

§ 120. Ratification of void acts. Irregular and void acts may be ratified or confirmed at a subsequent meeting.⁷⁹ Thus, where the action in allowing a claim is invalid because of a lack of a majority vote as required by law, it may be ratified at a subsequent meeting by resolution confirming such previous action.80 So a town may at a legal town meeting ratify acts of its selectmen in borrowing money and giving a note therefor in behalf of the town.⁸¹ In a New Hampshire case, the court expressed a doubt whether, where selectmen appoint one to an office without legal authority, a subsequent vote of the town to ratify their act is valid, but if valid the court held that it must only operate as a new appointment by the town and the officer, after such vote, must qualify.82 In one case where all of the members of the council were not notified of a special meeting and certain corporate action was taken, it was held that, if at the next regular meeting the minutes of the special meeting are read and approved, this will be equivalent to a ratification of what was done at that meeting.83 However, it

77 The court said that the charter contemplates that all amendments should be made, and the proposed ordinance perfected on the second reading; and that the notice given between the second and third reading will inform parties interested of the precise character of the improvements intended. State (Doyle) v. Newark, 30 N. J. L., 303, 305.

⁷⁸ State (Staates) v. Washington, 44 N. J. L., 605.

79 Act of park commissioners. State ex rel. v. Hennepin County Dist. Court. 33 Minn., 235; 22 N. W. Rep., 625; 7 Am. & Eng. Corp. Cas., 206.

A school district, at a legal meeting, may ratify and confirm proceedings of prevolus meetings which were not strictly legal. Jordan v. School District, 38 Me., 164.

80 Curtis v. Gowan, 34 Ill. App., 516.

81 "A ratification after the act is as potent as authority before the act." Brown v. Winterport, 79 Me., 305, 311; 9 Atl. Rep., 844.

 82 Johnston v. Wilson, 2 N. H., 202.

83 A municipal corporation may

has been held that the mere approval of the minutes of such meeting is not a complete ratification of the acts of the special meeting, but only an approval of the correctness of such meeting.⁸⁴ Where a particular action is confirmed by resolution, which resolution is afterwards duly rescinded, confirmation of the former action may take place legally only upon giving notice as required by law prior to the taking of the original action.⁸⁵

There can be no legal confirmation or ratification of ultra vires acts, so nor of acts under a void law. So, where the charter conferred exclusive power upon the council to execute the particular act, and it was performed by an officer, such act can not be legally ratified. Where the charter prescribes a method of doing the act, this mode must be observed in any act of ratification. Thus, where the act could only be done by ordinance, the ratification must be by ordinance. ss

§ 121. Reconsideration—General powers respecting. Unless restrained by charter or statute applicable, the legislative body of a municipal corporation, like all deliberative bodies, possesses the undoubted right to vote and reconsider its vote upon measures before it, at its own pleasure, and to do and undo, consider and reconsider, as often as it may think proper, until by final vote or act, accepted as such by the body, a conclusion is reached, and it is the result only which is done.⁸⁹

ratify all contracts not *ultra vires*. Shawneetown v. Baker, 85 Ill., 563.

84 Mills v. San Antonio (Tex. Civ. App., 1901), 65 S. W. Rep., 1121.

85 State v. Jersey City, 27 N. J. L., 536.

86 Shawneetown v. Baker, 85 Ill., 563; Maupin v. Franklin Co., 67 Mo., 327; Johnson v. School District, 67 Mo., 319; McKissick v. Mt. Pleasant Tp., 48 Mo. App., 416; Kolkmeyer v. Jefferson City, 75 Mo. App., 678, 683; Unionville v. Martin, 95 Mo. App., 28, 37; 68 S. W. Rep., 605.

87 Baltimore v. Porter, 18 Md.,
 284; 79 Am. Dec., 686; Baltimore
 v. Horn, 26 Md., 194, 204; Lester

v. Baltimore, 29 Md., 415; Horn v. Baltimore, 30 Md., 218, 222.

88 Unionville v. Martin, 95 Mo.App., 28, 37; 68 S. W. Rep., 605.

89 Whitney v. Van Buskirk, 40 N. J. L., 463, 467.

"All deliberative assemblies, during their sessions, have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result only which is done." State v. Foster, 7 N. J. L., 101, 107.

"The right of reconsidering lost measures inheres in every body possessing legislative powers." Jersey City v. State, 30 N. J. L., 521, 529.

May reconsider at subsequent meeting vote by which a measure

An ordinance after having been finally enacted over the veto of the mayor cannot be reconsidered. On So, after the mayor's veto of an ordinance is returned to the legislative body and the veto sustained, a subsequent reconsideration and passage of the ordinance over the veto is unauthorized. In such case the ordinance cannot be passed on a second reconsideration after the charter test had decided it in the negative.

The reconsideration must be in accordance with the provisions of the charter, and the rules of procedure, if any, governing the body. In the absence of evidence to the contrary,

was lost and pass the ordinance. People ex rel. v. Rochester, 5 Lans. (N. Y.), 11.

"All bodies, possessing a judicial capacity, have the competency to consult, resolve and reconsider, and they are not bound by their conclusions until such conclusions have been promulgated by their authority." State v. Crosley, 36 N. J. L., 425, 428,

Freeholders to lay out a public road may reconsider a vote by which they have determined a matter before them, and alter their determination if done before they separate. State v. Justice 24 N. J. L., 413.

County court may legally revoke an order. Dey v. Lee, 4 Jones L. (N. C.), 238; Tucker v. Iredell Co. Justices, 13 Iredell (N. C.), 434.

O Ashton v. Rochester, 60 Hun.
(N. Y.), 372; 14 N. Y. Supp., 855,
affirmed 133 N. Y., 187; 30 N. E.
Rep., 965; 31 N. E. Rep., 334; 28
Am. St. Rep., 619.

91 The charter provided that when an ordinance is returned vetoed the council "shall proceed to reconsider it. If after such reconsideration two-thirds" vote for it notwithstanding the veto it shall become a law, but upon failure to receive such vote the ordinance shall be lost. Sank v. Philadelphia, 4 Brews. (Pa.), 133; 8 Phila. Rep., 117; People v. Rochester, 5 Lans. (N. Y.), 11.

92 Sank v. Philadelphia, supra. As to consideration of mayor's veto, see Sec. 160, post.

A matter was reconsidered at a subsequent meeting. It did not appear that there was a rule of the council authorizing such action. It was presumed that there was such a rule. Red v. Augusta, 25 Ga., 386, 390.

Who to move reconsideration. People v. Rochester, 5 Lans. (N. Y.), 11.

In absence of proof to the contrary a reconsideration of the action of a county board taken on a former day of the same session, on any matter properly before it, will be presumed to have been done in conformity with its rules and regulations. Higgins v. Curtis, 39 Kan., 283; 18 Pac. Rep., 207; Masters v. McHolland, 12 Kan., 17, 24.

A resolution passed by the requisite vote, after veto declaring that the ordinance stand, the objections of the mayor to the contrary notwithstanding, is a sufficient reconsideration, though the resolution does not expressly declare that the body reconsiders the matter. Oakley v. Atlantic City, 63 N. J. L., 127; 44 Atl. Rep., 651.

Notice of reconsideration some-

ordinarily courts will presume that the action was properly had.⁹² A resolution authorizing a corporate act which requires a majority vote of all of the members of the body can be rescinded only by a like vote.⁹³ So, where the charter requires a two-third vote to adopt a resolution, the same vote is necessary on reconsideration.⁹⁴

§ 122. Power to rescind prior acts. In accordance with the doctrine of the last section, the legislative body of the corporation, or any board or department thereof, possesses the unquestioned power to rescind prior acts and votes at any time thereafter until the act or vote is complete, provided vested rights are not violated, and such rescission is in conformity to the law applicable and the rules and regulations adopted for the government of the body. Thus, where a town has voted to raise a tax, but nothing has been done thereunder, the town has the power at a meeting legally warned for that purpose to rescind or reconsider the vote. But where a town has in town

times required. Atlanta Ry. & Power Co. v. Atlanta Rapid Transit Co., 113 Ga., 481; 39 S. E. Rep., 12.

"When a bill is put upon its final passage in the board and fails to pass, and a motion is made to reconsider, the vote upon such motion shall not be acted upon before the expiration of twenty-four hours after adjournment." Charter San Francisco, art. II, ch. 1, § 12; Stat. and Amend. to Codes, Cal. (1899), p 245.

93 Naegely v. Saginaw, 101 Mich.,
532; 60 N. W. Rep., 46; Stockdale
v. School Dist., 47 Mich., 226; 10
N. W. Rep., 349. See City Sewerage U. Co. v. Davis, 8 Phila. (Pa.),
625; Green Bay v. Brauns, 50
Wis., 204; 6 N. W. Rep., 503.

94 Whitney v. Hudson, 69 Mich.,189; 37 N. W. Rep., 184.

In Illinois, by statute no vote shall be reconsidered or rescinded at a special meeting unless there be present as large a number as were present when such vote was taken. 1 Starr and Curtis Ill. Stat., p. 685, par. 43. 95 Sawyer v. M. & K. R. R. Co., 62 N. H., 135, 153, 154; Mitchell v. Brown, 18 N. H., 315; Damon v. Granby, 2 Pick. (Mass.), 345; Nelson v. Milford, 7 Pick. (Mass.), 18; Withington v. Harvard, 8 Cush. (Mass.), 66; Hunneman v. Grafton, 10 Met. (Mass.), 454; Hall v. Holden, 116 Mass., 172; Curnen v. Mayor, etc., 79 N. Y., 511; Ross v. Stackhouse, 114 Ind., 200; 16 N. E. Rep., 501.

Vote to aid a railroad may be rescinded where nothing had been done under the vote. Estey v. Starr, 56 Vt., 690.

Prior act to pay over money may be rescinded. Dey v. Lee, 4 Jones L. (N. C.), 238; Tucker v. Iredell Co. Justices, 13 Iredell (N. C.), 434.

96 Stoddard v. Gilman, 22 Vt., 568, 573, where it is said: "A vote to raise money for town purposes is a mere declaration, or resolution, on the part of the town alone, and not in the nature of a grant, or contract between the town and an individual. * * * So long as this rests in mere resolution,

meeting, by vote, ratified the act of the selectmen in borrowing money and giving a note therefor in behalf of the town, such vote of ratification fully completes the act, and, therefore, the town cannot at a subsequent meeting rescind such ratification so as to affect the validity of the contract. 97

§ 123. Committees. Provision is usually made in the organic law of the corporation, or by ordinance or other regulations, duly adopted in pursuance thereof, for the creation and constitution of committees, to assist the legislative body in the performance of its proper duties, as in the collection of facts and information which are generally embodied in reports. This method of performing portions of the public business is not forbidden and has often been sanctioned by judicial decisions. The rule appears to be well established that certain municipal duties may be performed by agents or committees. Thus, the

and has not been acted upon, we think the town must have the power to rescind or reconsider it. Until something has been done under the vote, the town alone are interested in it, and may alter their resolve at their own pleasure."

So a school district having voted to raise moneys for erecting a school house may afterwards and before the same are assessed, rescind such vote at their discretion. Pond v. Negus, 3 Mass., 230; 3 Am. Dec., 131.

97 Brown v. Winterport, 79 Me.,305; 9 Atl. Rep., 844.

Whether a vote of a town to discontinue a town way can be reconsidered after rights of third parties have intervened, quaere. Bigelow v. Hillman, 37 Me., 52, 58.

An order of a county court regularly made which vacates an old road and establishes a new public highway in lieu thereof cannot at a subsequent term be vacated so that the old road will be re-established, without the notice, petition and review prescribed by law. Reiff v. Conner, 10 Ark., 241.

After having rejected all bids, a council may reconsider and award a contract to one of the original bidders without readvertising. State ex rel. v. Cleveland, 15 Ohio Cir. Ct., 517; 8 Ohio Cir. Dec., 357.

¹ Commonwealth v. Pittsburgh, 14 Pa. St., 177, 184.

Towns may appoint committees for special purposes. Keyes v. Westford, 17 Pick. (Mass.), 273.

² United States—Bullitt County v. Washer, 130 U. S., 142.

Connecticut—Whitney v. New Haven, 58 Conn., 450; 20 Atl. Rep., 666.

Florida—Holland v. State, 23 Fla., 123; 1 So. Rep., 521.

Illinois—Gillett v. Logan County, 67 Ill., 256; Alton v. Mulledy, 21 Ill., 76.

Indiana—Duncan v. Lawrence County Comrs., 101 Ind., 403.

Iowa—Stewart v. Council Bluffs,
58 Iowa, 642; 12 N. W. Rep., 718.
Massachusetts—Damon v. Granby, 2 Pick. (Mass.), 345.

New Jersey—Burlington v. Dennison, 42 N. J. L., 165.

New York-Gilmore v. Utica, 131

council may refer applications for the location or alteration of streets to a committee to examine into the matter and report to the council.³ So, where the council is the sole judge of the election of its own members, upon the institution of a contest, a committee may be appointed to take testimony and report to the council.⁴ A council may authorize the mayor and the chairman of a committee on streets and alleys to make in its behalf a contract for doing public work and afterwards con-

N. Y., 26; 29 N. E. Rep., 841; Kamrath v. Albany, 53 Hun. (N. Y.), 206; 6 N. Y. Suppl., 54; Edwards v. Watertown, 24 Hun. (N. Y.), 426.

The doctrine forbidding the delegation of powers upon the part of the council or other governing legislative body to boards, officers or other persons is fully stated elsewhere (§§ 84 to 89, supra).

Council cannot delegate to a committee the power to contract, as for supply of gas. Minneapolis Gas Light Co. v. Minneapolis, 36 Minn., 159; 30 N. W. Rep., 450; Anderson v. Equitable Gas Light Co., 12 Daley (N. Y.), 462.

³ Preble v. Portland, 45 Me., 241.

Council committee may build a sewer, when. Dorey v. Boston, 146 Mass., 336, 339; 15 N. E. Rep., 897.

Make sewer assessments by third person. Collins v. Holyoke, 146 Mass., 298; 15 N. E. Rep., 908.

Committee to purchase school lands. Parkey v. Concord, 71 N. H., 468; 52 Atl. Rep., 1095.

⁴ Salmon v. Haynes, 50 N. J. L., 97, 100; 11 Atl. Rep., 151, holding committee may employ stenographer.

When representations of council committee will bind the city, see Sharp v. New York, 40 Barb. (N. Y.), 256; 25 How. Pr. (N. Y.), 389.

Under a charter which vested

legislative powers in a board of aldermen and a board of councilmen and provided that each board shall judge of the eligibility of its own members and punish or expel a member, a committee of aldermen authorized by a resolution of the general council (which was the designation of the two boards) to investigate charges of corruption of its members is illegal. Commonwealth v. Hillenbrand, 96 Ky., 407; 29 S. W. Rep., 287.

As to power of committee to issue attachments for witnesses, see Briggs v. Matsell, 2 Abb. Pr. (N. Y.), 156; *In re* Dunn, 9 Mo. App., 255.

Under a charter authorizing the issuance of an attachment against the witnesses for refusing to answer any proper question those only are proper questions which are pertinent to the investigation and come within the subject referred to and which relates to the matters of the power of the common council to inquire about. Van Tine v. Nims, 3 Abb. Pr. (N Y.), 39.

Power to commit a witness who refused to attend when duly summoned or to be sworn or affirmed or to answer after being sworn, extends no authority to the commitment of witness who refused to produce books and accounts. People v. Van Tassel, 135 N. Y., 638; 32 N. E. Rep., 646.

firm such report.⁵ When the council ratifies the act of the committee in due and legal form it becomes the act of the council.⁶

The committee, being the sole creature of the council, is subject at all times to the complete control of the council. Any committee may be reduced or enlarged in membership, or its powers entirely revoked, if not inconsistent with the charter or rules governing the body. Some charters require certain things to be done by committees, as that the engrossment of bills or ordinances shall be under the supervision of a committee which shall report that the bill is truly engrossed, and that no bill shall be considered for final passage unless the same has been reported upon by a committee.⁷

The rules as to quorums and majorities heretofore given respecting councils and boards usually apply to the proceedings of committees.⁸ The major part of a committee appointed by a town for a particular purpose is necessary to constitute a quorum, and the act of a majority of a quorum is the act of the committee.⁹ However, this rule is only important in so far as the report of the committee is concerned. The final or corporate act is within the discretion of the body creating the committee.

- ⁵ Hitchcock v. Galveston, 96 U. S., 341.
- 6 Milford School Town v. Powner, 126 Ind., 528; 26 N. E. Rep., 484; Railroad Co. v. Marion Co., 36 Mo., 294; Salmon v. Haynes, 50 N. J. L., 97; 11 Atl. Rep., 151.

A favorable report of a committee appointed by a city council to inspect waterworks and recommend action as to their acceptance, when approved by the board will constitute a complete acceptance, and the failure to pass an ordinance of acceptance subsequently proposed will not defeat it. Aurora Water Co. v. Aurora, 129 Mo., 540; 31 S. W. Rep., 946.

Where, after waterworks contracted for by a city have been completed, the city council appoints a committee to inspect them and the committee recommends their acceptance, the receiving of water from the works and the payment of an installment due under the contract amounts to a ratification of the report of the committee and an acceptance of the works by the city. Aurora Water Co. v. Aurora, 129 Mo., 540; 31 S. W. Rep., 946.

⁷ Charter of the City of St. Louis, art. III, secs. 13 and 15; The Municipal Code of St. Louis, pp. 205, 206.

- 8 Secs. 103 to 108, supra.
- Damon v. Granby, 2 Pick.
 (Mass.), 345; State (Van Vorst)
 v. Jersey City, 27 N. J. L., 493.

Majority of selectmen of a town may act in laying out a road. Jones v. Andover, 9 Pick. (Mass.), 146; Crommett v. Pearson, 18 Me., 344

RECORDS.

§ 124. Record of proceedings. Usually the law requires municipal corporations to make written records of their transactions and proceedings. The keeping of such records by the legislative or governing body is generally required in express terms. The law requires a record to the end that those who may be called to act under it may have no occasion to look beyond it; to avoid the mischief of leaving municipal corporate action to be proved by parol evidence; to make it certain that rights which have accrued under such actions shall not be destroyed or affected by the always fallible and often wholly unreliable recollection of witnesses, however truthful and intelligent they may be. For similar reasons the law requires conveyances of lands, wills, certain contracts, records of courts and legislation to be in writing. 11

Ordinarily the validity of an ordinance or resolution is not affected by the fact that, through an oversight of the clerk, it is not copied upon the municipal records.¹² But where the

10 1 Starr & Curtis III. Stat., p. 685, par. 41.

Proceedings of council meeting cannot be left in parol; they must be recorded. Moser v. White, 29 Mich., 59.

Provision that all by-laws, resolutions and ordinances are to be recorded in a book kept for that purpose, held with respect to the particular book in which the record shall be made, directory merely. "No negative words are used in connection with this requirement." Upington v. Oviatt, 24 Ohio St., 232, 241.

Law requiring records, held directory. Barton v. Pittsburgh, 4 Brewst. (Pa.), 373. The unrecorded acts of a borough council if clearly proved, are valid. Avoca v. Pittston, J. & A. R. Co., 7 Kulp. (Pa.), 470.

Township board bound to keep records. Fayette County v. Chitwood, 8 Ind., 504.

Boards and departments connect-

ed with city governments required to keep full records of public transactions. Board of public works must keep records. Davis v. Jackson, 61 Mich., 530; 28 N. W. Rep., 526.

Advisable that records of public board should be kept. Gearhart v. Dixon, 1 Pa. St., 224, 228.

Although not required in express terms, the duty to keep records arises by implication. Fruin-Brambrick Const. Co. v. Geist, 37 Mo. App., 509, 515; Larned v. Briscoe, 62 Mich., 393, 396; 29 N. W. Rep., 22.

¹¹ Per Carpentier, J., in Sawyer v. M. & K. R. R., 62 N. H., 135, 155, 156.

12 Crebs v. Lebanon, 98 Fed. Rep., 549, per Philips, D. J.; Parr v. Greenbush, 72 N. Y., 463.

So failure to enter a vote of stockholders in a private corporation in the corporation records at the time when it was adopted does not invalidate it. Here the resolaw, in express terms, requires ordinances to be recorded and published before going into effect, and this is not done, bonds issued in pursuance thereof are void.¹³

§ 125. Who to keep municipal records. The law usually designates the officer or person authorized to make and keep the municipal records. The person so designated and no other is the only one legally authorized to keep them. In the absence of the persons so named, charters often provide for the appointment of a clerk or secretary pro tem,14 but in the absence of such provision it has been held that corporations have the incidental power to name a person for this purpose. Records kept by such person or records completed by the secretary or clerk from memoranda kept by the temporary clerk, duly appointed by the corporate authorities, are legal evidence of the transactions of the corporate meeting. There cannot be a legal record without one to keep it, as a clerk or secretary or one duly appointed for this purpose.¹⁵ The appointment of one to keep the records by the presiding officer without objection may be considered an appointment by the meeting.¹⁶ In one case the selectmen of a town without express authority appointed a temporary clerk, who acted without objection, and his record of the transactions of the meeting were held valid on the de facto principle.17 The mere

lution was adopted in 1886 and formally entered of record two years thereafter when the omission was discovered. Brown, J., observed: "The failure to enter this resolution at the time it was adopted did not affect its validity, as most corporate acts can be proved as well by parol as by written entries." Handley v. Stutz, 139 U. S., 417, 422; Moss v. Averell, 10 N. Y., 449, 454.

¹³ Bank of Commerce v. Granada, 10 U. S. App., 692; 54 Fed.
 Rep., 100; 48 Fed. Rep., 278; 44
 Fed. Rep., 262.

14 Kellar v. Savage, 17 Me., 444. When minutes are kept by a clerk pro tem., where the clerk was absent, the clerk cannot decline to record them, but he must enter the proceedings, subject to the correction by the council. Cady v. Ihnken (Mich., 1902), 89 N. W. Rep., 72; 8 Detroit Leg. N., 1033.

¹⁵ Attorney General v. Crocker, 138 Mass., 214.

16 State v. McKee, 20 Or., 120;
25 Pac. Rep., 292; State v. Smith (Or., 1890), 25 Pac. Rep., 389.

¹⁷ The court held that a protest by a voter after the meeting respecting the legality of the election because the one named acted as clerk would not avail, but declined to say what effect a protest would have provided it had been made at the time the meeting was being held. Attorney General v. Crocker, 138 Mass., 214, 219.

failure of the clerk to take the oath of office does not invalidate his record.¹⁸

§ 126. Sufficiency of record—Presumptions. The record, to be complete, should show all of the essential or material facts respecting the corporate vote, act or transaction—that all of the mandatory charter provisions have been followed substantially.¹⁹ It is a reasonable rule that courts will not require the same exactness in keeping the records of a town as in case of court records.²⁰ Where the record is silent as to the mode in which a corporate act was done, as for example, the election of officers, the presumption will be, without proof to the contrary, that they were chosen in the manner prescribed

18 Stebbins v. Merritt, 10 Cush.
(Mass.), 27; Bartlett v. Kinsley,
15 Conn., 327; Kellar v. Savage,
17 Me., 444.

19 People ex rel. v. Starne, 35 Ill.,
121; Schwartz v. Oshkosh, 55 Wis.,
490; 13 N. W. Rep., 450; State
(Pope) v. Union, 32 N. J. L., 343.

The minutes of the council need not be signed by the clerk who records them, unless so required by charter. State ex rel. v. Badger, 90 Mo. App., 183.

Recording ordinance. Com. v. Davis, 140 Mass., 485; 4 N. E. Rep., 577.

Should record all acts and votes. Logan v. Tyler, 1 Pitts. (Pa.), 244.

Interlineation of record does not invalidate, respecting appointment by council. Brophy v. Hyatt, 10 Colo., 223; 15 Pac. Rep., 399.

²⁰ Hazelgreen v. McNabb, 23 Ky. Law Rep., 811; 64 S. W. Rep., 431.

A memoranda, made by the clerk, of the proceedings which is intelligible to no one but himself, and from which he wrote out and had published what he understood to be the ordinance was held an insufficient record to show the passage of the ordinance. Louisville v. McKegney, 70 Ky. (7 Bush.), 651.

A charter provision which prescribed that "before the presiding officer shall affix his signature to any bill he shall suspend all other business, declare that the bill shall now be read and that, if no objection be made he will sign the same," is merely directory and where the record shows that the signature of the presiding officer was affixed in open session and that no objections are made, the ordinance is valid although the record fails to show that the other formalities were observed. Barber Asphalt Paving Co. v. Hunt, 100 Mo., 22; 18 Am. St. Rep., 530; 8 L. R. A., 110; 13 S. W. Rep., 98; Heman Const. Co. v. Loevy, 64 Mo. App., 430.

Where the charter requires notice to be given relating to the passage of an ordinance the giving of such notice need not appear on the records. Barr v. New Brunswick, 58 N. J. L., 255; 33 Atl. Rep., 477.

Sufficiency of record in particular case. State v. Minneapolis & St. L. Ry. Co., 39 Minn., 219; 13 N. W. Rep., 153.

Although the record may be in certain particulars incomplete if from it it appears that the proceedings were regular and in subby-law.²¹ So, in a proceeding where the record recites that the rules were suspended, but omits to state by what vote, it will be presumed that they were suspended by the vote required, and hence oral evidence tending to show the contrary will be rejected.²² So, where the record shows that an ordinance is signed by the mayor and attested by the clerk, it will be presumed that the signature was rightfully made, and the minutes need not affirmatively show the mayor's presence at the meeting at which the ordinance was passed.²³ So, a record that a public officer "took the oath of office," imports the oath

stantial compliance with the charter and law, presumptions will be indulged in favor of the sufficiency of the record and the validity of the corporate acts. The following cases illustrate this rule:

Colorado—Greeley v. Hamman, 17 Colo., 30; 28 Pac. Rep., 460.

Iowa—Brewster v. Davenport, 51 Iowa, 427; 1 N. W. Rep., 737; State v. Vail, 53 Iowa, 550; 5 N. W. Rep., 709; Eldora v. Burlingame, 62 Iowa, 32; 17 N. W. Rep., 148.

Kansas—Downing v. Miltonvale, 36 Kan., 740; 14 Pac. Rep., 281.

Kentucky—Lexington v. Headley, 68 Ky. (5 Bush.), 508; Nevin v. Roach, 86 Ky., 492; 5 S. W. Rep., 546.

Minnesota—Duluth v. Krupp, 46 Minn., 435; 49 N. W. Rep. 235.

Missouri—Rutherford v. Hamilton, 97 Mo., 543; 11 S. W. Rep., 249.

New Jersey — Durant v. Jersey City, 25 N. J. Law (1 Dutch.), 309.

New York—In re City of Buffalo, 78 N. Y., 362; In re Board of Rapid Transit Railroad Com'rs, 18 N. Y. Suppl., 320.

Washington—Seattle v. Doran, 5 Wash. St., 482; 32 Pac. Rep., 105, 1002.

Wisconsin — O'Mally v. McGinn, 53 Wis., 353; 10 N. W. Rep., 515.

²¹ Hathaway v. Addison, 48 Me., 440.

As to sufficiency of record in

appointment of officers, see Pierce v. Richardson, 37 N. H., 306.

After ordinance has been duly passed and recorded subsequent unauthorized alteration will not affect its validity. H. & T. C. R. R. Co. v. Odum, 53 Tex., 343, 352.

22 Eldora v. Burlingame, 62 Iowa 32, 37: 17 N. W. Rep., 148.

²² Aurora Water Co. v. Aurora,
129 Mo., 540; 31 S. W. Rep., 946.
Sufficiency of record, showing presence of mayor at meeting.
Martin v. State, 23 Neb., 371; 36
N. W. Rep., 554.

Proof of notice of special meeting need not be recorded unless the law so requires, for it will be presumed that notice was properly given. Board of Supervisors v. Judges, 106 Mich., 166; 64 N. W. Rep., 42.

Where the facts essential to give jurisdiction to an inferior or special tribunal of limited authority are shown by its records, the same presumption prevails in favor of its jurisdiction as prevails in favor of the jurisdiction of superior courts of general jurisdiction, and the statement of jurisdictional fact cannot be denied upon a collateral attack, nor will its plain errors affect it. Rule applied to town council records. Shank-v. Ravenswood, 43 W. Va., 242; 27 S. E. Rep., 223.

prescribed by law.24 But in the silence of the record no presumption obtains that other proceedings than those mentioned in the record took place, as in the passage of an ordinance, that the yeas and nays were called and a majority of the members of the body voted in favor of it.²⁵ So, no presumption arises that an ordinance was passed from the recital of the fact in the record that it was reported, nor from the further fact that contracts were made and work performed under such ordinance.26 So, where officers are to be elected by ballot and a majority vote, the record, to be complete, must show these facts.²⁷ And it is undoubtedly true that where the charter requires particular corporate acts to be performed by a specified vote, as a majority, two-thirds or three-fourths, the record of the proceedings must show affirmatively that the measure received the vote prescribed.²⁸ Ordinarily this will not be presumed.29

Where bills are required to be read a certain number of

²⁴ Scammon v. Scammon, 28 N. H., 419, 429.

It is not necessary to show that the clerk who made the record was duly elected or appointed and sworn. Lemington v. Blodgett, 26 Vt., 210.

25 Tracey v. People, 6 Colo., 151,155; 4 Am. & Eng. Corp. Cas., 373;Ryan v. Lynch, 68 Ill., 160.

²⁶ Covington v. Ludlow, 1 Metc. (Ky.), 295. Compare Lexington v. Headley, 5 Bush. (Ky.), 508.

²⁷ Scammon v. Scammon, 28 N. H., 419, 429.

28 Tennant v. Crocker, 85 Mich., 328; 48 N. W. Rep., 577; Whitney v. Hudson, 69 Mich., 189; 37 N. W. Rep., 184; 30 Am. & Eng. Corp. Cas., 453, n.; Chicago Dock Co. v. Garrity, 115 Ill., 155; 3 N. E. Rep., 448; Rich v. Chicago, 59 Ill., 286; Logansport v. Legg, 20 Ind., 315; Moberry v. Jeffersonville, 38 Ind., 198; Brookbank v. Jeffersonville, 41 Ind., 406.

29 In re Carlton Street, 16 Hun.
 (N. Y.), 497, 499; 78 N. Y., 362;
 Spangler v. Jacoby, 14 Ill., 297.

See, Young v. St. Louis, 47 Mo., 492, 495.

Where the statute in express terms requires a record, no presumption arises as to regularity of proceedings not appearing on record, even though parties may have acted upon the supposed orders of county board. Gorman v. Boise Co. Com'rs, 1 Idaho, 553.

Where several resolutions are passed together, separate vote on each not required. Wright v. Forrestal, 65 Wis., 341; 27 N. W. Rep., 52

On motion to adjourn, the vote in detail need not be recorded. Green Bay v. Brauns, 50 Wis., 204; 6 N. W. Rep., 503.

Recital in the record that all of the members of the body were present and the ordinance passed unanimously is sufficient. Schofield v. Tampico, 98 Ill. App., 324.

Sufficiency of record in showing the passage of an ordinance by the requisite vote. Schofield v. Hudson, 56 Ill. App., 191,

In one case the record stated

times before passage the record should show that this has been done.³⁰ However, it has been held that it is not necessary that the record should show that the bill was read the number of times prescribed, for this will be presumed to have been done unless the record affirmatively shows that it was not done.³¹

§ 127. Same—Taking yeas and nays. In the taking of yeas and nays, a record which recites plainly the vote of each member on the proposition is sufficient.³² Any mode by which the

that a particular resolution was introduced and read, that a motion was made that the vote upon the resolution be by ballot and that the motion was put and carried,—the record fails to show the adoption of the resolution. State v. Curry, 134 Ind., 133; 33 N. E., 685.

When record incomplete in a particular case. Jones v. McAlpine, 64 Ala., 511.

30 Sufficiency of recital of third reading. Rockville v. Merchant, 60 Mo. App., 365, 371.

31 Supervisors of Schuyler v. People ex rel., 25 Ill., 181, 184.

Where the charter required concurrence of the two branches of the council and the record of one branch states that a certain vote was in concurrence with the vote of the other branch, but the whole records of both branches show that the vote was only a vote of one branch, the erroneous statement will be disregarded. Saunders v. Lawrence, 141 Mass., 380; 5 N. E. Rep., 840.

As to Reading—Presumption. If journal recites that the ordinance was presented and "laid over under the rules," it will be presumed that it was read as well as presented, where one of the rules adopted by the council requires that all ordinances, "after being presented and read, shall lie over one week" before final action. Chi-

cago Telephone Co. v. Northwestern Telephone Co., 199 Ill., 324; 65 N. E. Rep., 325, affirming 100 Ill. App., 57. Where the law "does not require a fact to be recorded upon the journal, and it can be inferred from recital in the journal that such fact existed, or such step was taken, then the presumption will be indulged that such fact did exist, or such step was taken, in order to sustain the validity of the law, where the contrary does not appear from the journal itself." Per Magruder, C. J., in Ib., p. 342. Wabash Ry. Co. v. Hughes, 38 Ill.. 174.

32 Delphi v. Evans, 36 Ind., 90.

Where it appears that nine out of ten of the aldermen were present at the submission of an ordinance, and the entry in the record declared it to have been "adopted by a majority vote," it will be presumed that it received the majority vote required by the charter, and not a mere majority of a quorum. McCormick v. Bay City, 23 Mich., 457, 463.

Where a council is composed of the mayor, recorder and six trustees and the record shows that the mayor and five trustees voted in favor of the ordinance and it did not appear that any other members of the council were present, held not necessary to call for the vote of each member is clearly and definitely ascertained for the purposes of the record is sufficient.³³ In Michigan it has been held that, the record of a vote reciting that it "was adopted unanimously on call," the names of those voting not otherwise appearing than by the statement of those present at the opening of the session, is not a compliance with the requirement. The ayes and noes must be entered at large on the minutes.³⁴ This rule has been affirmed in other jurisdictions.³⁵ If the charter expressly requires the year and nays

nays. Bayard v. Baker, 76 Iowa, 220; 23 Am. & Eng. Corp. Cas., 126; 40 N. W. Rep., 818.

33 Where the record recites that "upon the ballot being spread for its approval and adoption, the vote stood as follows: Ayes (names following). Noes, none," it is sufficient. "While the usual parliamentary mode of taking such a vote is by a call of the roll, and it was doubtless contemplated by the law-makers, still it is not to be regarded as essential. Brophy v. Hyatt, 10 Colo., 223, 226, 227; 15 Pac. Rep., 399; Tracy v. People, 6 Colo., 151.

Where the record shows that all of the members of the body voted for the proposition, it sufficiently shows the taking of the yeas and nays. Preston v. Cedar Rapids, 95 Iowa, 71; 63 N. W. Rep., 577.

Record showed the members present, and recited: "All present voting in favor thereof (act in question) and no one against same." Held sufficient. Goodyear Rubber Co. v. Eureka, 135 Cal., 613; 67 Pac. Rep., 1043; German Ins. Co. v. Manning, 95 Fed. Rep., 597. Compare New Albany Gas Light Co. v. Crumbo, 10 Ind. App., 360; 37 N. E. Rep., 1062.

34 "We are of opinion that the record does not show with sufficient certainty that all the members present at roll-call, at the opening of the meeting in question, voted for the resolution; and if it does not show that all did, it does not show that any particular one of them did. What it does show is. that at roll-call when the meeting was opened certain members named were present, and that afterwards, before the meeting adjourned, certain resolutions were adopted unanimously on call. There is no legal presumption that all the members who were present at the call to order remained until adjournment, and that no others came in and took their seats afterwards, nor that every member voted on the resolution on rollcall." Per Cooley, J., in Steckert v. East Saginaw, 22 Mich., 104, 108.

Compare McCormick v. Bay City, 23 Mich., 457; Gilberts v. Rabe, 49 Ill. App., 418; Scofield v. Tampico, 98 Ill. App., 324, 326.

35 Where the charter requires all votes on resolutions to be "by calling the roll, the members voting aye or nay," and that the vote of each member shall be recorded in the minutes or journal of the proceedings, the record of a vote on a resolution reciting "all voting aye" is insufficient. *In re* South Market St., 76 Hun. (N. Y.), 85; 27 N. Y. Suppl., 843; *In re* Younglove, 80 Hun. (N. Y.), 246; 29 N. Y. Suppl., 1030.

Record showed that year and

to be recorded as well as taken, some courts declare the provision mandatory.³⁶

The essential thing is that, the record should show that the ordinance was passed as prescribed by law; that it received the necessary number of votes. The calling of the yeas and nays is a means of ascertaining this fact, and the recording of them furnishes a permanent record of such fact. To sustain a record which recites that, a sufficient number were present when the body convened, and other business was transacted, and then the ordinance in question was passed unanimously, necessarily requires the inference that all remained throughout the meeting or all reappeared when the ordinance was placed on its passage. The calling of the yeas and nays upon the final vote and the recording of the names of those voting for and against certainly is the best form in which to provide absolute proof that the ordinance received the vote prescribed. The best judicial opinions sustain this view. The calling of the ayes and noes and the recording of the names voting for and against should be required that it may affirmatively appear who were present at the passage of the ordinance. When the door for the surreptitious passage of ordi-

nays were called and that a specified number of votes were cast, but omits the names of those voting or how each voted. Held insufficient to show passage of ordinance. Pickton v. Fargo, 10 N. D., 469; 88 N. W. Rep., 90.

Record should show not only the number of votes cast and the fact that the yeas and nays were called, but likewise the names of the members voting and how each voted, whether yea or nay. Pickton v. Fargo, 10 N. D., 469; 88 N. W. Rep., 90.

Record showed majority of members present, stating their names, and that the ordinance was passed unanimously. Held sufficient, in absence of charter provision requiring names of those voting for or against to be recorded. Corry v. Corry Chair Co., 18 Pa. Super. Ct. (Pa.), 271.

The name of each member's vote need not be recorded. State v. Vail, 53 Iowa, 550; 5 N. W. Rep., 709; Brewster v. Davenport, 51 Iowa, 427; 1 N. W. Rep., 737; Eldora v. Burlingame, 62 Iowa, 32; 17 N. W. Rep., 148; Solomon v. Hughes, 24 Kan., 211; Barr v. Auburn, 89 Ill., 361. Compare Schofield v. Hudson, 56 Ill. App., 191.

36 In re Carlton Street, 16 Hun.
(N. Y.), 497; 78 N. Y., 362; Spangler v. Jacoby, 14 Ill., 297; Cutler v. Russellville, 40 Ark., 105; Olin v. Meyers, 55 Iowa, 209; 7 N. W. Rep., 509.

The requirements of a charter that the ayes and nays be entered upon the records, held mandatory, and therefore a record failing to show that they were so taken is incomplete. O'Neil v. Tyler, 3 N. D., 47; 53 N. W., 434.

nances has been closed by charter or statute it ought not to be opened by judicial construction.³⁷

§ 128. Municipal records as evidence. Municipal records properly authenticated or verified are competent evidence of the corporate proceedings of the legislative or governing body and of the transactions of officers and boards connected with the local government.³⁸ Records imperatively required by law, made by the proper officers, are conclusive of the facts therein stated, not only upon the corporation, but upon all the world as long as they stand as records. Their accuracy can be contradicted or impeached only in proceedings instituted directly for the purpose, and to the end that the record may be corrected. So long as they are in existence and can be produced they are the only competent evidence of the acts of the corporation. If they are destroyed or lost secondary evidence may be received to prove them.³⁹ While the original minutes, or rec-

"No bill shall become an ordinance, nor resolution be adopted unless finally passed by a majority of all the members of the board, and the vote be taken by ayes and noes and the names of the members voting for and against the same be entered in the journal." Charter San Francisco, art. II, ch. 1, sec. 9; Statutes and Amend. to Codes of Cal., p. 245.

37 See dissenting opinion in Barr v. Auburn, 89 Ill., 361, 363, and Steckert v. East Saginaw, 22 Mich., 104, 108, per Cooley, J. Compare Schofield v. Hudson, 56 Ill. App., 191.

Burden of proof is on the one who denies the calling of the yeas and nays. Lindsay v. Chicago, 115 Ill., 120; 3 N. E. Rep., 443.

As to admissibility of parol evidence to prove the taking of the yeas and nays, see § 129, post.

38 School District v. Blakeslee, 13 Conn., 227; St. Charles v. O'Mailey, 18 Ill., 407; Fruin-Brambrick Construc. Co. v. Geist, 37 Mo. App., 509, 515; Wood v. Jefferson County Bank, 9 Cow. (N. Y.), 194, 205; Highland Turnpike Co. v. McKean, 11 Johns. (N. Y.), 98; McFarlan v. Tritton Insurance Co., 4 Denio (N. Y.), 392; State v. Van Winkle, 1 Dutch. (25 N. J. L.), 73; Weith v. Wilmington, 68 N. C., 24, 27; Hutchinson v. Pratt, 11 Vt., 402.

39 Sawyer v. M. & K. Ry., 62 N. H., 135, 153; Pickering v. Pickering, 11 N. H., 141, 144; Greeley v. Quimby, 22 N. H., 335; Harris v. School District, 28 N. H., 58, 66; Oxford v. Benton, 36 N. H., 395, 403; Farrar v. Fessenden, 39 N. H., 268; Hampstead v. Plaistow, 49 N. H., 84, 96; Bell v. Pike, 53 N. H., 473; Hill v. Godwin, 56 N. H., 441; Byer v. New Castle, 124 Ind., 86; 24 N. E. Rep., 578; Stevenson v. Bay City, 26 Mich., 44; Samis v. King, 40 Conn., 298, 304; People v. Adams, 9 Wend, (N. Y.), 333; People v. Zeyst, 23 N. Y., 140.

Books containing the minutes of the proceedings of a municipal corporation is the best and only evidence to prove whether or not a claim was allowed by the council. ords, constitute the primary evidence of the facts recited therein, properly authenticated copies of the proceedings of a municipal corporation or other public body have frequently been

Perryman v. Greenville, 51 Ala., 507, 511.

Books of a corporation, established for public purposes, are evidence of its acts and proceedings. Owings v. Speed, 5 Wheat. (U. S.), 420.

Books of account of a municipal corporation properly kept are admissible to charge the city. St. Louis Gas Light Co. v. St. Louis, 84 Mo., 202, affirming 11 Mo. App., 55. So books of a town, not kept with technical accuracy, are competent evidence of facts recited therein. Greenfield v. Camden, 74 Me., 56.

So books kept by selectmen, containing accounts of the business and expense of the town, are evidence in a suit against the town. Thornton v. Campton, 18 N. H., 20.

Contra. In an action of assumpsit to recover money allowed by resolution of the board of aldermen of a town, in settlement of his accounts as town marshal, the books of the town were produced to support the claim, from which it appeared that the sum demanded had been allowed. The town contended that the resolution had been passed by mistake, and offered to show by the same books the passage of a subsequent resolution by the board of aldermen, rescinding the first, and reducing the account. The second resolution was rejected on authority of the general rule, stated in 1 Starkie on Ev., 292, that the books of a corporation are evidence between the members of the body, or

against the body, but they are not evidence for the corporation against a stranger. Tuskaloosa v. Wright, 2 Porter (Ala.), 230. This case is against the weight of authority.

RECORDS OF COUNCIL in letting contract to grade, competent evidence. O'Dea v. Winona, 41 Minn., 424; 43 N. W. Rep., 97.

Record of proceedings of town meeting, competent to show that the meeting was legally warned for the purpose of making a bylaw. Isbell v. N. Y. & N. H. R. R., 25 Conn., 556.

Records of board of health, when conclusive. Stratton v. Lowell, 181 Mass., 511; 63 N. E. Rep., 948.

Ordinances are the best proof of municipal regulations. Hence, regulations of departments cannot be proved by officers where the subject-matter is covered by ordinances, or other records. Rehberg v. New York, 99 N. Y., 652; 2 N. E. Rep., 11.

Official record admissible to show passage of ordinance. People v. Murray, 57 Mich., 396; 24 N. W. Rep., 118.

Records of the location and alteration of streets admissible. Barker v. Fogg, 34 Me., 392.

Original minutes of council, when verified, are admissible. O'Mally v. McGinn, 53 Wis., 353, 357; 10 N. W. Rep., 515.

Original minutes competent without proof of their verity. Denning v. Roome, 6 Wend. (N. Y.), 651, 656.

admitted as evidence.⁴⁰ But this subject is usually regulated by statute.

§ 129. Parol evidence to prove record. Ordinarily, acts or proceedings of municipal corporations, their officers and boards may only be proved by the record. The record is presumed to contain the fundamental attribute of verity, and without which the first and most important definition of a record is not answered. Where it leaves the truth of what took place to be ascertained by an investigation of the antecedent facts upon which it purports to be based, as though nothing had been written, it is no record. The general rule that parol evidence is inadmissible to supply omissions, contradict or explain records, applies to proceedings showing corporate action of parishes, school districts and all forms of public or munici-

Minutes of council as evidence—parol proof. State ex rel. v. Hauser, 63 Ind., 155.

Original minutes taken at the meeting of a religious society held admissible. Waters v. Gilbert, 2 Cush. (Mass.), 27; Pruden v. Alden, 23 Pick. (Mass.), 184.

District school book competent evidence. Gearhart v. Dixon, 1 Pa. St., 224; Monaghan v. Randall, 38 Wis., 100, 106.

Record of secretary of school board admissible to show issuance of school bonds. Board, etc., v. Moore, 17 Minn., 412.

Election returns are admissible. They are documents of a public nature. Where they are produced by the sworn custodian, the party offering them in evidence is not required to explain an erasure and alteration visible upon the face thereof which appears to have been made at the same time and by the same hand as the obliterated letters and figures. People ex rel. v. Minck, 21 N. Y., 539, 541.

When persons other than town officers may identify books and town records, thus rendering them

admissible as evidence, see Hathaway v. Addison, 48 Me., 440.

Minutes of council meeting identified by clerk who kept them as correct are competent. State ex rel. v. Badger, 90 Mo. App., 183.

40 Metropolitan Street R. R. Co. v. Johnson, 90 Ga., 500; 16 S. E. Rep., 49; Dudley v. Grayson, 6 T. B. Monroe (Ky.), 259, 261; Hickock v. Shelburne, 41 Vt., 409.

Sufficiency of authentication. Sanborn v. School District, 12 Minn., 17.

Proceedings of corporate meeting need not be authenticated by a corporate seal. Brady v. Brooklyn, 1 Barb. (N. Y.), 584.

⁴¹ Bell v. Pike, 53 N. H., 473. Per Campbell, J., in Stevenson v. Bay City, 26 Mich., 44, 46.

Parol proof of proceedings of a council and declaration of individual members thereof, in ordering the grading of a street, is not admissible, until some valid reason is shown for not producing the record of such proceedings. Aurora v. Fox, 78 Ind., 1.

Where the law requires a board of public works to keep a record of its proceedings, evidence of oral pal corporations, full and quasi.⁴² Thus, where the warning of a corporate meeting is required to be recorded, and the record fails to show that the hour of the day for the meeting was specified in the warning, it cannot be shown by parol evidence that in the original warning the hour for the meeting was

instructions in open session to the commissioner is inadmissible. Davis v. Jackson, 61 Mich., 530, 539; 28 N. W. Rep., 526, distinguishing Chilson v. Wilson, 38 Mich., 267.

Parol proof that an ordinance was passed is inadmissible where the record only shows that it was reported. Covington v. Ludlow, 1 Metc. (Ky.), 295.

⁴² Connecticut — Gilbert v. New Haven, 40 Conn., 102.

Illinois—People ex rel. v. Madison Co., 125 Ill., 334; 17 N. E. Rep., 802, affirming 23 Ill. App., 386.

Louisiana—Gaither v. Green, 40 La. Ann., 362.

Maine—Crommett v. Pearson, 18 Me., 344.

Massachusetts—Halleck v. Boylston, 117 Mass., 469; Andrews v. Boylston, 110 Mass., 214; Wood v. Simons, 110 Mass., 116; Adams v. Pratt, 109 Mass., 59; Mayhew v. Gay Head, 13 Allen (Mass.), 129, approved in Morrison v. Lawrence, 98 Mass., 219, 221; Saxton v. Nimms, 4 Mass., 315; School Dist. v. Atherton, 12 Met. (Mass.), 105; Manning v. Gloucester, 6 Pick. (Mass.), 6.

Michigan—Larned v. Briscoe, 62 Mich., 393; 29 N. W. Rep., 22; Moser v. White, 29 Mich., 59.

Missouri—Keating v. Skiles, 72 Mo., 97.

New York — People ex rel. v. Zeyst, 23 N. Y., 140.

Pennsylvania—Pittsburg v. Cluley, 74 Pa. St., 262.

Vermont—Eddy v. Wilson, 43 Vt., 362; Cabot v. Britt, 36 Vt., 349;

Hoag v. Durfey, 1 Aiken (Vt.), 286.

Wisconsin — Monaghan v. Randall, 38 Wis., 100, 106.

Parol held inadmissible to prove that the measure was carried by a two-thirds vote as required. This fact must distinctly appear from the record. *In re* Carlton Street, 16 Hun. (N. Y.), 497, 499.

Parol evidence to prove the vote at a corporate meeting inadmissible. School Dist. v. Atherton, 12 Met. (Mass.), 105; Sawyer v. M. & K. R. R. Co., 62 N. H., 135, 153.

The legal effect of a vote cannot be explained away by parol evidence. Cameron v. North Hero, 43 Vt., 507, 510.

Township board can only speak by its record. Fayette County v. Chitwood, 8 Ind., 504.

Not admissible to prove transactions of school district meeting. Moor v. Newfield, 4 Me., 44, 46.

Clerk's attestation of date of mayor's approval of ordinance cannot be contradicted by parol. Ball v. Fagg, 67 Mo., 481, 484, relying on Pacific R. R. Co. v. Governor, 23 Mo., 353.

Some cases hold that acts of the legislature valid on their face may be impeached by the journal. State v. Platt, 2 S. C., 150; Jones v. Hutchinson, 43 Ala., 721; People v. De Wolf, 62 Ill., 253, 255.

Admissible to show mayor approved ordinance, under circumstances of particular case. Knight v. K. C., St. J. & C. B. R. R. Co., 70 Mo., 231.

named.⁴³ So, where the record of a town meeting held on the first of the month did not state that it was adjourned to the second, parol evidence of an adjournment is inadmissible.⁴⁴ But in a Maine case it was held that, where the record of a town meeting states that, "the inhabitants met in the highway and read the warning in the open air and adjourned the meeting" to a different place, parol evidence is admissible, at the instance of the inhabitants, to prove the time when and the place where the transactions took place, how many persons were present, and that others came afterwards to attend the meeting, and, finding no appearance of such meeting, went home.⁴⁵ The fact of the taking of the yeas and nays can only be shown by the production of the record.⁴⁶

§ 130. Parol evidence to show omissions. While the decisions present some apparent conflict respecting collateral impeachment of records of public or quasi public corporations which are required by express law to be kept in writing, they are reasonably uniform in admitting parol evidence to establish the real facts of transactions or corporate acts, in the entire absence of all record, or where the record kept is so meager that the particular transaction, act, or vote is not disclosed by it. This principle has been adopted in order to preserve the rights of creditors of the corporation or third persons who have performed work or services or expended money for the benefit of the corporation, relying in good faith upon the regularity and legality of the proceedings. It has also been

43 "To allow parol proof of that fact as a substitute for a fact that should appear from the record would be to substitute parol proof for the record." Sherwin v. Bugbee, 17 Vt., 337, 340.

44 Taylor v. Henry, 2 Pick. (Mass.), 397, Parker, C. J., said (p. 402): "We do not find any case which authorizes the opinion that an adjournment may be proved by parol. And it would be dangerous to admit such proof. Suppose a town be very much divided; it might be hard to decide, without polling, whether a meeting was adjourned or not, and we should

have honest and intelligent men swearing to each side of the question. If a fact of this kind can be proved by parol evidence, it is difficult to see why the election of officers may not be proved in the same manner. This goes to the foundation of our system of civil society."

⁴⁵ Chamberlain v. Dover, 13 Me., 466. 473.

⁴⁶ Sullivan v. Leadville, 11 Colo., 483; 18 Pac. Rep., 736; Logansport v. Crockett, 64 Ind., 319; *In re* St. Louis v. Foster, 52 Mo., 513; Carlton Street, 16 Hun. (N. Y.), 497, 499. invoked in other instances.⁴⁷ Where the charter or statute applicable declares in express terms that a record shall be kept and shall be the only evidence of corporate acts, the rule of strict construction would exclude parol evidence; but in the absence of such provision courts are more liberal in admitting

47 "When there is an omission to make records, the rights of other persons acting under or upon faith of a vote not recorded, ought not to be perjudiced." Per Williams, C. J. in Hutchinson v. Pratt, 11 Vt. 402, 421; Bank v. Dandridge, 12 Wheat. (U. S.), 64.

A record of a vote which shows on its face that three members voted yea and three no, may be contradicted by parol showing that two of the latter did not vote at all where the record also shows that members not voting were counted as voting no. State ex rel. v. Alexander, 107 Iowa, 177, 181; 77 N. W. Rep., 841.

board record showed School that a motion was passed, but failed to show what the motion was. The secretary who made the record was allowed to testify what the motion was. Here it was said: "The oral evidence did not impeach, contradict, or vary the contents of the minutes. It simply supplied an evident omission, and thereby applied it to its proper subject,-the record of the vote of the directors." Morgan v. Wilfley, 71 Iowa, 212, 213; 32 N. W. Rep., 265.

In order to show what the action of a township board was on a certain matter parol evidence is admissible, where there is only a brief synopsis of the proceedings entered of record. Here the law did not expressly require a record, nor make the proceeding or acts void unless recorded, nor make the record the only evidence. Rock

Creek Tp. v. Codding, 42 Kan., 649, 651; 22 Pac. Rep., 741.

Joint action of school boards of two townships in detaching certain territory from one school district and attaching it to another may be shown by parol, in the absence of all record, after acquiescence for five years. Pine River School Dist. v. Union School Dist., 81 Mich., 339, 344; 45 N. W., 993.

Where the law did not require a record and none had been made, parol evidence of a resolution was held competent. Darlington v. Com., 41 Pa. St., 68.

In a suit for salary, an officer may show that a resolution authorizing its payment was duly passed, but through negligence it was not recorded. Drott v. Riverside, 4 Ohio Cir. Ct., 312.

Where there is no record, official oath may be proved by parol. Farnsworth Co. v. Rand, 65 Me., 19; Hale v. Cushing, 2 Me., 218; Hathaway v. Addison, 48 Me., 440.

Where clerk pro tempore of religious society, through inadvertence, omits to record proceedings in record book, the testimony of the chairman of the meeting who also took minutes for such clerk was admitted as secondary evidence. Waters v. Gilbert, 2 Cush. (Mass.), 27, 31.

Parol is admissible to show that the selectmen elected acted as such during the year. Lemington v. Blodgett, 37 Vt., 210.

Proof by parol allowed that signers of petition for laying out

oral testimony for the purposes and within the limitations stated.⁴⁸

Same subject—Imperfect record—Rights of credit-§ 131. Since the rights of creditors and third persons cannot be prejudiced by the entire absence of all record, as stated in the last section, so such rights will not be destroyed by the neglect of the corporate officers to keep a proper record. 49 As declared in a New Jersey case, the rights of creditors cannot be made to depend "upon the regularity with which the minutes of the city council are kept, nor whether they are kept Thus, where the records are kept in an imperfect manner, and there is no written evidence in existence to prove. that certain work was done by authority of the council, parol evidence will be admissible to prove that fact.⁵¹ So the passage and existence of an ordinance under which a contractor made large expenditures may be shown by parol testimony where the city fails to keep a record of its ordinances.⁵²

a highway were freeholders. Austin v. Allen, 6 Wis., 134.

McCormick v. Bay City, 23 Mich., 457.

"That which is not established by the written record, fairly construed, cannot be shown to vary them." Per Campbell, J., in Stevenson v. Bay City, 26 Mich., 44, 47.

Parol may be proper in proper proceedings to compel the clerk to amend his record according to the truth. Taylor v. Henry, 2 Pick. (Mass.), 397, 402; Manning v. Gloucester, 6 Pick. (Mass.), 6, 16; Stoughton v. Atherton, 12 Met. (Mass.), 105, 113.

48 "When the law requires municipal bodies to keep records of their official action in the legislative business conducted at their meetings, the whole policy of the law would be defeated if they could rest partly in writing and partly in parol, and the true official history of their acts would perish with the living witnesses, or fluctuate with their conflicting mem-

ories." Per Campbell, J., in Stevenson v. Bay City, 26 Mich., 44, 46.

49 First Nat. Bk. v. Randall, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 971.

What the council in fact did may be shown by evidence alunde the record kept by it. Bridgeford v. Tuscumbia, 16 Fed. Rep., 910, 913; 4 Woods C. C., 611.

Fer Green, C. J., in Bigelow v.
 Perth Amboy, 25 N. J. L., 297, 301.
 Ross v. Madison, 1 Ind., 281, 284; 48 Am. Dec., 361.

52 Per Brewer, J., in Troy v. A. &
N. R. R., 11 Kan., 519; 13 Kan.,
70; Barton v. Pittsburgh, 4 Brewster (Pa.), 373.

Parol received respecting contents of an ordinance at time of its passage and subsequent alterations. Dyer v. Brogan, 70 Cal., 136; 11 Pac. Rep., 589.

When parol admissible to show mayor approved ordinance, see Knight v. K. C., St. J. & C. B. R. R., 70 Mo., 231.

Omission of school district to

§ 132. Amendment of record. The courts are liberal respecting amendments of corporate records. If through inadvertence or misapprehension the record has been defectively made it is competent to complete it according to the truth.⁵³ Thus, where the record fails to show that the yeas and nays were taken, it may be amended so that it will speak the truth.⁵⁴

make a contract a matter of record is no defense to an action against the district on such contract. Athearn v. Millersburg, 33 Iowa, 105.

Defective school records may be explained, or omission supplied by parol evidence. Gearhart v. Dixon, 1 Pa. St., 224.

53 "Courts have never adopted. and from their nature it would not be practicable to adopt, those strict. technical and peculiar rules as to their correction, which apply to the amendment of judicial records. On the contrary, it is deemed of so great importance to uphold the proceedings of our municipal corporations that courts are disposed to be as indulgent in allowing entries of their proceedings to be amended, as is consistent with the safety of those whose interests would be affected by them. From carelessness, on the part of the clerks of our towns and other municipal corporations, or their not sufficiently appreciating the importance of fully and precisely describing their proceedings, they are frequently entered in their records very loosely and irregularly; and it is not to be expected that those officers will always be competent to perform their duties in this respect with the correctness that is desirable. To hold, therefore, that their entries, as first made, are beyond the reach of their subsequent correction. would produce greatest confusion." Per Storrs, J., in Boston Turp. Co. v. Pomfret, 20 Conn., 590, 595, 596.

"It is competent for any tribunal to correct its record so as to make it speak the truth." Everett v. Deal, 148 Ind., 90, 92; 47 N. E. Rep., 219; Anniston v. Davis, 98 Ala., 629; 39 Am. St. Rep., 94; 13 So. Rep., 331; Whittier v. Varney, 10 N. H., 291; Adams County v. Quincy, 130 Ill., 566; 22 N. E. Rep., 624; St. Charles v. O'Mailey, 18 Ill., 407; Turley v. Logan County, 17 Ill., 151.

Record of school districts. Harris v. Canaan School District, 28 N. H., 58.

Tax bills. Stadler v. Roth, 59 Mo., 400; Prendergast v. Richards, 2 Mo. App., 187.

Record has the same force and effect as though originally made as amended. Gilberts v. Rabe, 49 Ill. App., 418, 421; Du Page County v. Martin, 39 Ill. App., 298.

⁵⁴ Logansport v. Crockett, 64 Ind., 319; Pineville v. Burchfield, 19 Ky. L. Rep., 984; 42 S. W. Rep., 340.

Allowed if there be matter of record which authorizes amendment by nunc pro tunc entry. Commissioners of Lowndes County v. Hearne, 59 Ala., 371, 376.

Defect in passage of an ordinance may be cured by subsequent supplemental action, as by supplying omitted record, where there are no restrictions as to time of making record. Schenley v. Commonwealth, 36 Pa. St., 29.

Held to be substantial compliance with the requirement where the minutes gave the name of each councilman present, the number

The officer while in office may amend a record made by him.⁵⁵ It has been held that one who was formerly town clerk. but who is no longer in office, cannot amend a town record made by him when town clerk.⁵⁶ On the other hand, it has been decided that the person in office at the time the proceedings were had may make the amendment; that it is not necessary that he should hold the office when the amendment is made.⁵⁷ The records of councils or legislative bodies or departments or boards are generally controlled by the body as a unit, and while the determination of what the record should set forth devolves upon the clerk or secretary in the first instance, as a rule, the propriety of amendments belongs to the body it-But where the charter required the clerk to keep a voting in the affirmative and the (Mass.), 229; Hadley v. Chambernames of those voting in the negalain, 11 Vt., 618.

voting in the affirmative and the names of those voting in the negative, and where, upon a correction of the minutes at the next regular meeting, and before the minutes were signed, the names of those voting in the affirmative were inserted. Becker v. Henderson, 100 Ky., 450; 38 S. W. Rep., 857.

55 Connecticut—Boston Turnp.
Co. v. Pomfret, 20 Conn., 590, 596.

Illinois—Ryder Estate v. Alton,
175 Ill., 94, 97; 51 N. E. Rep., 821;
St. Charles v. O'Mailey, 18 Ill.,
407; Belknap v. Miller, 52 Ill. App.,
617.

Maine—Fossett v. Bearce, 29 Me., 523; Chamberlain v. Dover, 13 Me., 466; 29 Am. Dec., 517.

Massachusetts—Halleck v. Boylston, 117 Mass., 469; Saxton v. Nimms, 14 Mass., 315, 321; Welles v. Battelle, 11 Mass., 477.

New Hampshire—Bishop v. Cone, 3 N. H., 513, 516; Scammon v. Scammon, 28 N. H., 419, 429.

Vermont—Hoag v. Durfey, 1 Aiken (Vt.), 286.

Where there is no proof of the election of one as town clerk such person cannot amend the records of a town meeting. Taylor v. Henry, 2 Pick, (Mass.), 397.

58 Hartwell v. Littleton, 13 Pick.

The clerk of a school district after he is out of office and another chosen and sworn in his stead cannot amend the record of the district. Stoughton v. Atherton, 12 Metc. (Mass.), 105.

Clerk may amend records made by him, although in the meantime he is out of office, but is again restored. Mott v. Reynolds, 27 Vt., 206.

An ordinance was reported to the council and no further action was had thereon. Nearly two years thereafter a new board came in, and, by order, caused the words "passed unanimously" to be added. This was held to be unauthorized. Covington v. Ludlow, 1 Met. (Ky.), 295

57 Gibson v. Bailey, 9 N. H., 168, 176; Fossett v. Bearce, 29 Me., 523; Kiley v. Cranor, 51 Mo., 541. City engineer permitted to amend special tax bill after the expiration of his term of office. Stadler v. Roth, 59 Mo., 400; Kiley v. Oppenheimer, 55 Mo., 374; State ex rel. v. Phillips, 102 Mo., 664, 667; 15 S. W. Rep., 319.

58 Council has power to determine whether the journal truly

record of the proceedings of the council which should be received in all courts as evidence of the truth of the matters therein contained, it was held that it could not be amended by vote of the council, but only by the clerk or by order of court. In one case the record showed the election of a street commissioner by a majority of one vote, resulting from a ruling of the presiding officer, sustained by the council, that a certain member could not change his vote. At its next meeting, before approving the minutes, the council ordered them to be corrected so as to show that the member in question was allowed to change his vote, and, hence, "that there was no election." Here the charter prescribed that, the council "shall determine the rules of their proceedings and keep a journal thereof," and required the clerk to make an accurate record of all proceedings. The amendment was sustained.

§ 133. Method of amending. Amendments should only be made on evidence showing the truth of the facts.⁶¹ And it has been said that, ordinarily they should be made from original documents or minutes, and not upon the testimony of third persons, or upon the clerk's own recollection, unless in a very obvious case of omission or error.⁶² In one case, amendments were sustained, made some years after the original entry, by the town clerk, on information from others and not on his own personal knowledge, the court observing: "It is sufficient that the fact recorded is ascertained by him, by whatever means, and that it is recorded by him, or by his authority." Some

sets forth its proceedings. State ex rel. v. Cleveland, 15 Ohio Cir. Ct., 517; 8 Ohio Cir. Dec., 357.

Where the record of the proceedings of a council fails to show its action in a particular matter, as in approving the report of one of its committees, the council, at a subsequent meeting, may amend the record so as to show the fact. Adams County v. Quincy, 130 III., 566, 581; 22 N. E. Rep., 624.

"A legislative body makes and controls its own records, and decides for itself when it contains a true history of its proceedings." Gilberts v. Rabe, 49 III. App., 418, 420.

⁵⁹ Samis v. King, 40 Conn., 298, 305.

60 Mann v. LeMars, 109 Iowa,251, 255; 80 N. W. Rep., 327.

61 Low v. Pettengill, 12 N. H., 337.

62 Mott v. Reynolds, 27 Vt., 206,208, per Redfield, C. J.

63 Boston Turnpike Co. v. Pomfret, 20 Conn., 590, 598, two judges dissented and applied the rule relating to court records, citing Wilkie v. Hall, 15 Conn., 32.

Amendment sustained which was made by addition "from the personal knowledge of the members of the board." Gilberts v. Rabe, 49 Ill. App., 418, 421,

courts hold that where the record is amended it should appear on the record when, how, and why the amendment was made. It is only when this is done that the true character of the record appears, and all the facts connected with it which are essential to show its validity.⁶⁴ Where litigation has arisen involving rights existing under the amendment proposed it should be made on application to the court.⁶⁵

Court may order amendment — Mandamus. stated, amendments may be compelled on order of court,66 and mandamus will lie for this purpose. 67 The writ will lie to compel a town clerk to amend the record so that it would show the true fact of the appointment of plaintiff to office in place of another. In such case neither the incumbent nor the city are necessary or proper parties. The fact that amending the record would prepare the way for the plaintiff to displace the incumbent was held to be no objection to granting the relief prayed. 68 Where, under the law, the jurisdiction of the council in approving its journal, in the absence of any charge of fraud or bad faith, is final and conclusive, and the record of a previous meeting is read at a succeeding meeting under the rules adopted, and the council has corrected and disposed of the journal, the clerk has no further right, and there is no duty enjoined upon him by law to correct the same; mandamus, therefore, will not lie to compel him to do so. court will not inquire into the accuracy of that record any more than it will into the motives which prompted members in voting as they did.69

§ 135. Amendment after lapse of time—Estoppel—Ex post facto. Amendments have been sustained made several years after the original entries. Where a record, made 39 years previous, recites that the officer was "sworn into office," and it appeared that the town clerk was dead and the officer was chosen and acted as such, the record is competent to be sub-

⁶⁴ Low v. Pettengill, 12 N. H., 337, 340.

⁶⁵ Low v. Pettengill, 12 N. H.,
337, 340; Gibson v. Bailey, 9 N. H.,
168, 176; Pierce v. Richardson, 37
N. H., 306, 311, per Bell, J.

⁶⁶ Bishop v. Cone, 3 N. H., 513.67 Samis v. King, 40 Conn., 298,

⁶⁷ Samis v. King, 40 Conn., 298, 305.

⁶⁸ Farrell v. King, 41 Conn., 448. See Smith v. Moore, 38 Conn., 105.

⁶⁹ State ex rel. v. Cleveland, 15 Ohio Cir. Ct., 517; 8 Ohio Cir. Dec., 357.

 $^{^{70}}$ Welles v. Battelle, 11 Mass., 477, 481.

mitted to the jury, as tending to show that the officer took the oath of office as prescribed by law.⁷¹ Ordinarily courts apply the principles of estoppel as strictly and with as much reason to municipalities and their inhabitants as to individuals.⁷² In accordance with this principle, where a town record as originally made showed that a town voted to guarantee certain bonds in aid of a railroad, and it appeared that the company, in good faith, relying on the legality of the guarantee, incurred large expenditures of money, after the lapse of three years the town will be estopped from availing itself of a correction of the record by the town clerk, showing that the vote had not been legally adopted, although the correction was made in pursuance of order of court.⁷³

In one case the record of the village board did not show at the time the ordinance was violated that it had been legally passed. The record was subsequently amended so as to show the fact. Here it was contended that the defendant acquired some sort of vested right to immunity which could not be disturbed by the subsequent amendment, or that such subsequent amendment was ex post facto in its character and void as to him. But the court replied: "When defendant contemplated a violation of its provisions, ordinary prudence would require that he should ascertain whether it was in fact passed in the required mode. He is presumed to have known that the law authorized the board to amend its records by adding any omitted fact, and he could acquire no vested right that the prosecution for his wrong doing should be governed by the record in its incomplete form. When he undertook to violate the ordinance, because he thought the village would not be able to prove its passage, he took the risk of such proof being made, and he had no right to insist that the proof should not be made.''74

⁷¹ Cass v. Bellows, 31 N. H., 501, 511; 64 Am. Dec., 347.

⁷³ N. H. W. R. R. Co. v. Chatham,42 Conn., 465, 479.

⁷² Per Pardee, J., in Society for Savings v. New London, 29 Conn., 174, 192. See § 352, post.

⁷⁴ Gilberts v. Rabe, 49 Ill. App., 418, 421.

CHAPTER IV.

OF ENACTMENT OF ORDINANCES .- Continued.

2. THE ORDINANCE AND ITS PASSAGE.

- § 136. Charter method of enact- § 153. ment exclusive. 154.
- 137. Form of ordinance.
- 138. The formal parts of an ordinance enumerated.
- 139. Recital of authority to enact not required.
- 140. Ordinance need not recite necessity of enactment.
- 141. One subject and title.
- 142. Same-illustrative cases.
- Title in revision of ordinances.
- 144. Preamble.
- 145. Ordaining or enacting clause.
- 146. Time of introduction and passage.
- 147. Same-double board.
- 148. Reference to and report by committee.
- 149. Signing and approval of ordinances by mayor.
- 150. Veto of mayor.
- Return of bill or ordinance by mayor.
- 152. Ordinances passed and approved by electors.

- § 153. Recording ordinances.
 - 154. Deposit and custody of ordinances.
 - 155. Publication of ordinances and notice of pendency.
 - 156. Time and frequency of publication.
 - 157. Method of publication.
 - 158. Amendment on passage.
 - 159. Publication of amendments on passage.
 - 160. Consideration of mayor's veto.
 - 161. Courts will not inquire into legislative motive.
 - 162. Same—rule limited—ministerial act.
 - 163. Injunction to restrain passage of ordinance.
 - 164. Validating void ordinance by municipality.
 - 165. Curative power of legislature over void ordinances.
 - 166. Same proceedings to subscribe for railroad stock.
 - 167. Same-to collect taxes.
- § 136. Charter method of enactment exclusive. To validate the ordinance, the mode prescribed by the charter for its enactment must be observed.¹ Prior to the introduction for passage of ordinances relating to public work and improvement which are to be paid for by special assessment or taxation (as sometimes termed), certain preliminary steps are usually required, as notice by advertisement of the contemplated work; public hearing; establishment of benefit, assessment or taxing dis-

'McCoy v. Briant, 53 Cal., 247, Mo. Pac. R. R. Co. v. Wyandotte, 250; Fuller v. Heath, 89 Ill., 296; 44 Kan., 32; 23 Pac. Rep., 950; Elizabethtown v. Lefler, 23 Ill., 90; Lewis v. St. Louis, 4 Mo. App., 563;

tricts; determination of protests or remonstrances; recommendation of the proposed ordinances by a designated board or department and estimate of the cost of the work endorsed thereon. These and like requirements are regarded as conditions precedent to final action on the ordinance; they are jurisdictional in their nature and non-compliance with them leaves the council without power to adopt the ordinance.² This doctrine is more frequently applied in the passage of ordinances, resolutions and orders authorizing and providing for street and sewer construction and reconstruction and other public improvements, and will be found fully treated in the chapter on improvement ordinances.³

§ 137. Form of ordinance. Of course, the ordinance must be in writing as the legislative will can be expressed in no other manner. And it seems equally unnecessary to state that the English language should be employed.⁴

Welker v. Potter, 18 Ohio St., 85; Williams v. Willard, 23 Vt., 369; Danville v. Shelton, 76 Va., 325; Dunstan v. Imperial Gas Light, etc., Co., 3 Barn. & Adol., 125; 23 Eng. Com. L., 42.

² San Francisco v. Buckman, 111 Cal., 25; 43 Pac. Rep., 396; State v. Plainfield, 38 N. J. L., 95; *In re* Douglass, 46 N. Y., 42; Gilman v. Milwaukee, 61 Wis., 588; 21 N. W. Rep., 640; Quint v. Merrill, 105 Wis., 406; 81 N. W. Rep., 664.

3 Chapter XVI.

4 Breaux's Bridge v. Dupuis, 30 La. Ann. (pt. 2), 1105, holding that the constitutional provision of Louisiana commanding that all laws and legislative proceedings shall be promulgated and preserved in the English language applied to acts of town councils. Hence, an ordinance in the French language only was held void.

In a case decided in 1831, an ordinance promulgated in French only was held valid, but this resulted from the construction of the Louisiana constitution of 1812, and is distinguished from the con-

stitution of 1868 in the case above The constitution of 1812 prescribed the use of the English language, in the promulgation and preservation of all laws passed by the legislature, the public records of the state, the legislative and judicial written proceedings of the same. The court was of the opinion that that constitutional provision could not, without too forced a construction, be extended to the by-laws and ordinances of corporations. "Whatever force and effect such by-laws and ordinances may have, they are not laws passed by the legislature of the state." Loze v. New Orleans, 2 La., 427.

The "ordinance imposing the license * * * is a law, a legislative proceeding, and though its promulgation in the language understood and spoken in the locality wherein it was adopted was proper and authorized, the 109th article of Constitution of 1868, which differs from sec. 15 of title VI of the state constitution of 1812, commands that all laws and legislative proceedings shall

Where no particular form is prescribed any form of expression may be adopted which clearly signifies the corporate will that the ordinance or by-law exists and which plainly indicates its terms and the objects to which it is intended to apply. In an early New Hampshire case, the record of the town meeting showed that it was "voted, to collect fines of one dollar of all persons riding or driving across the village bridge or salmonhole bridge, faster than a walk, agreeably to an act passed January 13, 1837." In sustaining the by-law, the court observed: "It is apparent from this record that the question came regularly before the town, whether they would adopt bylaws to impose fines, in pursuance of the statute, upon persons who should improperly ride or drive across the bridges described in the warrant, and that they voted to do so, in terms that can admit of no mistake or doubt. It would therefore seem that the by-law was by that vote adopted. No particular form was prescribed by the statute in which the law should be engrossed, and there seems to be no law or custom restraining the towns from selecting such form of expression as suits them, provided enough be contained to signify their will that the by-law exists and to indicate the terms of it, and the objects to which it should apply. * * * A great variety of forms may be found in the history of legislation for the expression of the legislative will, that have never been called in question, and that are as unlike to each other as the form used in this case is to any of them."5

As we have seen, an ordinance in the form of a resolution is not necessarily invalid.⁶ However, if such resolution wants the solemnities of an ordinance it cannot be regarded as a legislative equivalent.⁷

Many charters adopt the usual constitutional requirement and provide that "no ordinance shall be passed except by bill." 8

be promulgated and preserved in the English language. * * * * Now, unless promulgated and preserved in the English language, no law or ordinance, whether passed by the legislature or town council, can have any binding effect." Breaux's Bridge v. Dupuis, 30 La. Ann. (pt. 2), 1105.

⁵ Lisbon v. Clark, 18 N. H., 234,

238, per Gilchrist, J. By-law of private corporation, held good, not in writing. Holly Springs Bank v. Pinson, 58 Miss., 421; 38 Am. Rep., 330.

⁶ Sec. 5, supra.

⁷ Paterson v. Barnet, 46 N. J. L., 62, 66.

⁸ Charter San Francisco, art. II. ch. 1, sec. 8; Statutes and Amend-

An ordinance establishing grades of streets may properly refer to maps and books on file in a public office, as a part thereof.⁹ So a prior ordinance may be incorporated in a subsequent ordinance and be carried forward by appropriate language.¹⁰

- § 138. The formal parts of an ordinance enumerated. The formal parts of a complete penal ordinance are:
 - 1. The title.
 - 2. The preamble, or reason for passage (not usual).
 - 3. The ordaining or enacting clause.
- 4. The command to do (and sometimes the manner of doing it) or not to do, and designation of subjects and objects of operation.
 - 5. The penalty.
- 6. Naming the time when to take effect; in the absence of charter provision or in case of emergency, it should be declared.¹¹

In administrative, franchise and improvement ordinances the form will vary with the subject-matter and the experience and taste of the framer. In franchise ordinances the reservation of the right of the municipal corporation to change, alter and repeal is usually incorporated.

In penal ordinances, especially of towns and villages, formality is not always observed and sometimes all parts are thrown into one section or paragraph.¹² Where the ordinance is precise, definite and certain in its terms bad form will not invalidate it. While the law concerns itself more with substance than mere form, yet clear manner of expression and proper arrangement of the parts of the ordinance are the best and frequently the only guides in ascertaining the legislative intent. Every ordi-

ments to Codes of Cal. (1899), p. 245; Charter St. Louis, art. III, sec. 13; Mun. Code of St. Louis, p. 205; 2 R. S. Mo., 1899, p. 2482, sec. 13.

Napa v. Easterby, 76 Cal., 222;18 Pac. Rep., 253.

¹⁰ Baumgartner v. Hasty, 100 Ind., 575, 586, per Elliott, J.

A statute may be carried forward by reference to the general subject. Opp. v. Ten Eyck, 99 Ind., 345.

11 Van Alstine v. People, 37

Mich., 523; Watkins v. Hillerman, 73 Hun. (N. Y.), 317; 26 N. Y. Suppl., 252.

12 (Relating to sale of intoxicating liquor.) "That whoever not having a license to keep a dramshop, shall, by himself or another, either as principal, clerk, or servant, directly, or indirectly, sell any intoxicating liquor in any quantity, shall be fined not less than twenty dollars, nor more than one hundred dollars for each and

nance should be so drawn as to successfully pass the test of judicial scrutiny.¹³

§ 139. Recital of authority to enact not required. Unless expressly required by the charter, the ordinance need not contain a recital of the power to enact it. This will be presumed until the contrary is shown.14 The established rule is thus aptly stated in an early Maryland case: "It is not essential to the validity of an ordinance, executing powers conferred by the legislature, that it should state, or indicate, the power in execution of which the ordinance was passed. If it state no particular power, as its basis, judicial courtesy requires that we should regard it as emanating from that power which would have warranted its passage. If two such powers exist, it may be imputed to either, in conformity to which its provisions and prerequisites show that it has been adopted. If, in these respects, in accordance with both, no incongruity or injustice can result, in regarding it as the offspring of both, or either of the powers."15 Within the reason of this rule, it has been held that, the misrecital in an ordinance of the source of power by which the ordinance is passed will not invalidate it if the power to enact it existed.16

every offense." Schofield v. Tampico, 98 Ill. App., 324, 325; Buell v. State, 45 Ark., 336.

¹³ Failure to number the subdivisions of the ordinance in proper order does not affect its validity. Los Angeles County v. Eikenberry, 131 Cal., 461; 63 Pac. Rep., 766.

Form of appropriation ordinances. Itemizing specific objects and purposes. Leadville v. Matthews, 10 Colo., 125; 14 Pac. Rep., 112; Sank v. Philadelphia, 8 Phila. (Pa.), 117; 4 Brewster (Pa.), 133. 14 Com. v. Fahey. 5 Cush. (Mass.), 408; Hoyt v. E. Saginaw, 19 Mich., 39; Ogdensburgh v. Lyon, 7 Lans. (N. Y.), 215; Biggar, Mun. Manual of Canada, p. 334, citing Fisher v. Tp. of Vaughan, 10 Up. Can. Q. B., 492; Tylee v. County of Waterloo, 9 Up. Can. Q. B., 588, 590; Re Cameron and Tp. of East Nissouri, 13 Up. Can. Q. B., 190; Re Gibson and United Counties of Huron and Bruce, 20 Up. Can. Q. B., 11; Re Croome and City of Brantford, 6 Ontario Rep., 188.

There is no right of action against a city for attempting to enforce a by-law *ultra vires*. Pocock v. Toronto, 27 Ontario Rep., 635.

¹⁵ Methodist Protestant Church v. Baltimore, 6 Gill. (Md.), 391, 399; 48 Am. Dec., 540, per Dorsey, C. J.

¹⁶ Baltimore v. Ulman, 79 Md., 469; 30 Atl. Rep., 43.

Preamble recited that ordinance is adopted on the prayer of a majority of the property owners. Held not material whether true or not, as power to proceed did not depend upon request of property

§ 140. Ordinance need not recite necessity of enactment. Charters often provide that in certain ordinances, especially those relating to sanitary affairs, and street, sewer and other public work, the necessity of their passage be declared. The judicial view is that failure in this respect does not render the ordinance void, since its passage authorizing the act is equivalent to declaring the necessity.17 Necessity "is nearly synonymous with expediency or what is necessary for the public good. The word necessary when applied to law, or taking private property, is constantly understood and acted upon in this sense. or as contradistinguished from unnecessary or mexpedient. The statute then, by the words of the power in question, 'if they find it necessary,' says no more than what is implied by every charter of incorporation, as directory to its members. 'You shall not pass by-laws which are unnecessary.' But be this as it may, some exigency should, in the nature of things, always exist, and in legal presumption does exist, to warrant the passage of a positive law. Yet, we believe, an adjudication or recital of such exigency in the law itself was never deemed requisite to its validity, whether it was one of absolute necessity or mere expediency. A recital is sometimes deemed proper and useful in the construction of a law, but not essential to its constitutional existence. * * * It is of the nature of legislative bodies to judge of the exigency upon which

owners, and, therefore, the matter in the preamble was not jurisdictional. Bohle v. Stannard, 7 Mo. App., 51.

A recital on the face of municipal bonds of a statute which does not grant authority to issue them is not fatal, provided the city possesses power to make the issue. Beatrice v. Edminson (U. S. C. C. A.), 117 Fed. Rep., 427. See § 539, nost.

17 Connecticut — Townsend v. Hoyle, 20 Conn., 1, 8.

Missouri—Young v. St. Louis, 47 Mo., 492; Kiley v. Forsee, 57 Mo., 390, 395; McCormick v. Patchin, 53 Mo., 33; Bohle v. Stannard, 7 Mo. App., 51; Miller v. Anheuser, 2 Mo. App., 167, 172. New York—Rector, etc., of Trinity Church v. Higgins, 4 Robertson (N. Y.), 1, 10; New York v. Dry Dock, etc., R. R. Co., 133 N. Y., 104; 28 Am. St. Rep., 609; 30 N. E. Rep., 563.

North Carolina — Raleigh v. Peace, 110 N. C., 32; 14 S. E. Rep., 521.

Texas—Connor v. Paris, 87 Tex., 32; 27 S. W. Rep., 88; Ex parte Gregory, 20 Tex. App., 210; 54 Am. Rep., 516.

"It is not necessary that all the reasons of the by-law should be given in the preamble of it." Per Lord Mansfield in Rex v. Harrison, 3 Burrows, 1328. Compare Hoyt v. East Saginaw, 19 Mich., 39; 2 Am. Rep., 76.

their laws are founded; and when they speak, their judgment is implied in the law itself." 18

§ 141. One subject and title. Following the provisions of most of the state constitutions, municipal charters sometimes provide that an ordinance shall embrace but one subject, which subject shall be clearly expressed in its title. General appropriation ordinances are usually excepted which may embrace the various subjects and the accounts for and on account of which moneys are appropriated. In the absence of such express provision the constitutional requirement in this respect does not apply to the passage of municipal ordinances, as ordinances are held not to be laws within its meaning. The

18 Stuyvesant v. New York, 7 Cow. (N. Y.), 588, 606, 607, followed in Cronin v. People, 82 N. Y., 318, 323. To same effect Martin v. Mott, 12 Wheat. (U. S.), 19.

19 Charter of San Francisco, art. II, ch. 1, sec. 1; Statutes and amendments to the Codes of Cal. (1899), p. 245; Charter of St. Louis, art. III, sec. 13; Mun. Code of St. Louis, p. 205; 2 R. S. of Mo., 1899, p. 2482, sec. 13.

Colorado — Thomas v. Grand Junction, 13 Colo. App., 80; 56 Pac. Rep., 665.

Illinois—Thompson v. Highland Park, 187 Ill., 265; 58 N. E. Rep., 328; Chicago T. T. Co. v. Chicago, 178 Ill., 429; 53 N. E. Rep., 361; Hinsdale v. Shannon, 182 Ill., 312; 55 N. E. Rep., 327.

Iowa — Hanson v. Hunter, 86 Iowa, 722; 48 N. W. Rep., 1005; 53 N. W. Rep., 84; Des Moines v. Hillis, 55 Iowa, 643; 8 N. W. Rep., 638.

Kansas — Emporia v. Shaw, 6 Kan. App., 808; 51 Pac. Rep., 237. Kentucky—Elliott v. Louisville, 101, Ky., 262; 40 S. W. Rep., 690; Nevin v. Roach, 86 Ky., 492; 5 S. W. Rep., 546.

Minnesota—State v. Starkey, 49 Minn., 503; 52 N. W. Rep., 24. Mississippi — Ocean Springs v.

Green, 77 Miss., 472; 27 So. Rep., 743.

Pennsylvania — Chester v. Bullock, 187 Pa. St., 544; 41 Atl. Rep., 452.

²⁰ California—Ex parte Haskell,
 112 Cal., 412; 32 L. R. A., 527; 44
 Pac. Rep., 725.

Illinois — Schofield v. Tampico, 98 Ill. App., 324.

Indiana—Baumgartner v. Hasty, 100 Ind., 575, 585; Green v. Indianapolis, 25 Ind., 490.

Kansas—Topeka v. Raynor, 61 Kan., 10; 58 Pac. Rep., 557; 55 Pac. Rep., 509; 8 Kan. App., 279; Smith v. Emporia, 27 Kan., 528; Humboldt v. McCoy, 23 Kan., 249.

Louisiana — Callaghan v. Alexandria, 52 La. Ann., 1013; 27 So. Rep., 540.

Michigan—People v. Wagner, 86 Mich., 594; 24 Am. St. Rep., 141; 13 L. R. A., 286; 49 N. W. Rep., 609; People v. Hanrahan, 75 Mich., 611; 4 L. R. A., 751; 44 N. W. Rep., 1124.

Missouri — Tarkio v. Cook, 120 Mo., 1; 41 Am. St. Rep., 678; 25 S. W. Rep., 202.

New Hampshire—Lisbon v. Clark, 18 N. H., 234.

New Jersey—Jersey City H. & P. St. Ry. v. Passaic (N. J. L., 1902), 52 Atl. Rep., 242; Delaware

provision as to title and subject-matter is generally held to be mandatory.²¹ The purpose of the provision is that neither the members of the legislative body nor the people should be misled by the title of an ordinance.²² It is intended to prevent the practice of joining in the same ordinance incongruous subjects, having no relation or connection with each other, and foreign to the subject embraced in the title. Matters germane to the general subject expressed in its title may be united.²³ Similar prohibitions contained in state constitutions are given like construction.²⁴ The provision being restrictive, a liberal construc-

& A. Tel. Co. v. Camden County, 67 N. J. L., 91, 531; 50 Atl. Rep., 452; 52 Atl. Rep., 482.

Pennsylvania — Yardley v. Borough, 22 Pa. Co. Ct. Rep., 179, 180; Corry v. Corry Chair Co., 18 Pa. Super. Ct., 271.

South Carolina—State v. Gibbes, 60 S. C., 500; 39 S. E. Rep., 1.

21 Mo. Pac. Ry. Co. v. Wyandotte,
44 Kan., 32; 23 Pac. Rep., 950;
State ex rel. Belt v. St. Louis, 161
Mo., 371; 61 S. W. Rep., 658;
Cooley's Const. Lim., secs. 82, 83.

Contra, Pim v. Nicholson, 6 Ohio St., 176; Lehman v. McBride, 15 Ohio St., 573; State ex rel. v. Covington, 29 Ohio St., 102.

²² Board of Water Com'rs of Clinton v. Dwight, 101 N. Y., 9, 11;
³ N. E. Rep., 782, per Danforth, J.
²³ Bergman v. St. Louis Iron Mountain & Southern R. R. Co., 88
Mo., 678, 683; Senn v. Southern

Ry. Co., 124 Mo., 621; 28 S. W. Rep., 66; Weber v. Johnson, 37 Mo. App., 601; Fairmont v. Meyer, 83 Minn., 456; 86 N. W. Rep., 457; St. Louis v. Green, 7 Mo. App., 468.

²⁴ Florida—State v. Duval County, 23 Fla., 483; 3 So. Rep., 193.

Georgia—Macon v. Hughes, 110 Ga., 795; 36 S. E. Rep., 247; Burns v. State, 104 Ga., 544; 30 S. E. Rep., 815, distinguishing Sasser v. State, 99 Ga., 54; 25 S. E. Rep., 619; Butner v. Boifeuillet, 100 Ga.,

743; 28 S. E. Rep., 464; Ayeridge v. Comrs., 60 Ga., 404; Brieswick v. Brunswick, 51 Ga., 639.

Illinois — McGurn v. Board of Education, 133 Ill., 122; 24 N. E. Rep., 529; Ottawa v. People ex rel., 48 Ill., 233; People ex rel. v. Mellen, 32 Ill., 181.

Iowa—Williamson v. Keokuk, 44 Iowa, 88; Whiting v. Mt. Pleasant, 11 Iowa, 482; Ex parte Pritz, 9 Iowa, 30; Morford v. Unger, 8 Iowa, 82.

Missouri—Ewing v. Hoblitzelle, 85 Mo., 64; State ex rel. v. Mead, 71 Mo., 266; State ex rel. v. County Court, 102 Mo., 531; 15 S. W. Rep., 79; State ex rel. v. Matthews, 44 Mo., 523; Lynch v. Murphy, 119 Mo., 163; 24 S. W. Rep., 774; State ex rel. v. Finn, 8 Mo. App., 341.

New Jersey—Curry v. Elvins Co., 32 N. J. L., 362, 363, per Dalrimple, J

Washington—State ex rel. v. New Whatcom, 3 Wash., 7, 10; 27 Pac. Rep., 1020.

Wisconsin — Thompson v. Milwaukee, 69 Wis., 492; 34 N. W. Rep., 402.

The title of an act is sufficient if it does not mislead as to the chief topic of the act, and that the minor features of it have a reasonable and natural connection with the subject named in the title. State $ex\ rel.\ v.$ County

tion is adopted. If the title shows the general character of the ordinance and thus prevents its enactment being inadvisedly or fraudulently accomplished, it will be sufficient.25 Matters of detail need not be specified. The title need not be an index to the act; nor need it state a catalogue of all the powers intended to be bestowed.26 "An abstract of the law is not required in the title;"27 nor need the title state the mode in which the subject is treated, nor the means by which the end sought by the enactment is to be reached.28 So it is not required that every other law repealed by implication because of repugnancy or inconsistency shall be mentioned in the title of the new law.29

The fact that an ordinance violates the charter in that it contains a provision upon a foreign subject, disconnected from that expressed in the title, has been held not to invalidate the balance of the ordinance, properly embraced in the title.30

Special statutes will sometimes suspend charter restrictions relating to the title of ordinances. Thus where a special statute authorized the council to submit to the voters a plan, by Court, 128 Mo., 427, 441; 30 S. W. Rep., 103; 31 S. W. Rep., 23; State ex rel. v. Miller, 100 Mo., 439; 13 S. W. Rep., 677; Lynch v. Murphy, 119 Mo., 163; 24 S. W. Rep., 774; Ewing v. Hoblitzelle, 85 Mo., 64; St. Louis v. Tiefel, 42 Mo., 578; State v. Mathews, 44 Mo., 523; State v. Miller, 45 Mo., 495; State ex rel. v. Mead, 71 Mo., 266; Hannibal v. Marion Co., 69 Mo., 571; State ex rel. v. Heege, 135 Mo., 112; 36 S. W. Rep., 614.

25 State v. Cantieny, 34 Minn. 1, 6, 7; 24 N. W. Rep., 458.

26 Lockhart v. Troy, 48 Ala., 579, 584; People ex rel. v. Mellen, 32 Compare Thompson v. Ill., 181. Milwaukee, 69 Wis., 492; 34 N. W. Rep., 402.

While the title need not be an index of the contents of the ordinance, it ought not to be misleading, and if it fairly gives notice of the subjects so as to reasonably lead to inquiry into its body, it is

Commonwealth v. Lasufficient. Bar, 7 North (Pa.), C. C. R., 85.

27 Per Johnson, C. J., in Brewster v. Syracuse, 19 N. Y., 116, 117. 28 Board of Water Comrs. of Clinton v. Dwight, 101 N. Y., 9, 12; 3 N. E. Rep., 782; People ex rel. v. Lawrence, 41 N. Y., 137, 139; Gordon v. Cornes, 47 N. Y., 608, 615, per Rapallo, J.; Barton v. Pittsburg, 4 Brews. (Pa.), 373; Appeal of Esling, 89 Pa. St., 205.

E. G., "an act for the relief of J. L.," need not state that the money is to be raised by taxation. Brewster v. Syracuse, 19 N. Y., 116.

29 State v. Gallagher, 42 Minn., 449; 44 N. W. Rep., 529.

30 Duluth v. Krupp, 46 Minn., 435; 49 N. W. Rep., 235.

The charter of San Francisco provides that, "if any subject be embraced in an ordinance and not expressed in its title, such ordinance shall be void only as to so much thereof as is not expressed ordinance, for the construction of water, light and sewerage systems, "either or both," it was held that under such statute an ordinance on these subjects might be either single, double or triple.³¹

§ 142. Same—Illustrative cases. Where the title, authorizing the repairing of a street, declares that the paving shall be done with asphalt, while the body of the ordinance contains a proviso permitting the use of vitrified brick in lieu of asphalt in the gutters and such other portions of the street as, in the judgment of the city engineer, shall be necessary or desirable, the ordinance is valid.³² An ordinance which provided for the grading and paving of an alley was held valid against the objection that it contained two subjects in violation of the charter provisions.33 An ordinance, authorizing the "purchase or construction" of water works, is not void on account of covering two subjects, nor because it is in the alternative.³⁴ So an ordinance controlling the keeping of certain animals, and also their use in public places, is not void as relating to more than one subject.³⁵ An ordinance which in the first section vacates an alley and in the second grants the land over which it passed is valid, for both provisions relate to the same general subject, which is the grant.³⁶ Where the ordinance is in the nature of grant, that which is incident thereto may be embraced. Thus where an ordinance grants the right to transmit electric light and power, the further grant therein of a privilege to conduct to the electric light plant water from a particular source is an incident to the object of supplying electricity.37 Under the title "To prevent the establishment of tippling houses," an ordinance which prohibited any sale of lager beer, ale or other malt liquor, without a license, was sustained, the court remarking: "The title is unnecessary, and

in its title." Recent Charter of San Francisco, art. II, ch. 1, sec. 12; Stat. and Amend. to Code of Cal. (1899), p. 245.

31 Yesler v. Seattle, 1 Wash., 308;25 Pac. Rep., 1014.

32 Baltimore v. Stewart, 92 Md.,535; 48 Atl. Rep., 165.

33 Weber v. Johnson, 37 Mo. App., 601.

34 Thomas v. Grand Junction, 13
 Colo. App., 80; 56 Pac. Rep., 665.
 35 Bayard v. Baker, 76 Iowa, 220;
 N. W. Rep., 818.

36 Dempsey v. Burlington, 66 Iowa, 687; 24 N. W. Rep., 508.

³⁷ Hanson v. William A. Hunter Electric Light Co., 86 Iowa, 722; 48 N. W. Rep., 1005; 53 N. W. Rep., 84. cannot control the tenor of the enactment.''38 ''An ordinance to regulate and prohibit the running at large of animals' is sufficient to embrace a clause forbidding any person from breaking open the inclosure established as a pound, and unlawfully taking and driving therefrom animals impounded therein.³⁹

An ordinance entitled, "An ordinance relative to misdemeanors, breaches of the peace, and disorderly conduct," imposing a penalty or fine and imprisonment upon "any person who shall make any noise, riot, disturbance or improper diversion." and on persons found in a state of notorious drunkenness in any street or public place in the city, and persons guilty of other offenses described, is valid.40 "An ordinance defining and prescribing punishment for certain offenses," and which in the body thereof defines and prescribes the punishment for twenty-six different offenses, was held valid.41 An ordinance to regulate the speed of trains may embrace provisions relating to the equipment of trains.42 An ordinance with the title "Public carriers," may properly regulate street railway cars.43 An ordinance entitled, "An ordinance regulating and keeping, storing and handling and licensing the removal of garbage, grease, offal and other refuse matter composed of either animal or vegetable matter," and to repeal a prior ordinance on the same subject, and prescribing penalties for the violation thereof, and fixing a license tax on vehicles used for the re-

38 State (Hershoff) v. Beverly,45 N. J. L., 288, 291.

³⁹ Smith v. Emporia, 27 Kan., 528, 530.

40 State v. Cantieny, 34 Minn., 1;24 N. W. Rep., 458.

41 "The subject of the ordinance is offenses against the city. The subject is composed of many parts." State v. Wells, 46 Iowa, 662, 663, per Beck, J.

Ordinance regulating several trades and occupations, under general title held good. Seattle v. Barto (Wash., 1903), 71 Pac. Rep., 735.

"An ordinance to prohibit the manufacture and sale of intoxi-

cating liquors, except for medical, scientific and mechanical purposes, and to regulate the manufacture and sale thereof for said excepted purposes," held valid. *In re* Thomas, 53 Kan., 659; 37 Pac. Rep., 171.

"An ordinance to regulate bicycles," covering use of, on streets, is sufficient. Des Moines v. Keller, 116 Iowa, 648; 88 N. W. Rep., 827.

⁴² Bergman v. St. L. I. M. & S. Ry. Co., 88 Mo., 678; 1 S. W. Rep., 384.

⁴³ Senn v. So. Ry. Co., 124 No., 621; 28 S. W. Rep., 66.

moval of garbage, is valid.44 "An act for the relief of the village of Clinton" is a good title.45

The provisions of the ordinance must not be inconsistent with the title. Thus the title "Regulating the use and sale of intoxicating liquors," is insufficient where the substance of the ordinance is entirely prohibitory, with "no pretense at regulation." The charter required the subject to be clearly expressed in the title.46 So where the title and body of the ordinance embraces two distinct subjects, namely, (1) extending the limits of the city, and (2) making an appropriation to build a bridge, the ordinance is void, notwithstanding the provision relating to the appropriation was null because of lack of power in the council to make it.47 So an ordinance whose title is to prohibit animals from running at large, which, in addition, provides that no person shall keep a dog without paying a tax, and directing the city marshal to kill all dogs running at large whose owners have not complied with the regulation, and rendering such owners liable to criminal prosecution, contains more than one subject and is void.48

44 St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045.

Ordinance amending section relating to officers, their salaries and bonds, under title "An ordinance to amend sec. —, ch. —, of the city ordinance," held good, as the subjects are naturally connected. Lowry v. Lexington, 24 Ky. L. Ry., 516: 68 S. W. Rep., 1109.

45 "It must be conceded that the words of the title are very general, but they are comprehensive and do express a single intent which the body of the act neither exceed nor contradicts. It has been held that the purpose of the provision was that neither the members of the legislature nor the public should be misled by the title of an act, and thereby various objects, having no necessary or natural connection with each other, be united in one bill. There is here neither that danger nor that result," Board of Water Com'rs of

Clinton v. Dwight, 101 N. Y., 9, 11; 3 N. E. Rep., 782, per Danforth, J.

46 "Instead of the title of this ordinance being a clear statement of its subject, it is wholly inconsistent with it, and states a wholly different subject as different as regulation is from prohibition. We cannot disregard this provision of the law. It is not unreasonable that when a village assumes to itself the functions of a municipal corporation it should be held to a reasonable compliance with the laws of the state in the enactment of its ordinances, and to that end employ legal counsel if necessary." Cantril v. Sainer, 59 Iowa 26; 12 N. W. Rep., 753.

⁴⁷ Mo. Pac. Ry. v. Wyandotte, 44 Kas., 32; 23 Pac. Rep., 950.

48 Stebbins v. Mayer, 38 Kan., 573; 16 Pac. Rep., 745.

VALIDITY OF TITLES IN PARTICU-LAR CASES. El Dorado v. Beardsley, 53 Kan., 363; 36 Pac. Rep., § 143. Title in revision of ordinances. Charters often require a revision of the general ordinances at stated intervals. This is generally done by ordinance.⁴⁹ The ordinance in revision may embrace all of the existing ordinance provisions, classified according to titles, chapters, articles and sections, and be passed as one ordinance, under the general title "An ordinance in revision of the general ordinance of the City of —— (or Town of ——)." Sometimes, in addition, words are included in the title, as "to provide new ordinance provisions for the government of said city." It seems clear that under a charter requiring the title to clearly express the subject matter of the ordinance, such words would be insufficient to authorize the enactment of new ordinance provisions, but their incorporation would not invalidate the title; they may be treated as surplusage.

It has been held in Maryland that, in the absence of statutory prohibition, it is entirely competent for the municipal legislature by a single ordinance to declare any compilation of ordinances or proposed ordinances to be in force. The court remarked: "Such a power has been too generally exercised, with implied if not express recognition by the courts, to be now questioned." 50

746; Fairmont v. Meyer, 83 Minn., 456; 86 N. W. Rep., 457; State ex rel. v. St. Louis, 169 Mo., 31; 68 S. W. Rep., 900.

The following titles have been held sufficient. "Ordinance No. —, in relation to the sale of intoxicating liquor." Schofield v. Tampico, 98 Ill. App., 324, 325.

"An ordinance relating to the railroad encroachments and obstructions in Beach Avenue." Cape May v. Cape May, Del. Bay & S. P. R. R. Co., 60 N. J. L., 224, 225; 37 Atl. Rep., 892; 39 L. R. A., 609.

"An ordinance directing the removal of telephone and telegraph poles placed in the sidewalks, streets, highways and public places in the township of Pensauken, without the consent of the public authorities." Delaware & Atl. Tel. & Tel. Co. v. Pensauken Tp., 67 N.

J. L., 531, 532; 52 Atl, Rep., 482.

"An ordinance providing for the licensing of telegraph, telephone and electric light poles and wires and collecting of an annual tax therefor," is valid. Newcastle v. Electric Light Co., 16 Pa. Co., Ct. Rep., 663.

"An ordinance to regulate certain trades and occupations in the City of Seattle, providing penalties for the violation thereof, and repealing all ordinances inconsistent therewith," held valid. Seattle v. Barto (Wash., 1903), 71 Pac. Rep., 735.

49 Charter of St. Louis, art. III,
 sec. 29; The Mun. Code of St.
 Louis, 294; 2 R. S. of Mo., 1899,
 p. 2489, sec. 29.

50 Garrett v. Janes, 65 Md., 260,265; 3 Atl. Rep., 597.

TIME OF REVISION. Under a

§ 144. Preamble. While, as we have seen, it is unnecessary that the ordinance should contain a recital of the authority⁵¹ or the necessity for its passage,⁵² a preamble is sometimes adopted declaring the reasons and purpose of the ordinance.⁵³ The stately preamble beginning with the emphatic "whereas" was the style of the early-day legislation; but as it is not required it is less frequently employed at the present time, especially in municipal corporation legislation.⁵⁴

§ 145. Ordaining or enacting clause. In the absence of a preamble, the title is followed by the ordaining or enacting clause. The form is usually prescribed in the charter. The style varies in different charters.⁵⁵ Charter provisions pre-

charter providing that the ordinances should be revised within one year from the time the charter took effect, it was held that a revision made after the expiration of the time was valid. Lowrey v. Lexington, 24 Ky. L. Rep., 516; 68 S. W. Rep., 1109.

Statute requiring a publication of a digest of ordinances every five years, held directory. Whalen v. Macomb, 76 Ill., 49, 51.

51 Section 139, supra.

52 Section 140, supra.

53 Com. V. Turner, 1 Cush. (Mass.), 493; Barter v. Com., 3 Pa. (Penrose & Watts), 253; Plymouth v. Pettijohn, 4 Devereux (N. C.), 591; Summerville v. Pressley, 33 S. C., 56, 59; 26 Am. St. Rep., 659; Charleston v. Elford, 1 McMullan (S. C.), 234; State (Delaware & Alt. Tel. & T. Co.), v. Pensauken Tp., Camden County, 67 N. J. L., 91, 531; 50 Atl. Rep., 452; 52 Atl. Rep., 482; Ex parte Gregory, 20 Tex. App., 210; 54 Am. Rep., 516.

54 PREAMBLE of ordinance forbidding smoking in street cars: "Whereas, The custom of permitting smoking in street cars of this city is a most vile and objectionable one to a majority of our citizens, especially to the ladies, who are entitled to that courtesy and consideration due to their sex; and Whereas, This alone of all the cities in the Union allow such a discomfort to those of their citizens who ride in the public cars." The ordinance was sustained under general powers. State v, Heidenhain, 42.La. Ann., 483, 484, 485; 21 Am. St. Rep., 388.

⁵⁵ Greater New York: "Be it ordained by the Municipal Assembly of The City of New York, as follows." Charter, City of New York, ch. 1, § 38; Laws of N. Y. (1897), p. 14.

CHICAGO: "Be it ordained by the City Council of Chicago." 1 Starr & Curtis Ill. Stat., p. 717, par. 64.

PHILADELPHIA: "The Select and Common Councils of the City of Philadelphia do ordain." Philadelphia v. Brabender, 201 Pa. St., 574-5; 51 Atl. Rep., 374.

St. Louis. "Be it ordained by the Municipal Assembly of the City of St. Louis, as follows." Charter, art. III., sec. 12; Mun. Code of St. Louis, p. 205; 2 R. S. of Mo., 1899, p. 2482, sec. 12.

SAN FRANCISCO: "Be it ordained by the people of the City and County of San Francisco, as scribing the style of ordinances are generally held to be directory, hence failure to observe the charter form,⁵⁶ or even omission of the ordaining or enacting clause, although expressly required, does not invalidate the ordinance, in the absence of provision of the charter to that effect.⁵⁷

In like manner as respects the title, as we have seen,⁵⁸ a constitutional provision relating to the enacting clause of acts of the legislature, in the absence of express provision, has no application to municipal ordinances.⁵⁹

A variance in stating the legal name of the corporation in a by-law is not material if it appears on the face of the by-law to be enacted by the corporation having power to pass it.⁶⁰ So an immaterial variance from the prescribed form in the ordaining clause will not render the ordinance void, as where the

follows." Charter, art. II., ch. 1, sec. 8; Statutes and Amendments to Codes of Cal., 1899, p. 245.

New Orleans: "Be it ordained by the City Council of the City of New Orleans." State v. McNally, 48 La. Ann., 1450.

DETROIT: "It is hereby ordained by the people of the City of Detroit." People v. Keir, 78 Mich., 98, 100; 43 N. W. Rep., 1039.

"Be it ordained by the City Council of the City of Tampa." Tampa v. Salomonson, 35 Fla., 446, 467; 17 So. Rep., 581.

"Be it ordained by the Mayor and City Council of Monroe." Vicksburg, etc., R. R. Co. v. Monroe, 48 La. Ann., 1102, 1105; 20 So. Rep., 664.

"Be it ordained by the President and board of trustees of the village of ———." Schofield v. Tampico, 98 Ill. App., 324, 325.

"Be it ordained by the township committee of the township of Pensauken." Delaware & Atlantic Teleg. & Telep. Co. v. Pensauken Tp. Committee, 67 N. J. L., 531; 50 Atl. Rep., 452; 52 Atl. Rep., 482.

56 Napa v. Easterby, 76 Cal., 222,

228; 18 Pac. Rep., 253; State v. Fountain, 14 Wash., 236; 44 Pac. Rep., 270.

57 St. Louis v. Foster, 52 Mo.,
513; People v. Murray, 57 Mich.,
396; 24 N. W. Rep., 118; Ryan v.
Lynch, 68 Ill., 160; Chicago, etc.,
R. Co. v. Hines, 82 Ill. App.,
488; Ramsey County v. Heenan, 2
Minn., 330.

People ex rel v. Lee 112 Ill., at p. 121, contains a dictum to the effect that omission of the ordaining clause of the ordinance may not be important.

A like ruling has been made respecting the enacting clause of a legislative act provided for by the constitution. Cape Girardeau v. Riley, 52 Mo., 424; 14 Am. Rep., 427. Contra, Galveston, H. & S. A. Ry. v. Harris (Tex. Civ. App., 1896), 36 S. W. Rep., 776.

58 Section 141, supra.

⁵⁹ Tarkio v. Cook, 120 Mo., 1, 7;
 41 Am. St. Rep., 678; 25 S. W. Rep., 202.

60 In re Hawkins v. Municipal Council, etc., of Huron et al., 2 Up. Can. C. P., 72, 83, 84, rule as to misnomer in deed and conveyances applied.

words "common council" instead of "city council" are employed; or "The mayor and common council" instead of "The common council of the city." 62

§ 146. Time of introduction and passage. Charter requirements that ordinances shall be introduced at a meeting prior to their passage are generally held mandatory.⁶³ A charter provision reciting that, "no ordinance and no resolution granting any franchise for any purpose shall be passed * * * on the day of its introduction, nor within five days thereafter, nor at any other time than at a regular meeting, nor without being first submitted to the city attorney," has been held not to apply to ordinances other than those granting franchises.⁶¹ Under such provision a substituted ordinance which is, in

61 Law v. People ex rel., 87 Ill., 385, 403.

62 State v. Nohl, 113 Wis., 15;
 88 N. W. Rep., 1004.

Under a charter providing the enacting clause, as follows: "Be it ordained by the council of the Town of * * *," an ordinance is valid where the ordaining clause recites, "Be it ordained by the town council." State v. Fountain, 14 Wash., 236; 44 Pac. Rep., 270.

A borough ordinance was held invalid which recited as enacted by the chief burgess and town council, when the corporate name is the chief burgess, assistant burgess and town council. Milton Borough v. Hoagland, 3 Pa. Co. Ct. Rep., 283.

As to corporate name in particular case, where there was a change in class. West v. Columbus, 20 Kan., 633, 635.

63 Oswald v. Gosnell, 21 Ky. L. Rep., 1660; 56 S. W. Rep., 165; East Tennessee Tel. Co. v. Anderson Co. Tel. Co., 22 Ky. L. Rep., 418;57 S. W. Rep., 457; State (Delaware & A. Tel. & T. Co.) v. Pensauken Tp., Camden County, 67 N. J. L., 91, 531; 50 Atl. Rep., 452; 52 Atl. Rep., 482; State v. Bergen,

33 N. J. L., 39; State v. Jersey City, 34 N. J. L., 429; New Orleans v. Brooks, 36 La. Ann., 641; Danville v. Shelton, 76 Va., 325; Gilman v. Milwaukee, 61 Wis., 588; 21 N. W. Rep., 640; Wright v. Forrestal, 65 Wis., 341; 27 N. W. Rep., 52.

An ordinance may be enacted on the day introduced, if the charter does not forbid. Fourth Street, 19 Pa. Co. Ct. Rep., 488.

64 "Many good and sufficient reasons might be given for imposing legislative restrictions upon city authorities in the granting of franchises that would not be applicable to their control of the ordinary affairs committed to their discretion." Raborn v. Mish, 12 Wash., 167, 169; 40 Pac. Rep., 731, overruling dictum in Vancouver v. Wintler, 8 Wash., 378, 380; 36 Pac. Rep., 278, 685.

"No bill for the grant of any franchise shall be put upon its final passage within ninety days after its introduction, and no franchise shall be renewed before one year prior to its expiration." Charter San Francisco, art. II., ch. 1, sec. 12; Stat. & Amend. to Codes of Cal. (1899), 245.

effect, an amendment of the original ordinance, and which is clearly within the limits of the subject-matter of the original proposition, may be passed although five days did not elapse between its introduction and its passage.⁶⁵

An ordinance which cannot be passed at the same meeting at which it is introduced cannot be passed at an adjourned meeting thereof. In one case an ordinance was taken up and laid over for thirty days, but on such thirtieth day there was no meeting of the council. It was held that the ordinance died on such day, and was not rendered valid by being taken up, read a third time and passed. A charter provision that, "no error in the proceedings of the general council shall exempt from payment after the work is done, as required by ordinance or contract," has been held curative, and therefore failure to vote upon the ordinance under which a public improvement was made, on two different days as required by charter, does not invalidate it.68

§ 147. Same—Double board. In a legislative municipal assembly, composed of two branches, a charter provision that, "no bill shall be passed finally in either branch upon the same day on which it was introduced or reported," prohibits the passage by one branch of an ordinance on the same day that it is reported to it by the other branch.⁶⁹ So where the legislative department is composed of two boards, an ordinance passed by one board at one session, but not passed by the other

65 Vancouver v. Wintler, 8 Wash., 378, 380; 36 Pac. Rep., 278, 685.

66 State (Staates) v. Washington, 44 N. J. L., 605; 43 Am. Rep., 402; Flood v. Atlantic City, 63 N. J. L., 530; 42 Atl. Rep., 829.

67 Jersey City H. & P. St. Ry.
 Co. v. Passaic (N. J. L., 1902), 52
 Atl. Rep., 242.

68 Broadway Baptist Church v. McAtee, 8 Bush. (Ky.), 508, 515.

When provision as to time of introduction and vote on passage not applicable. Derby v. Modesto, 104 Cal., 515; 38 Pac. Rep., 900; Mackin v. Wilson, 20 Ky. L. Rep., 218; 45 S. W. Rep., 663; Roberts v. Paducah, 95 Fed. Rep., 62.

Sometimes by rule of council or-

dinances are required after being presented and read to lie over one week before final action. Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill. 324; 65 N. E. Rep., 329, affirming 100 Ill. App., 57.

69 Altoona v. Bowman, 171 Pa. St., 307; 33 Atl. Rep., 187; Fehler v. Gosnell, 99 Ky., 380; 35 S. W. Rep., 1125; Oswald v. Gosnell, 21 Ky. L. Rep., 1660; 56 S. W. Rep., 165; Louisville v. Selvage, 106 Ky., 730; 51 S. W. Rep., 447; Gleason v. Barnett, 20 Ky. L. Rep., 1865; 49 S. W. Rep., 1060. See Lewis v. New York, 35 How. Pr. (N. Y.), 162.

until the next session, is not duly passed and is void.⁷⁰ So in another case of a double legislative board, the express charter requirement that an ordinance which had passed one board should be published before being sent to the other, and which forbade an ordinance which had passed one board from being acted on by the other on the same day, except by unanimous consent, was held mandatory.⁷¹ Mere failure to observe a provision of the joint rules and orders of a council composed of two boards, as one directing that an ordinance shall first be passed in the common council, does not invalidate the ordinance, provided it is shown that the charter has been complied with in its passage.⁷²

§ 148. Reference to and report by committee. Charter requirements that an ordinance shall not be considered for final passage unless the same has been referred to and reported upon by a committee are generally held mandatory. Ordinances authorizing the disbursements of money are, under some charters, required to be referred to certain fiscal officers, as the comptroller, and be endorsed to the effect that sufficient unappropriated means stands to the credit of the fund therein named to meet the requirements of the ordinance; and unless this is done it is unlawful to recommend its passage or pass it. Failure to observe a charter provision requiring all contracts for street improvements to be referred to a committee of the council, who should report thereon, has been held to invalidate the contract and not binding on the lot owners. The manifest object was to prevent improvident legislation; to

70 In re Beekman, 11 Abb. Pr. (N. Y.), 164; 19 How. Pr., 518; Wetmore v. Story, 22 Barb. (N. Y.), 414; 3 Abb. (N. Y.), 262.

71 Herzo v. San Francisco, 33Cal., 134.

⁷² Chandler v. Lawrence, 128 Mass., 213.

Where charter has been violated as to time of passage, defect may be cured by reconsideration. Specht v. Louisville, 22 Ky. L. Rep., 699; 58 S. W. Rep., 607; Oswald v. Gosnell, 21 Ky. L. Rep., 1660; 56 S. W. Rep., 165.

INITIATIVE, Electors may propose

certain ordinances under recent charter of Los Angeles, Cal. Stat. & Amendments to Codes of Cal. (1903), p. 572, §198a. In San Francisco electors may propose certain ordinances.

73 Charter of St. Louis, art. III., sec. 3; Mun. Code of St. Louis, p. 205; 2 R. S. of Mo., 1899, p. 2482, sec. 13; Charter of St. Louis, art. V., sec. 12; Mun. Code of St. Louis, 247; 2 R. S. Mo., 1899, p. 2502; sec. 12.

74 Covington v. Woods, 3 Ky. Law Rep., 85. S. P. Murphy v. Louisville, 9 Bush. (Ky.), 189.

create a circumspect body that would stand between the street contractor and the city treasury, between the lot owner and the tax collector, between the citizen and the almost absolute power of the city council, and see that no wrong was committed.''75 In a Wisconsin case, the subject-matter of the resolution was the laying of permanent water mains. The charter provided that ordinances and resolutions "appropriating money or creating any charge against any fund of the city shall be referred to appropriate committees, and shall only be acted on by the council at a subsequent meeting not held on the same day, on the report of the committee to which the same was referred." In direct violation of it, the matter embraced in the resolution was never referred to any committee by the council, and was acted upon not only on the same day on which it was first presented, but also at the same meeting of The resolution was held void, the court saying the council. that, "the requisite steps and delay were doubtless to afford notice to all the members of the council and the public. action is expressly prohibitory."76

§ 149. Signing and approval of ordinance by mayor. Where the mayor is a constituent part of the legislative power, his concurrence is essential to complete any given legislative act. This is as necessary to its validity as its passage by the council or governing body, unless it should be passed over his veto in accordance with the law governing the corporation.⁷⁷ His consent is usually evidenced by his signature to the bill or ordinance.⁷⁸ Whether the mayor's signature is indispensable to the validity of an ordinance or other corporate act will depend upon the language of the particular charter and its construction as compared with other provisions.⁷⁹ Under some

75 Per Holt, J., in Worthington v. Covington, 6 Ky. Law Rep., 237.

76 Gilman v. Milwaukee, 61 Wis.,588: 21 N. W. Rep., 640.

77 Waln v. Philadelphia, 99 Pa. St., 330; Breaux's Bridge v. Dupuis, 30 La. Ann. (pt. 2), 1105; People v. Schroeder, 76 N. Y., 160.

Injunction to restrain. New Orleans E. R. Co. v. New Orleans, 39 La. Ann., 127; 1 So. Rep., 434; Dailey v. New Haven, 60 Conn., 314; 14 L. R. A., 69; 22 Atl. Rep., 945.

78 Eichenlaub v. St. Joseph, 113 Mo., 395; 21 S. W. Rep., 8; Trenton v. Coyle, 107 Mo., 193; 17 S. W. Rep., 643; Irvin v. Devors, 65 Mo., 625; Thomson v. Boonville, 61 Mo., 282; Saxton v. St. Joseph, 60 Mo., 153; Saxton v. Beach, 50 Mo., 488.

70 California — Clarke v. Jennings (Cal., 1893), 32 Pac. Rep., 1049; McDonald v. Dodge, 97 Cal.,

charters it is held that without the mayor's signature the legislative act, whether in the form of an ordinance or a resolution, is void.⁸⁰ But unless this is made an express requirement, as

112; 31 Pac. Rep., 909; Taylor v. Palmer, 31 Cal., 241; Creighton v. Manson, 27 Cal., 613.

Iowa—Altman v. Dubuque, 111 Iowa, 105; 82 N. W. Rep., 461.

Maine—Preble v. Portland, 45 Me., 241.

Massachusetts—Hibbard v. Suffolk County, 163 Mass., 34; 39 N. E. Rep., 285.

Michigan—Baar v. Kirby, 118 Mich., 392; 76 N. W. Rep., 754; Chaffee v. Granger, 6 Mich., 51.

Minnesota—State v. Armstrong, 54 Minn., 457; 56 N. W. Rep., 97; State v. District Court, 41 Minn., 518; 43 N. W. Rep., 389.

New Jersey-McDermott v. Kenny, 45 N. J. L., 251.

New York—People v. Amsterdam, 90 Hun. (N. Y.), 488.

Oregon—Ladd v. East Portland, 18 Ore., 87; 22 Pac. Rep., 533.

80 MAYOR'S SIGNATURE REQUIRED. California—Pollok v. San Diego, 118 Cal., 593; 50 Pac. Rep., 769; San Francisco Gas Co. v. San Francisco, 6 Cal., 191.

Colorado—Central v. Sears, 2 Colo., 588.

Illinois—1 Starr & Curtis Ill. Stat., p. 686, par. 47.

Iowa—Altman v. Dubuque, 111 Iowa, 105; 82 N. W. Rep., 461; Stutsman v. McVicar, 111 Iowa, 40; 82 N. W. Rep., 460; Chicago, etc., R. R. Co. v. Council Bluffs, 109 Iowa, 425; 80 N. W. Rep., 564; Heins v. Lincoln, 102 Iowa, 69; 71 N. W. Rep., 189.

Louisiana—Breaux's Bridge v. Dupuis, 30 La. Ann., 1105.

Minnesota—State v. Darrow, 65 Minn., 419; 67 N. W. Rep., 1012; State v. Dakota County, 41 Minn., 518; 43 N. W. Rep., 389. Missouri—Saxton v. Beach, 50 Mo., 588; Saxton v. St. Joseph, 60 Mo., 153; Thomson v. Boonville, 61 Mo., 282; Irvin v. Devors, 65 Mo., 625; Trenton v. Coyle, 107 Mo., 119; 17 S. W. Rep., 643; Carondelet v. Wolfert, 39 Mo., 305; Crutchfield v. Warrensburg, 30 Mo. App., 456; Cape Girardeau v. Fougeu, 30 Mo. App., 551.

New Jersey—Booth v. Bayonne, 56 N. J. L., 268; 28 Atl. Rep., 381.

New York—People v. Schroeder, 76 N. Y., 160.

Oregon—Ladd v. East Portland, 18 Or., 87; 22 Pac. Rep., 533; Babbidge v. Astoria, 25 Or., 417; 42 Am. St. Rep., 796.

Pennsylvania—Kepner v. Commonwealth, 40 Pa. St., 124; Jones v. Schuylkill L. H. & P. Co., 202 Pa. St., 164; 51 Atl. Rep., 762.

Ordinance determining the lowest bid for furnishing hose and awarding a contract therefor, held to be a "legislative act," requiring the mayor's signature. Gleason v. Peerless Mfg. Co., 37 N. Y. Supp., 267; 1 App. Div., 257.

Certain ordinance relating to sanitary affairs required to be approved by board of health, without power of amendment. The board may at first refuse and afterwards approve. Darcantel v. People's Slaughter-House & R. Co., 44 La. Ann., 632; 11 So. Rep., 239.

Town by-laws to be approved by court or justice thereof, when. Does not apply to ordinances of Boston. Com. v. Lagorio, 141 Mass., 81; 6 N. E. Rep., 546; Com. v. Davis, 140 Mass., 485; 4 N. E. Rep., 577.

where the charter either expressly or by implication declares that the act will have no validity in the absence of such signature, many cases hold that it may be dispensed with.⁸¹

It has been held in Alabama that the mayor need not sign a revised code of ordinances which had been copied at length on

81 MAYOR'S APPROVAL NOT QUIRED. Jacobs v. San Francisco, 100 Cal., 121; 34 Pac, Rep., 630; Morton v. Broderick, 118 Cal., 474; 50 Pac. Rep., 644; Terre Haute & I. R. Co. v. Voelker, 129 Ill., 540; 22 N. E. Rep., 20; 31 Ill. App., 314; McKenzie v. Wooley, 39 La. Ann., 944; 3 So. Rep., 128; Hibbard v. Suffolk Co., 163 Mass., 34; 39 N. E. Rep., 285; Burlington v. Dennison, 42 N. J. L., 165; Fisher v. Graham, 1 Cincinnati Rep. (Ohio), 113; State v. Henderson, 38 Ohio St., 644.

If the legislative intent to the contrary is not clear an ordinance passed as the law requires, published and going into force is not void because not signed by the mayor or president of the council. McKenzie v. Wooley, 39 La. Ann., 944; 3 So. Rep., 128; Opelousas v. Andrus, 37 La. Ann., 699.

Approval of resolution required. Charter of San Francisco, art. II., ch. 1, § 16; Chaffee v. Granger, 6 Mich., 51; Booth v. Bayonne, 56 N. J. L., 268; 28 Atl. Rep., 381; Waln v. Philadelphia, 99 Pa. St., 330; Kepner v. Com., 40 Pa. St., 124; Charter of New York, ch. 1, § 40; Laws of N. Y. (1897), p. 14.

Approval of resolution not required. Smith v. Utica, 53 Hun. '(N. Y.), 638; 6 N. Y. Supp., 792.

By charter of Jersey City only such resolutions and ordinances as are in their nature *final* need be approved by mayor. Resolutions relating to intermediate proceedings cannot be said to go into effect, and therefore need not be ap-

proved. Howeth v. Jersey City, 30 N. J. L., 93.

A resolution of a council referring a petition for a sewer to the committee on sewerage does not require mayor's signature. State v Jersey City, 30 N. J. L., 148.

A resolution appointing commissioners to assess damages and benefits in street opening proceeding in place of others resigned need not be approved by mayor. State v. Jersey City, 25 N. J. L., 309.

Mayor need not approve appointments to office by council although he must approve ordinances and resolutions. State *ex rel*. McDermott v. Miller, 45 N. J. L., 251.

Not required in selection of officers by council. Haight v. Love, 39 N. J. L., 14; McDermott v. Kenny, 45 N. J. L., 251; North v. Cary, 4 Thomp. & C. (N. Y.), 357.

Where council has exclusive power of removal, a resolution relating thereto need not be approved by the mayor. State v. Duluth, 53 Minn., 238; 39 Am. St. Rep., 595; 55 N. W. Rep., 118.

Mayor not required to approve bid of sale accepted by council resolution. Straub v. Pittsburgh, 138 Pa. St., 356; 22 Atl. Rep., 93.

As to approval in particular case, see Knight v. Kansas City, 70 Mo., 231.

As to power of mayor to veto action of council in appointing officers under particular charter, see People v. Fitchie, 76 Hun. (N. Y.), 80; 28 N. Y. Supp., 600.

Signing by mayor will be presumed, in the absence of evidence the record, signed by him, and which record showed that he voted for it on its passage.⁸²

Where the mayor's approval is required, a vetoed resolution returned by him and subsequently altered by the council, in order to meet the mayor's objections, which is again passed becomes a new resolution and must again be submitted to the mayor.⁸³ Charters vary respecting the time in which the mayor's approval is to be given.⁸⁴ One legally acting as mayor may approve the ordinance.⁸⁵ In the absence of the

to the contrary. Allen v. Davenport, 107 Iowa, 90; 77 N. W. Rep., 532. Parol to prove signature. Seattle v. Doran, 5 Wash., 482; 32 Pac., 105, 1002.

82 The court remarked: "The matter of substance is the approval of the ordinance by the mayor, and not the form or manner in which it may be manifested, so that it is plainly manifested in writing, as all corporate action of this character must be manifested. Signing the ordinance, or an endorsement upon it, is not the only mode in which approval can be manifested. * * * All of the purposes of the statute are satisfied, when the approval distinctly and affirmatively appears upon the corporate records or files which bear his signature, though the ordinance is not signed by him. The rule might be different if * * * the statute contained negative or restraining words." Woodruff v. Stewart, 63 Ala., 206, 214, 215.

83 Padavano v. Fagan, 66 N. J. L., 167; 48 Atl. Rep., 998.

84 Pennsylvania G. G. Co. v. Scranton, 97 Pa. St., 538; Detroit v. Moran, 46 Mich., 213; 9 N. W. Rep., 252; State ex rel. v. Carr, 67 Mo., 38; 1 Mo. App., 490; McMichael v. Inter-County St. Ry. Co., 167 Pa. St., 126; 31 Atl. Rep., 477; 36 Wkly. Notes Cas., 179; Reilly

v. Racine, 51 Wis., 526; 8 N. W. Rep., 417.

Ordinance passed by former administration cannot be approved by new mayor. Altman v. Dubuque, 111 Iowa, 105; 82 N. W. Rep., 461.

Mayor cannot act after expiration of his term. *In re* Front Street, 24 Pa. Co. Ct. Rep., 88.

A formal and literal presentation to mayor must be shown—there can be no waiver of such requirement. Ashley v. Newark, 25 N. J. L., 399.

Provision extends to all acts, legislative or otherwise. People v. Schroeder, 76 N. Y., 160.

Evidence of presentation in particular cases. Knell v. Buffalo, 54 Hun. (N. Y.), 80; 7 N. Y. Supp., 233; Gleason v. Peerless Mfg. Co., 1 App. Div., 257; 37 N. Y. Supp., 267.

85 O'Mally v. McGinn, 53 Wis., 353; 10 N. W. Rep., 515; Seattle v. Doran, 5 Wash., 482; 32 Pac. Rep., 105.

If the charter so requires the ordinance must be signed by the mayor proper or *pro tempore*, otherwise it is void. *Ex parte* Bedell, 20 Mo. App., 125.

Signing by presiding officer and attesting by clerk, held sufficient. Hammond v. N. Y., C. & St. L. Ry. Co., 5 Ind. App., 526; 31 N. E. Rep., 817.

mayor the presiding officer of the legislative body is generally authorized to approve or disapprove.⁸⁶

The requirement as to the approval is not satisfied by mere approval of the council journal.⁸⁷ The resolution or ordinance itself must be signed.⁸⁸ Thus the mere signature of the mayor as president of the council to the minutes of the proceedings has been held not to constitute approval of a resolution forfeiting a lease made by the corporation.⁸⁹ The mayor's approval must be in writing notwithstanding the existence for many years of a custom to the contrary.⁹⁰

§ 150. Veto of mayor. Charters often confer upon the mayor the power to disapprove all or certain legislation of the council or governing body, and, in event of veto, to give the act the force of law, it is required to pass the legislative body by

86 Saleno v. Neosho, 127 Mo., 627;
48 Am. St. Rep., 653; 27 L. R. A.,
769; 30 S. W. Rep., 190; Babbidge
v. Astoria, 25 Oregon, 417; 42 Am.
St. Rep., 796; 36 Pac. Rep., 291;
Parker v. Astoria, 25 Oregon, 425;
36 Pac. Rep., 293.

When president of council cannot approve. Leavenworth v. Douglass, 3 Kan. App., 67; 44 Pac. Rep., 1099; Detroit v. Moran, 46 Mich., 213; 9 N. W. Rep., 252.

Temporary chairman cannot approve. Moore v. Perry, (Iowa, 1903), 93 N. W. Rep., 510.

Mayor's clerk cannot. Lyth v. Buffalo, 48 Hun. (N. Y.), 175.

87 Whitney v. Port Huron, 88Mich., 268; 26 Am. St. Rep., 291;50 N. W. Rep., 316.

But revised ordinances may be so approved. Woodruff v. Stewart, 63 Ala., 206.

88 Altman v. Dubuque, 111 Iowa,
105; 82 N. W. Rep., 461; State v.
Dakota County, 41 Minn., 518; 43
N. W. Rep., 389.

89 Graham v. Carondelet, 33 Mo., 262, 268, 269.

The presence of the mayor during the deliberations of the council, and an examination by him of the clerk's minutes, by which he is informed of the passage of certain resolutions, is not such a presentation to him of the original resolutions as the charter requires. Whether the mayor's signature and approval to the copies recorded in the minutes, is sufficient evidence of the presentation of the original resolutions, and a sufficient approval of them, is questioned. State v. Newark, 25 N. J. L., 399, 408-411.

90 New York, etc., R. R. v. Waterbury, 55 Conn., 19; 10 Atl. Rep., 162.

Under a charter requiring ordinances to be signed by the presiding officer, and attested by the clerk, and to be recorded, the defects cannot be remedied by a motion. Bills v. Goshen, 117 Ind., 221; 3 L. R. A., 261; 20 N. E. Rep., 115.

Merely suggesting amendments to a resolution does not relieve the mayor of the duty to sign and return the resolution. Kittinger v. Buffalo Traction Co., 160 N. Y., 377.

Signature by the mayor, as such, and not by the mayor as ex officio

a designated vote, usually two-thirds or three-fourths.⁹¹ In some charters the power of veto is denied.⁹² The provision requiring the mayor's veto to contain his reasons therefor or objections to the proposed legislation has been held mandatory and hence a failure in this respect renders the disapproval unavailing.⁹³ Merely writing a letter suggesting amendments is not a compliance with the charter.⁹⁴ Where a resolution is passed by the requisite majority over the mayor's veto, refusal on his part to sign the order for the money appropriated by the resolution may be compelled by mandamus. "To permit the mayor to again interpose the same objection would invest

president of the board of aldermen, held valid. Becker v. Washington, 94 Mo., 375; 7 S. W. Rep., 291.

As to method of designation of clerk where his signature is necessary to validate ordinances. *Ex parte* Guerrero, 69 Cal., 88; 10 Pac. Rep., 261.

As to the proper authentication and signature of ordinances, see the following cases: Napa v. Easterby, 76 Cal., 222; 18 Pac. Rep., 253; Taylor v. Palmer, 31 Cal., 241; Ceighton v. Manson, 27 Cal., 613: Martindale v. Palmer, 52 Ind., 411; Waln v. Philadelphia, 99 Pa. St., 330; Kepner v. Commonwealth, 40 Pa., 124; Dey v. Jersey City, 19 N. J. Eq., 412; State (Howeth) v. Jersey City, 30 N. J. L., 93; State v. Hudson, 5 Dutch. (29 N. J. L.). 475: State v. Henderson, 38 Ohio St., 644; Knight v. K. C., St. J. & C. B. R. R., 70 Mo., 231; In re Stadiford, 5 Mackey (16 D. C.), 549.

MERE MISTAKE as to precise date of approval will not invalidate. Allentown v. Grim, 109 Pa. St., 113.

Calling an election by mayor to submit resolution extending corporate limits to voters does not constitute approval of resolution. Moore v. Perry (Iowa, 1903), 93 N. W. Rep., 510.

91 Starr & Curtis Ill. Stat., p.
686, par. 47; State v. Hoboken, 52
N. J. L., 88; 18 Atl. Rep., 685;
Charter New York, ch. 1, § 40;
Laws N. Y. (1897), pp. 14, 15.

92 Com. v. Kepner, 30 Leg. Int. (Pa.), 312; Achley's Case, 4
Ab. Pr. (N. Y.), 35; Wyoming v. Wilkesbarre W. S. Ry. Co., 8 Luz. Leg. Reg. (Pa.), 113; Hall v. Racine, 81 Wis., 72; 50 N. W. Rep., 1094.

Under a charter providing that, the mayor "shall have a negative upon the action of the aldermen in laying out highways, and in all other matters; and no vote can be passed or appointment made by the board of aldermen over his veto, unless by a vote of two-thirds at least of all the aldermen elected," the mayor is not authorized to veto the judicial action of a board of aldermen, sitting as a court, and determining the election of its members. Cate v. Martin, 70 N. H., 135; 40 Atl. Rep., 54; 48 L. R. A., 613.

Veto power discussed. Jacobs v. San Francisco, 100 Cal., 121; 34 Pac. Rep., 630.

93 Truesdale v. Rochester, 33 Hun. (N. Y.), 574, 577.

94 Kittinger v. Buffalo Traction Co., 160 N; Y., 377. him with a power over appropriations not intended by the charter.''95 Charters generally provide that where the ordinance contains several items appropriating money the mayor may object to one or more items separately while approving other portions of the ordinance.96 Sometimes this executive privilege is extended to ordinances containing several items fixing a tax levy.97

§ 151. Return of bill or ordinance by mayor. The method and time within which bills, after approval or veto, shall be returned by the mayor are usually prescribed by the charter. Unless the return is made within the time named, with the disapproval, the ordinance becomes a law. Where a charter provides that, if the municipal assembly shall finally adjourn within ten days after the bill has been presented to the mayor, the mayor shall, within ten days after such adjournment, return such bill to the city register, with his approval or reasons for disapproval, otherwise the bill shall become a law as if approved; when after presentation of a bill to the mayor the municipal assembly adjourned sine die before the ten days expire and before the mayor signs the bill, it does not become a law, otherwise it would be in the power of the assembly by such adjournment to nullify the charter and dispense with the concurrence of the mayor.2 Under such charter an ordinance is not invalid because of its having been filed by the mayor in the city register's office instead of being returned to the house in which it originated, it appearing that both houses had

95 State (Ahrens) v. Fiedler, 43
 N. J. L., 400, 405.

Oharter of St. Louis, art. III, sec. 24; Mun. Code of St. Louis, p. 208; 2 R. S. of Mo., 1899, p. 2484, sec. 24; King v. Chicago, 111 Ill., 63.

⁹⁷ Charter of San Francisco, art. II., ch. 1, sec. 14; Statutes and Amendments to the Codes of Cal., p. 245.

¹ Charter of San Francisco, art. II., ch. 1, sec. 16; Stat. & Amend. to Codes of Cal. (1899), 246; 1 Starr & Curtis III. Stat., p. 686, par. 47; Charter of New York, ch. 1, sec. 40, Laws of N. Y. (1897), p. 15; Jacksonville v. Ledwith, 26

Fla., 163; 23 Am. St. Rep., 558; 7
So. Rep., 885; Stutsman v. Mc-Vicar, 111 Iowa, 40; 82 N. W. Rep., 460; Doty v. Lyman, 166 Mass., 318, 44 N. E. Rep., 337; Saleno v. Neosho, 127 Mo., 627; 48 Am. St. Rep., 653; 30 S. W. Rep., 190; 27 L. R. A., 769; Babbidge v. Astoria, 25 Oregon, 417; 42 Am. St. Rep., 796; 36 Pac. Rep., 291; Com. v. Fitler, 136 Pa. St., 129; 20 Atl. Rep., 129; Pa. Globe Gas Light Co. v. Scranton, 97 Pa. St., 538; Schwartz v. Oshkosh, 55 Wis., 490; 13 N. W. Rep., 450.

² State ex rel. v. Carr, 67 Mo. 38; 1 Mo. App., 490.

adjourned on the day it was presented to the mayor.³ But adjournment from day to day is not such an adjournment as would prevent the return within the time prescribed.⁴ Placing a veto in the hands of a clerk of the council on the evening of the last day on which it should be returned, after making an ineffectual attempt to gain admittance to the clerk's office in the afternoon, is sufficient.⁵ Placing a bill beyond the executive control constitutes a return of it.⁶ Failure of the clerk to certify the time on the ordinance when it was presented to and returned by the mayor will not invalidate it.⁷

Where the legislative department of the corporation is composed of two houses or branches, charters generally prescribe that the ordinance shall be returned by the mayor to the house or branch in which it originated. In Pennsylvania it has been held that this requirement is directory merely, since no harm can follow from failure to observe it. In one case the ordinance passed the second branch of the council first, but was returned by the mayor to the first branch. The ordinance had been drafted by the board of estimates and submitted by it to the council for approval. Here it was held that as the ordinance did not originate in either branch it might be returned to either. In

§ 152. Ordinances passed and approved by electors. Under the recent charter of San Francisco certain franchise ordinances, as those to supply light or water, or for the lease or sale of any public utility, or for the purchase of land of more than \$50,000 in value, are required to be submitted to the vote of the electors.¹¹ And under the same charter any ordinance

³ Barber A. P. Co. v. Hunt, 100 Mo., 22, 27; 18 Am. St. Rep., 530; 8 L. R. A., 110; 13 S. W. Rep., 98; State *ex rel.* v. Mead, 71 Mo., 266; Knight v. K. C., St. J. & C. B. R. R. Co., 70 Mo., 231.

⁴ Harpending v. Haight, 39 Cal., 189; 2 Am. Rep., 432.

⁵ Baar v. Kirby, 118 Mich., 392; 76 N. W. Rep., 754.

⁶ Harpending v. Haight, 39 Cal., 189; 2 Am. Rep., 432.

⁷ Boehme v. Monroe, 106 Mich., 401: 64 N. W. Rep., 204. Mere error as to date of approval held immaterial. Allentown v. Grim, 109 Pa. St., 113.

8 Charter New York, ch. 1, § 40; Laws of N. Y. (1897), p. 14; Charter St. Louis, art. III., § 23; Mun. Code of St. Louis, p. 208.

⁹ Com. v. Fitler, 136 Pa. St., 129;20 Atl. Rep. 129.

10 Baltimore v. Gorter, 93 Md., 1;48 Atl. Rep., 445.

¹¹ Charter of San Francisco, art. II., ch. 1, sec. 21; Stat. and Amend. to Codes of Cal. (1899), 247.

may be passed by the electors by presenting a petition, signed by 15 per cent of the voters, to the election commissioners, who are required to submit the proposed ordinance to the people. Ordinances so passed cannot be repealed by the legislative body; this question is to be submitted to the electors.¹² Under some charters certain ordinances are required to receive the approval of the qualified electors of the local corporation by vote before they take effect.¹³

§ 153. Recording ordinances. Charters often provide that after passage ordinances and resolutions shall be duly recorded.¹⁴ The requirement is designed to furnish record evi-

12 Charter of San Francisco, art. II., ch. 1, sec. 20; Stat. and Amend. to Codes of Cal. (1899), 246, 247; Charter of Los Angeles, Cal.; Statutes & Amendments to Codes of Cal. (1903), p. 574, § 198b.

¹³ Crebs v. Lebanon, 98 Fed. Rep., 549.

Establishment of a system of waterworks. Taylor v. McFadden, 84 Iowa, 262; 50 N. W. Rep., 1070; Centerville v. Fidelity & Guaranty Co. (U. S. C. C. A.), 118 Fed. Rep., 332.

After establishment, an ordinance increasing the number of hydrants need not be so approved. Aurora Water Co. v. Aurora, 129 Mo., 540; 31 S. W. Rep., 946.

Vacation of street. Lamm v. Chicago, etc., R. R. Co., 45 Minn., 71; 47 N. W. Rep., 455.

Extension of municipal territory. Moore v. Perry (Iowa, 1903), 93 N. W. Rep., 510; Parker v. Zeisler, 73 Mo. App., 537.

Ordinance forbidding animals from running at large not required to be so approved. Batsel v. Blaine, 4 Tex. App., 195; 15 S. W. Rep., 283.

Bonds. Kearney v. Woodruff, (U. S. C. C. A.), 115 Fed. Rep., 90; Le Tourneau v. Duluth (Minn., 1902), 88 N. W. Rep., 529; Wilkins v. Waynesboro, 116 Ga., 359; 42 S. E. Rep., 767; Beatrice v. Edminson (U. S. C. C. A.), 117 Fed. Rep., 427.

Two PROPOSITIONS—one for street paving and one for constructing a bridge—held valid. Maybin v. Biloxi, 77 Miss., 673; 28 So. Rep., 566.

Where the tax is for two purposes, as for example, to pay interest on bonds and to provide for public improvements it is necessary that these propositions should be separately submitted to the voters. Woodlawn v. Cain, 135 Ala., 369; 33 So. Rep., 149.

In Louisiana it has been held that in obtaining authority for electors to incur a debt it is not necessary that the debt to be incurred for each particular purpose should be specially set out. Application of the special tax to be thus raised in detail, within the purposes authorized is committed to the discretion of the corporate authorities. If wrong application should be attempted an injunction will lie. Gray v. Bourgeois, 107 La., 671; 32 So. Rep., 42.

¹⁴ Resolutions to be recorded. Kepner v. Commonwealth, 40 Pa. St., 124; Waln v. Philadelphia, 99 dence of their existence. Whether failure to record will invalidate the ordinance or resolution depends upon the proper construction of the provisions of the particular charter. Under most charters the requirement is held directory merely.¹⁵ It has been held that an ordinance passed for a special purpose in order to carry out an act of the legislature, outside of the charter, need not be recorded, in accordance with the charter provision.¹⁶ The act of recording is regarded as a mere clerical or ministerial duty and not essential to complete the legislative act unless made so by express legal provisions.¹⁷ In a Penn-

Pa. St., 330; Charter San Francisco, art. II., ch. 1, sec. 17; Statutes and Amendments to the Codes of Cal. (1899), p. 246.

Resolution need not be recorded unless required by charter. It may be proved by parol. Darlington v. Commonwealth, 41 Pa. St., 68.

All acts and votes should be recorded. Logan v. Tyler, 1 Pitts. (Pa.), 244.

15 People v. Cole, 70 Cal., 59; 11 Pac. Rep., 481; Central Irrigation District v. De Lappe, 79 Cal., 351; 21 Pac. Rep., 825; Whalin v. Macomb, 76 Ill., 49; Shea v. Muncie, 148 Ind., 14, 33; 46 N. E. Rep., 138; Martindale v. Palmer, 52 Ind., 411, 414; Moore v. Perry (Iowa, 1903), 93 N. W. Rep., 510; Allen v. Davenport, 107 Iowa, 90; 77 N. W. Rep., 532; Conboy v. Iowa City, 12 Iowa, 90; Crowley v. Rucker, 107 La., 213; 31 So. Rep., 629; Bathurst v. Course, 3 La. Ann., 260; Wiggin v. New York, 9 Paige (N. Y.), 16; Barton v. Pittsburg, 4 Brews. (Pa.), 373.

In re-enactment of ordinances, recording may be omitted. Commonwealth v. Davis, 140 Mass., 485; 4 N. E. Rep., 577; Tipton v. Norman, 72 Mo., 380.

It is not necessary to repeat recording in each successive revision of the ordinances. *Ex parte* Bedell, 20 Mo. App., 125, 130.

When a former provision is included in a revised law, it is only thereby intended to continue its existence, not to make it operate as an original act, to take effect from the date of the revised law. The revision has not the effect of breaking the continuity of those provisions which were in force before it was made. St. Louis v. Foster, 52 Mo., 513; St. Louis v. Alexander, 23 Mo., 483, 509; Dart v. Bagley, 110 Mo., 42; Attorney-General v. Heidorn, 74 Mo., 410; State ex rel. v. Ranson, 73 Mo., 78, Kamerick v. Castleman, 21 Mo. App., 587.

Provision that all ordinances, by-laws and resolutions be recorded in a separate book kept for that purpose, held directory with respect to the particular book in which the record shall be made. Upington v. Oviatt, 24 Ohio St., 232, 241.

On change of a borough to a city by act of the legislature, containing a provision that existing ordinances shall remain in force, provided they be recorded within four months thereafter, the proviso was held merely directory, and noncompliance does not affect validity. Trustees of Erie Academy v. Erie, 31 Pa. St., 515.

¹⁶ Amey v. Allegheny City, 24 How. (65 U. S.), 364, 374.

17 Stevenson v. Bay City, 26

sylvania case the charter provided that all ordinances "shall be recorded in a book to be kept at the office of the burgess, which shall be free to public inspection, and no ordinance * * * shall be carried into operation in less than two weeks after the same shall be so recorded." "Such provision calls for no discussion whether it is mandatory or directory, for it plainly expresses the condition upon the performance of which, after two weeks, the ordinance shall be carried into operation, and no ingenuity can make the ordinance operative before." "18

§ 154. Deposit and custody of ordinances. It is usual for charters to provide that all ordinances and resolutions shall be deposited with the clerk or other municipal officer. Production of the original ordinance by the clerk, the legal custodian of the instrument, is prima facie evidence to show that it was deposited with that official. In one case the charter required all ordinances to be deposited in the office of the clerk before they became effective. An ordinance required all ordinances to be "filed" instead of deposited. It was held that an ordinance is in legal effect filed when it is delivered to the proper officer and by him received to be kept on file. "The deposit

Mich., 44; Boehme v. Monroe, 106 Mich., 401; 64 N. W. Rep., 204.

Failure through oversight to copy the ordinance or resolution on the city records does not affect its validity. Crebs v. Lebanon, 98 Fed. Rep., 549.

Method of recording. Klais v. Pulford, 36 Wis., 587. Ordinances printed and posted in the record book of proceedings of the board of trustees is a sufficient recording. Eubanks v. Ashley, 36 Ill., 177, approving Teft v. Size, 10 Ill., 432.

Publication of the ordinances in book form, complies with the provisions requiring recording. Allen v. Davenport, 107 Iowa, 90, 98; 77 N. W. Rep., 532.

Sufficient compliance. Hammond v. N. Y. C. & St. L. Ry. Co., 5 Ind. App., 526; 31 N. E. Rep., 817; *In* re Tunkhannock Borough, 3 Pa. Co. Ct. Rep., 480.

After an ordinance is duly re-

corded its validity cannot be affected by subsequent unauthorized alteration or interlineations. H. & T. C. R. R. Co. v. Odum, 53 Tex., 343, 352.

Amendment of record. Samis v. King, 40 Conn., 298.

Subsequent ratification. Schenley v. Conn., 36 Pa. St., 29; 78 Am. Dec., 359; Com. v. Marshall, 69 Pa. St., 328. See Section 164 to 167, post.

¹⁸ Per Turnkey, J., in Appeal of Borough of Verona, 108 Pa. St., 83, 89; Marshall v. Com., 59 Pa. St., 455; Schwartz v. Oshkosh, 55 Wis., 490; 13 N. W. Rep., 450.

¹⁹ Charter San Francisco, art. II, ch. 1, sec. 17; 1 Starr & Curtis, III. Stat., p. 686, par. 47; Charter, St. Louis, art. III, sec. 28; Mun. Code of St. Louis, 223; 2 R. S. of Mo., 1899, sec. 28.

²⁰ Schofield v. Tampico, 98 Ill. App., 324, 326. with the proper officer is the thing essential, of which the filing is but evidence." Under a charter provision requiring all ordinances to be recorded in a book to be provided for that purpose and to be kept by the mayor, an ordinance duly enacted, published and recorded was held valid although the book containing it was kept in the council chamber and not in the mayor's office.²²

§ 155. Publication of ordinances and notice of pendency. As all valid ordinances have the force of law within the municipal territory,23 are binding upon inhabitants and strangers,²⁴ operative upon property within the corporate limits,²⁵ and all persons upon whom they are binding are bound to take notice thereof.²⁶ it would seem to be a reasonable requirement that notice of their existence should be given in some appropriate manner before they are permitted to take effect. recognition of such necessity, publication of the ordinance after passage, or sufficient notice thereof before it takes effect, is generally expressly required, 27 especially of police ordinances and those providing penalties and forfeitures.28 So charters frequently provide for the publication of certain kinds of ordinances or resolutions prior to passage, or notice that the ordinance or resolution is pending for passage. This is usually required in providing for improvements which are paid for in

California — Hellman v. Shoulters, 114 Cal., 136; 44 Pac. Rep., 915; 45 Pac. Rep., 1057.

Illinois — Tisdale v. Minonk, 46 Ill., 9; Raker v. Maquon, 9 Ill. App., 155.

Iowa—Larkin v. Burlington, etc., R. R. Co., 91 Iowa, 654; 60 N. W. Rep., 195; Albia v. O'Harra, 64 Iowa, 297; 20 N. W. Rep., 444.

Kansas-Pittsburg v. Reynolds,

48 Kan., 360; 29 Pac. Rep., 757; Leavenworth v. Douglass, 3 Kan. App., 67.

Michigan — Boehme v. Monroe, 106 Mich., 401; 64 N. W. Rep., 204; Thornton v. Sturgis, 38 Mich., 639; Van Alstine v. People, 37 Mich., 523.

Nebraska — Bailey v. State, 30 Neb., 855; 47 N. W. Rep., 208.

New Jersey—Hoboken v. Gear, 27 N. J. L., 265.

New York — Watkins v. Hillerman, 73 Hun. (N. Y.), 317; 26 N.
Y. Suppl., 252; De Loge v. New York Central, etc., R. R. Co., 157
N. Y., 688; 92 Hun. (N. Y.), 149.
Wisconsin—Janesville v. Dewey, 3 Wis., 245.

28 State v. Noblesville, 157 Ind.,
 31; 60 N. E. Rep., 704; Union

²¹ McGregor v. Lovington, 48 Ill. App., 202, 207.

 ²² Beaumont v. Wilkes-Barre, 142
 Pa. St., 198, 218; 21 Atl. Rep., 888.

²³ Section 12, supra.

²⁴ Sec. 23, supra.

²⁵ Sec. 24, supra.

²⁶ Sec. 22, supra.

²⁷ Provisions Relating to Publication.

whole or in part by special assessment or by the extraordinary exercise of the power of special taxation,²⁹ and all of those ordinances which directly affect the property rights of the citizen. Due notice of contemplated action upon the part of the municipal authorities is a wise and salutary rule, and is rigidly enforced by the courts as a fundamental constitutional right.³⁰ Provisions respecting publication and sufficient notice are generally held mandatory, and hence failure to publish in substantially the manner prescribed renders the ordinance or resolution void.³¹ However, when such provisions are applicable and publication required, and when they are to be held directory merely, depends upon the proper construction of the particular charter or statute applicable, and sometimes largely upon the special facts of each case. When the matter relates

Pac. R. Co. v. Montgomery, 49 Neb., 429; 68 N. W. Rep., 619; Stuhr v. Hoboken, 47 N. J. L., 147; Cak Grove v. Juneau, 66 Wis., 534; 29 N. W. Rep., 644.

29 Harvey v. Aurora, 186 Ill., 283;
57 N. E. Rep., 857; Byrnes v. Riverton, 64 N. J. L., 210; 44 Atl., Rep., 857; Cape May v. Cape May., etc., R. Co., 60 N. J. L., 224; 37 Atl. Rep., 892; Heman v. Allen, 156 Mo., 534; 57 S. W. Rep., 559; Wood v. Seattle, 23 Wash. 1; 62 Pac. Rep., 135.

30 Ch. XVI, Of Public Improvement Ordinances.

³¹ Arkansas — Crane v. Siloam Springs, 67 Ark., 30; 55 S. W. Rep., 955.

California — People v. Cole, 70 Cal., 59; 11 Pac. Rep., 481; Derby v. Modesto, 104 Cal., 515; 38 Pac. Rep., 900; San Francisco v. Buckman, 111 Cal., 25; 43 Pac. Rep., 396.

Connecticut—Higley v. Bunce, 10 Conn., 436, 567.

Illinois—Newland v. Aurora, 14 Ill., 364; Barnett v. Newark, 28 Ill., 62; Elizabethtown v. Leffer, 23 Ill., 90; Illinois Central R. R. v. People, 161 Ill., 244; 43 N. E. Rep., 1107; Standard v. Industry, 55 Ill. App., 523; Hutchison v. Mt. Vernon, 40 Ill. App., 19.

Indiana — Bills v. Goshen, 117 Ind., 221; 3 L. R. A., 261; 20 N. E. Rep., 115; Meyer v. Fromm, 108 Ind., 208; 9 N. E. Rep., 84; Bumgartner v. Hasty, 100 Ind., 575; 50 Am. Rep., 830; Loughridge v. Huntington, 56 Ind., 253.

Iowa—Conboy v. Iowa City, 2 Iowa, 90; Starr v. Burlington, 45 Iowa, 87; Dubuque v. Wooton, 28 Iowa, 571.

Maryland—Baltimore v. Johnson, 62 Md., 225; Baltimore v. Little Sisters of the Poor, 56 Md., 400.

Michigan—Richter v. Harper, 95 Mich., 221; 54 N. W. Rep., 768; People v. Keir, 78 Mich., 98; 43 N. W. Rep., 1039.

Minnesota—Warsop v. Hastings, 22 Minn., 437.

Missouri — Rumsey Mfg. Co. v. Schell, 21 Mo. App., 175.

Nebraska—Union Pac. R. R. Co. v. McNally, 54 Neb., 112; 74 N. W. Rep., 390; Union Pac. R. R. Co. v. Montgomery, 49 Neb., 429; 68 N. W. Rep., 619.

purely or mainly to form, courts usually adopt a liberal construction.³²

New Jersey — North Baptist Church v. Orange, 54 N. J. L., 111; 22 Atl. Rep., 1004; State v. Long Branch Comrs., 54 N. J. L., 484; 24 Atl. Rep., 368; State v. Morristown, 34 N. J. L., 445; Rutgers' College A. A. v. New Brunswick, 55 N. J. L., 279; 26 Atl. Rep., 87; State v. Plainfield, 38 N. J. L., 95; Daives v. Hightston, 45 N. J. L., 127; State v. Hudson, 29 N. J. L., 475; Byrnes v. Riverton, 64 N. J. L., 210; 44 Atl. Rep., 857.

New York—Kneib v. People, 50 How. Pr. (N. Y.), 140; Moore v. New York, 73 N. Y., 238; 29 Am. Rep., 134; 4 Hun. (N. Y.), 545; Matter of Brassford, 50 N. Y., 509; 63 Barb. (N. Y.), 161; People v. Board of Health, 33 Barb. (N. Y.), 344; Schenectady v. Furman, 61 Hun. (N. Y.), 171; 15 N. Y. Suppl., 724; Matter of Anderson, 60 N. Y., 457; Matter of Levy, 4 Hun. (N. Y.), 501.

North Dakota—O'Hare v. Park River, 1 N. D., 279; 47 N. W. Rep., 380.

Ohio—Smith v. Columbus, etc., R. R. Co., 8 Ohio N. P., 1; State v. Cincinnati, 8 Ohio Cir. Ct. Rep., 523; 8 Ohio Cir. Dec., 689.

Oklahoma—Stillwater v. Moor (Okla., 1893), 33 Pac. Rep., 1024.

Pennsylvania—Marshall v. Com., 59 Pa. St., 455; Waln v. Philadelphia, 99 Pa. St., 330; Olds v. Erie City, 79 Pa. St., 380.

Washington—Wood v. Seattle, 23 Wash., 1; 62 Pac. Rep., 135.

Wisconsin—Quint v. Merrill, 105 Wis., 406; 81 N. W. Rep., 664; Herman v. Oconto, 100 Wis., 391; 76 N. W. Rep., 364; Smith v. Eau Claire, 78 Wis., 457; 47 N. W. Rep., 830; Schwartz v. Oshkosh, 55 Wis., 490; 13 N. W. Rep., 450; Clark v. Janesville, 10 Wis., 136; Janesville v. Dewey, 3 Wis., 245.

United States—Nat. Bank of Commerce v. Grenada, 44 Fed. Rep., 262, reversing 41 Fed. Rep., 87; 10 U. S. App., 692, affirmed in 48 Fed. Rep., 278.

32 WHEN PUBLICATION REQUIRED—ILLUSTRATIVE CASES.—"By-laws of general or permanent nature," as used in Iowa Code relating to publication, includes a city ordinance granting a franchise. State v. Omaha & C. B. Ry. Co., 113 Iowa, 30; 84 N. W. Rep., 983.

Ordinances for expenditure of money. Dumars v. Denver (Colo. App. 1901), 65 Pac. Rep., 580; Barr v. New Brunswick, 58 N. J. L., 255; 37 Atl. Rep., 477.

Ordinances providing for loan. National Bank of Commerce v. Grenada, 44 Fed. Rep., 262, reversing 41 Fed. Rep., 87.

Required—resolution. Central v. Sears, 2 Colo., 588; State v. Darrow, 65 Minn., 419; 67 N. W. Rep., 1012.

Provisions as to publication held directory. Sacramento v. Dillman, 102 Cal., 107; 36 Pac. Rep., 385; Commonwealth v. Mc-Cafferty, 145 Mass., 384; 14 N. E. Rep., 451.

Statutory provision respecting publication held not to apply to a city created by special charter. Pitts v. District of Opelika, 79 Ala., 527; Commonwealth v. Mc-Cafferty, 145 Mass., 384; 14 N. E. Rep., 451.

State laws requiring printing legal notices, etc., held not to apply to municipal ordinances. Pittsburg v. Reynolds, 48 Kan., 360; 29 Pac. Rep., 757.

Contract, ministerial function.

§ 156. Time and frequency of publication. The time and frequency of publication is controlled by charter.³³ Compliance with the charter in this respect is necessary in order to render valid the ordinance.³⁴ In the absence of charter specification, the time during which the publication is to be made must be fixed by the legislative body; it cannot be designated by a mere ministerial officer.³⁵ In one case where the charter prescribed no time it was held that publication five days after the passage of the ordinance was sufficient.³⁶ Under a charter requiring publication for twenty days, publication once each week for three weeks successively is a sufficient compliance.³⁷

Seitzinger v. Tamaqua, 187 Pa. St., 539; 41 Atl. Rep., 454.

Does not apply to "orders" or "resolutions," when. Napa v. Easterby, 76 Cal., 222; 18 Pac. Rep., 253; Fairchild v. St. Paul, 46 Minn., 540; 49 N. W. Rep., 325; Elmendorf v. New York, 25 Wend. (N. Y.), 693.

Ordinance by board of health declaring a nuisance, notice of passage need not be given. Yonkers Board of Health v. Copcut, 140 N. Y., 12; 35 N. E. Rep., 443.

Ordinance imposing a penalty or forfeiture for violation, required to be published. Held ordinance removing officer for drunkenness not such. State v. Noblesville, 157 Ind., 31; 60 N. E. Rep., 704.

When ordinances may become a law without publication under special charter provisions, see Schweitzer v. Liberty, 82 Mo., 309.

Providing for election. Heilbron v. Cuthbert, 96 Ga., 312; 23 S. E. Rep., 206.

Publication of digest of ordinances held directory. Whalin v. Macomb, 76 Ill., 49.

Not required in re-enactment or continuation of similar ordinances duly published. Commonwealth v. Davis, 140 Mass., 485; 4 N. E. Rep., 577; Tipton v. Norman, 72 Mo., 380, 385; Ex parte Bedell, 20 Mo. App., 125, 130. When re-enactment

constitutes a new enactment, and not merely a continuation of the old law, see Emporia v. Norton, 16 Kan., 236.

Where provisions as to publication are directory, mere failure to publish will not invalidate an ordinance. Reed v. Louisville, 22 Ky. Law Rep., 1636; 61 S. W. Rep., 11.

Failure to publish as required by statute does not invalidate, where it has been duly approved and signed by the mayor, and a section thereof provided that the ordinance should be in force from and after its passage. Johnson v. Finley, 54 Neb., 733; 74 N. W. Rep., 1080.

Provision as to publication of council proceedings held directory. Reed v. Louisville, 22 Ky. Law Rep., 1636; 61 S. W. Rep., 11.

33 Time of publication. Standard v. Industry, 55 Ill. App., 523; Hoboken v. Gear, 27 N. J. L., 265; Truchelut v. City Council, 1 Nott & McCord (S. C.), 227.

34 Van Alstine v. People, 37 Mich., 523.

35 Thornton v. Sturgis, 38 Mich., 639.

36 St. Paul v. Coulter, 12 Minn.,41; 90 Am. Dec., 278.

37 Hoboken v. Gear, 27 N. J. L., 265. So under a law directing publication to be for five successive days, the publication may be for five successive week days notwithstanding Sunday intervenes, on which there was no issue of the paper in which the publication was made.³⁸ A publication for fourteen consecutive days complies with a provision requiring publication for "at least two weeks."³⁹ Three weeks means twenty-one days and not simply three insertions.⁴⁰ Where the law requires publication in a newspaper of general circulation or in a book or pamphlet, one publication in a Sunday newspaper of an ordinance will be sufficient.⁴¹

§ 157. **Method of publication**. The charter method of publication of by-laws, ordinances and proceedings of the legislative body should be followed.⁴² Ordinances are promulgated in book or pamphlet form, printed in newspapers or posted in public places.⁴³

38 Ex parte Fiske, 72 Cal., 125; 13 Pac. Rep., 310. Sundays and holidays to be counted. Taylor v. Palmer, 31 Cal., 240.

³⁹ Derby & Co. v. Modesto, 104 Cal., 515; 38 Pac. Rep., 900.

40 Loughridge v. Huntington, 56 Ind., 253. Publication once a week. Commonwealth v. Matthews, 122 Mass., 60; Richter v. Harper, 95 Mich., 221; 54 N. W. Rep., 768; State v. Hardy, 7 Neb., 377.

⁴¹ Dumars v. Denver (Colo. App., 1901), 65 Pac. Rep., 580.

Time and frequency of publication under various charters. Luis Obispo v. Hendricks, 71 Cal., 242; 11 Pac. Rep., 682; Richter v. Harper, 95 Mich., 221; 54 N. W. Rep., 768; Schweitzer v. Liberty, 82 Mo., 309; Cape Girardeau v. Fongeu, 30 Mo. App., 551; Union Pac. R. R. Co. v. McNally, 54 Neb., 112; 74 N. W. Rep., 390; Lawson v. Gibson, 18 Neb., 137; 24 N. W. Rep., 447; Hull v. Chicago, etc., R. R. Co., 21 Neb., 371; 32 N. W. Rep., 162; Union Pac. R. R. Co. v. Montgomery, 49 Neb., 429; 68 N. W. Rep., 619.

42 State v. Hoboken, 38 N. J. L., 110, 113; Hoboken v. Gear, 27 N. J. L., 265.

⁴³ Pamphlet or newspaper. Standard v. Industry, 55 Ill. App., 523.

Book form or pamphlet. Allen v. Davenport, 107 Iowa, 90; 77 N. W. Rep., 532; Moss v. Oakland, 88 Ill., 109; Raker v. Maquon, 9 Ill. App., 155; Union Pac. R. R. Co. v. Montgomery, 49 Neb., 429; 68 N. W. Rep., 619; Union Pac. R. R. Co. v. McNally, 54 Neb., 112; 74 N. W. Rep., 390.

Newspaper notice of ordinances insufficient, when. Keckely v. Road Commissioners, 4 McCord (S. C.), 463.

Newspaper in which publication is to be made. San Luis Obispo v. Hendricks, 71 Cal., 242; 11 Pac. Rep., 682; Haskill v. Bartlett, 34 Cal., 281; Kerr v. Hitt, 75 Ill., 51; Tisdale v. Minonk, 46 Ill., 9; Larkin v. Burlington, etc., R. R. Co., 85 Iowa, 492; 52 N. W. Rep., 480; Bayard v. Baker, 76 Iowa, 220; 40 N. W. Rep., 818; Pittsburg v. Reynolds, 48 Kan., 360; 29 Pac. Rep., 757; McKusick v. Stillwater, 44 Minn., 372; 46 N. W. Rep., 769;

Usually the publication is required to be in the English language. Where no language is specified in the law, English is meant. Under a charter specifying that all ordinances

State (Bayer) v. Hoboken, 44 N. J. L., 131; *In re* Astor, 50 N. Y., 363; Kellogg v. Carrico, 47 Mo., 157; Wright v. Forrestal, 65 Wis., 341; 27 N. W. Rep., 52; Gallerno v. Rochester, 46 Up. Can. Q. B., 279.

Designation of newspaper, when directory, see *In re* Smith, 65 Barb. (N. Y.), 283.

Posting. Reg. v. Huntingdon, 4 Q. B. Div., 522; 29 Moak, 61.

In newspaper in which the ordinances were usually published is sufficient promulgation. Truchelut v. City Council, 1 Nott & McCord (S. C.), 227, 230.

Extra edition of newspaper and distribution of 50 or 100 copies of such edition is not a newspaper of general circulation. State v. Omaha & C. B. Ry. & B. Co., 113 Iowa, 30; 84 N. W. Rep., 983.

Sunday publications held valid. Dumars v. Denver (Colo. App., 1901), 65 Pac. Rep., 580; Hastings v. Columbus, 42 Ohio St., 585; Knoxville v. Knoxville Water Co., 107 Tenn., 647; 64 S. W. Rep., 1075.

Publication with council proceedings, held sufficient. Law v. People ex rel., 87 Ill., 385.

Publication in book form, posting or newspaper. Moss v. Oakland, 88 Ill., 109; Raker v. Maquon, 9 Ill. App., 155; Chicago v. McCoy, 136 Ill., 844; 26 N. E. Rep., 363.

Inaccurate print of certain words will not invalidate, if not misleading. Moss v. Oakland, 88 Ill., 109.

So mistake of date of enactment is not material. Vincent v. Pacific Grove, 102 Cal., 405; 36 Pac. Rep., 773,

Circulating ordinance with local paper, although printed elsewhere, is sufficient. Ex parte Bedell, 20 Mo. App., 125, 130, 131.

Mode of publication under particular provision. People v. Supervisors of City and County of San Francisco, 27 Cal., 655; Vincent v. Pacific Grove, 102 Cal., 405; 36 Pac. Rep., 773; Ex parte Christensen, 85 Cal., 208; 24 Pac. Rep., 747; In re Guerrero, 69 Cal., 88; 10 Pac. Rep., 261; Byars v. Mt. Vernon, 77 Ill., 467; Raquer v. Maquon, 9 Ill. App., 155; Dubuque v. Wooton, 28 Iowa, 571; State v. Smith, 22 Minn., 218; State v. Hoboken, 44 N. J. L., 131; Chamberlain v. Hoboken, 38 N. J. L., 110; In re Phillips, 60'N. Y., 16; In re Little, 60 N. Y., 343; In re Anderson, 60 N. Y., 457; In re N. Y. Public School, 47 N. Y., 556; Rathbun v. Acker, 18 Barb. (N. Y.), 393; Wasem v. Cincinnati, 2 Cin. R. (Ohio), 84.

Publication of ordinances relating to salaries, when to take effect. Stuhr v. Hoboken, 47 N. J. L., 147.

44 Chicago v. McCoy, 136 Ill., 344; 11 L. R. A., 413; 26 N. E. Rep., 363; 33 Ill. App., 576; Breaux's Bridge v. Dupuis, 30 La. Ann., 1105, distinguishing Loze v. New Orleans, 2 La., 427, holding publication in French only sufficient; City Pub. Co. v. Jersey City, 54 N. J. L., 437; 24 Atl. Rep., 571.

⁴⁵ Wilson v. Trenton, 56 N. J. L., 469; 29 Atl. Rep., 183; Cincinnati v. Bickett, 26 Ohio St., 49; State v. Cincinnati, 8 Ohio Cir. Ct. Rep., 523. shall be published in a German newspaper, in the absence of legal direction to the contrary, they must be printed in English, for an ordinance has no legal existence except in the language in which it is passed.⁴⁶

Publication of the ordinance alone is sufficient to give it validity, without a publication of the law authorizing it. All persons are charged with notice of a law upon which an ordinance is founded.47 So where the ordinance establishing grades of streets refers to maps and books on file, the latter need not be published with the ordinance; only that which is entered in the ordinance book need be published.48 Where the law allows alternate modes of publication of ordinances, as that they shall not be in force until published four weeks in a newspaper printed in the town, or in the town nearest to such town in which a newspaper is printed, or in some other newspaper generally circulated where such by-law is made as the town shall direct, the town must point out one of the three described newspapers in which the by-laws should be published, and a failure to so do will invalidate the by-law. Under such provision a publication made by order of the clerk without direction from the proper corporate authorities is void.49

⁴⁶ State (North Baptist Church) v. Orange, 54 N. J. L., 111; 14 L. R. A., 62; 22 Atl. Rep., 1004; see Wasem v. Cincinnati, 2 Cin. Super. Ct. (Ohio), 84.

German newspaper. Kernitz v. Long Island City, 50 Hun. (N. Y.), 428; Upper Hanover Road, 44 Pa. St., 277; In re North Whitehall Tp., 47 Pa. St., 156; German P. & P. Co. v. Illinois S. Z. Co., 55 Ill., 127.

⁴⁷ People *ex rel*. v. San Francisco, 27 Cal., 655.

The whole ordinance must be published. People v. Russell, 74 Cal., 578; 16 Pac. Rep., 395. But other ordinances affected by the new enactment need not be published. Ex parte Christensen, 85 Cal., 208; 27 Pac. Rep., 747.

48 Napa v. Easterby, 76 Cal., 222; 18 Pac. Rep., 253.

49 Higley v. Bunce, 10 Conn.,

Where the law does not prescribe the time of publication it must be fixed by the legislative body and not by a mere ministerial officer. Thornton v. Sturgis, 38 Mich., 639.

When clerk may designate the paper, if council fails, see *In re* Durkin, 10 Hun. (N. Y.), 269.

ORDER FOR PUBLICATION may be embraced in the ordinance. *In re* Guerrero, 69 Cal., 88; 10 Pac. Rep., 261.

PROOF OF PUBLICATION, how made, and presumptions, see Section 388, et seq., post.*

Violating the law in exceeding debt limit to pay for publication does not invalidate the ordinance. Kimble v. Peoria, 140 Ill., 157; 29 N. E. Rep., 723.

§ 158. Amendment on passage. Charters provide, as state constitutions, that no ordinance shall be so amended on its passage as to change its original purpose. This purpose means the general purpose of the bill or ordinance, and not the mere details through which and by which that purpose is manifested or effectuated. 51

Usually amendments are required to be incorporated with the bill or ordinance by engrossment. And before final action is taken a report is made by a committee that the bill is truly engrossed and correct.⁵²

After amendment, under some charters, the ordinance must be laid over for a specified time, as one week, before its final passage.⁵³

A charter provision to the effect that, no ordinance or by-law shall be enacted or passed unless the same shall have been introduced at a previous regular meeting operates as a limitation when amendments are made. In a New Jersey case, at a regular meeting the ordinance was introduced. It provided for laving out and opening a public street, and contained the names of the commissioners for this purpose, who were required to be appointed by ordinance and not otherwise. At a subsequent meeting the ordinance was taken up, the name of one of the commissioners stricken out and another inserted, and then The ordinance was held illegal because it materially varied from that introduced at the previous meeting. The court was of the opinion that the variance was in the most important part of the ordinance and that to permit such changes to be so made would defeat the precise object of the charter, which was to insure deliberation in every important proceeding.54 But a slight alteration of the title in no wise affecting the construction of the ordinance will be held imma-

50 Charter San Francisco, art. II., ch. 1, sec. 8; Statutes and Amendments to Codes of Cal. (1899), p. 245; Charter of St. Louis, art. III., sec. 13; Mun. Code of St. Louis, p. 205; 2 R. S. Mo. (1899), p. 2482, sec. 13.

⁵¹ Rule applied to act of legislature. State *ex rel*. v. Mason, 155 Mo., 486; 54 S. W. Rep., 524.

⁵² Charter of St. Louis, art. III, sec. 16; Mun. Code of St. Louis, p.

206; 2 R. S. Mo. (1899), p. 2482, sec. 16.

⁵³ Charter San Francisco, art. II., ch. 1, sec. 13; Statutes and Amendments to Codes of California (1899), p. 245.

54 State (Ackerman) v. Bergen,
33 N. J. L., 39; State v. Jersey
City, 34 N. J. L., 429; Cowen v.
Wildwood, 60 N. J. L., 365; 38 Atl.
Rep., 22.

terial.⁵⁵ Thus the title of an ordinance concerning inns and taverns and retailers of liquor may be amended on its passage by striking out the word "retailers" and inserting "dealers," since the change is immaterial.⁵⁶

§ 159. Publication of amendments on passage. Certain kinds of ordinances, as those providing for specific improvements, granting franchises or privileges, involving leases, appropriating or disposing of public property, expenditures of public money (except in small sums), levying a tax or assessment, providing for the imposition of a new duty or penalty, are, under some charters, required to be published before final action is taken thereon, and if amended during passage the ordinance, as amended, is to be advertised for a specified period before final action is taken thereon.⁵⁷

Where the charter requires an ordinance to be published between its second and third reading, a material amendment cannot be made after the second reading, without the publication and notice prescribed by the charter.⁵⁸ But an ordinance ordering a vote of the tax payers supplemented by an amendment after the original was advertised is not rendered void, where it appeared that such amendment does not vary from the substance of the original.⁵⁹

§ 160. Consideration of mayor's veto. Charters differ somewhat respecting the method and time of consideration of the bill or ordinance when it is returned with the mayor's objections. Objections to appropriations and tax levies are usually required to be made by items, and each item so objected to is to be separately reconsidered.⁶⁰

⁵⁵ State (Townsend) v. Jersey City, 26 N. J. L., 444, 448.

56 State (Staates) v. Washington, 44 N. J. L., 605, 610; 43 Am.
Rep., 402; Thornhill v. Stephany,
66 N. J. L., 171; 48 Atl. Rep., 573.
See Sec. 159, post.

Amendments made during passage need not be read on different days, as required with respect to the bill or ordinance. Chillicothe v. Logan Natural Gas, etc., Co., 8 Ohio N. P., 88; Weaver v. Mt. Vernon, 6 Ohio Dec., 436.

57 Charter San Francisco, art.

II., ch. 1, sec. 13; Statutes and Amendments to Codes of Cal. (1899), p. 245.

⁵⁸ State (Doyle) v. Newark, 30 N. J. L., 303.

⁵⁹ Mackenzie v. Wooley, 39 La. Ann., 944; 3 So. Rep., 128. See Sec. 158, supra.

GO Charter San Francisco, art. II., ch. 1, sec. 14; Statutes and Amendments to Codes of Cal. (1899), p. 246; St. Louis, art. III., sec. 24; Mun. Code of St. Louis, p. 208; 2 R. S. Mo. (1899), p. 2484, sec. 24.

Under some charters reconsideration cannot take place until after the expiration of five days and within thirty days from the return by the mayor.⁶¹ Under a charter which required reconsideration "at the next regular meeting thereafter" (after return), it was held that an ordinance passed over the veto at the meeting at which it was returned was void.⁶² Under a charter providing that, when the ordinance with the objections is returned, "and if two-thirds of the members then present * * * shall agree to said ordinance, notwithstanding such objections, then, but not otherwise, said ordinance shall have the force of law," etc., it was held that the reconsideration must take place at such meeting and that it could not be adjourned to a subsequent meeting.⁶³

After the ordinance has been reconsidered and the vote taken, in accordance with the charter, it cannot again be reconsidered.⁶⁴

§ 161. Courts will not inquire into legislative motive. The general rule is well established that courts will not inquire into

⁶¹ Charter San Francisco, art. II., ch. 1, sec. 16; Statutes and Amendments to Codes of Cal. (1899), p. 246.

62 Gleason v. Peerless Mfg. Co.,
37 N. Y. Suppl., 267; 1 App. Div.
(N. Y.), 257; 163 N. Y., 574; Peck
v. Rochester, 3 N. Y. Supp., 872.

Under some charters every bill returned vetoed "shall stand as reconsidered in the house to which it is returned," and after entering objections on the journal the house shall "proceed at its convenience to consider the pending question." Charter St. Louis, art. III., sec. 25; Mun. Code of St. Louis, p. 208; 2 R. S. Mo. (1899), p 2484, sec. 25.

63 In re Opening of Robin St.,1 La. Ann., 412.

64 Sections 121 and 122, supra; Ashton v. Rochester, 133 N. Y., 187; 60 Hun. (N. Y.), 372.

"The idea was suggested on argument that there is no affirmative declaration that in event of fail-

ure to overrule the mayor's veto by the constitutional number, that the ordinance would be a nullity. This was not necessary. mode of testing the question being prescribed, together with the result, in case of the overthrow of the veto, is the exclusion of all other modes and results. maxim, expressio unius est exclusio alterius, expresses the idea in such a contingency. Indeed, it has been said, and I think truly, that anything prescribed by constitution is a prohibition of all other modes that might be devised for doing it. All, after the constitutional method is exhausted, is ultra vires the lawful power of the body, and of non-effect." Per Thompson, C. J., in Sank v. Philadelphia, 4 Brews. (Pa.), 133; 8 Phila., 117.

When resolution, passed over veto in particular case. Caswell v. Bay City, 99 Mich., 417; 58 N. W. Rep., 331.

the motives of legislators where they possess the power to do the act and it has been exercised as prescribed by the organic law. In such case the doctrine is that the legislators are responsible alone to the people who elect them.⁶⁵ And this principle is generally applied to purely legislative acts of municipal corporations.⁶⁶ In passing an ordinance legislative in character, relating to the police power and importing no private contract or right, "the members of the city council are entitled to the same privileges and prerogatives which belong to members of the state legislature." Neither the motives of the members, nor the influences under which they acted, can

65 United States—Doyle v. Continental Ins. Co., 94 U. S., 535.

California — Harpending v. Haight, 39 Cal., 189; 2 Am. Rep., 432.

Illinois—Meyer v. Teutopolis, 131 Ill., 552; 23 N. E. Rep., 651.

Indiana—Lilly v. Indianapolis, 149 Ind., 648; 49 N. E. Rep., 887; McCulloch v. State, 11 Ind., 424, 431; Wright v. Defrees, 8 Ind., 298, 302.

Louisiana—State v. Davidson, 50 La. Ann., 1297; 69 Am. St. Rep., 478; 24 So. Rep., 324.

Missouri—Kiley v. Forsee, 57 Mo., 390; Young v. St. Louis, 47 Mo., 492; Dreyfus v. Lonergan, 73 Mo. App., 336.

New Jersey—Moore v. Haddonfield, 62 N. J. L., 386; 41 Atl. Rep., 946.

New York—Stuyvesant v. New York, etc., 7 Cow. (N. Y.), 588; Kittinger v. Buffalo Traction Co., 160 N. Y., 377.

Washington—Wood v. Seattle, 23 Wash., 1; 62 Pac. Rep., 135.

Wisconsin—State v. Superior Court, 105 Wis., 651; 81 N. W. Rep., 1046.

"The legislature is a co-ordinate branch of the state government, and in the enactment of laws is entirely independent of the judiciary; and if the laws are otherwise legal, the courts have no power to annul or set them aside on the ground that the members acted from improper or unlawful views." Per Wagner, J., in State ex rel. Blakeman v. Hays, 49 Mo., 604, 607, 608.

66 People v. Cregier, 138 Ill., 401;
28 N. E. Rep., 812; Knoxville v. Bird, 12 Lea (Tenn.), 121; 47 Am. Rep., 326.

The council is a miniature general assembly, and its ordinances, duly authorized, have the force of laws passed by the state legislature. Taylor v. Carondelet, 22 Mo., 105

⁶⁷ Villavaso v. Barthet, 39 La.
 Ann., 247, 258; 1 So. Rep., 599.

In considering a police ordinance, Mr. Justice Field said: "The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable

be shown to nullify an ordinance duly passed in legal form, within the scope of their corporate powers. "The legality of the acts of legislative or of corporate bodies cannot be tested by the motives of the individual members, or the adventitious circumstances they may lay hold of to carry their measures, provided they proceed regularly and act within the scope of their powers. If they be regularly convened, if the purpose be lawful, and if their acts are passed in due form of law and within the scope of their authority, persons who lend their money on the faith of such acts, or do other lawful-things in a just reliance upon their validity, cannot be affected by the secret springs of corporate action, and the public faith cannot be tarnished by the unseen influences surrounding it."68

Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good and are clothed with all the immunities of government, and are exempted from all liabilities for their mistaken use. They are not personally liable for the enactment of ordinances not authorized by the charter, nor are they liable upon a charge that they acted maliciously.⁶⁹

effect of their enactment. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." Soon Hing v. Crowley, 113 U. S., 703, 710, 711.

Charge of fraud. People v. Cregier, 138 Ill., 401; 28 N. E. Rep., 812; Shinkle v. Covington, 83 Ky., 420; Wood v. Seattle, 23 Wash., 1; 62 Pac. Rep., 135; Barhite v. Home Telephone Co., 50 N. Y. App. Div., 25.

An ordinance for improvement cannot be attacked in collateral proceedings by showing its passage was obtained fraudulently. Buell v. Ball, 20 Iowa, 282.

68 The chief burgess being ab-

sent the assistant burgesses took advantage of the absence, convened and passed the ordinance. Per Agnew, J., in Freeport v. Marks, 59 Pa. St., 253, 257.

In Paine v. Boston, 124 Mass., 486, 490, it is said: "For, although the circumstances surrounding and accompanying the passage of the order (to pay money) may be given in evidence, it does not by any means follow that the motives, reasons and considerations which operated upon the minds of the members of the council to induce them to vote for an order which partakes so much of the character of legislation, are competent or proper."

OB Jones v. Loving, 55 Miss., 109,
 111; Anne Arundel Co. Com'rs v.
 Duckett, 20 Md., 468; Baker v.
 State, 27 Ind., 485, 489.

Assessors are not liable, as their acts are judicial. Vail v. Owen.

§ 162. Same—Rule limited—Ministerial act. Judicial decisions have limited this doctrine in its application to municipal legislative bodies. "We suppose," says Judge Dillon, "it to be a sound proposition that their (municipal bodies) acts whether in the form of resolutions or ordinances, may be impeached for fraud at the instance of persons injured thereby." As early as 1868 this rule was expressly declared in a case determined by the Supreme Court of Ohio.71 The immunity from impeachment for fraudulent motives on the part of the legislative body, or other abuses of power, under the decisions does not extend to all cases of such bodies, notwithstanding they may assume the form of ordinances. Thus where the council was empowered to regulate the price of gas, and under the exercise of such power they, for a fraudulent purpose, passed the ordinance fixing the price of gas at a rate which they well knew could not be manufactured and sold without loss, it was held that the motives of the council could be properly inquired into.⁷² In such relation the members of the council act in a ministerial capacity. In New York it has been held that a city council in passing a resolution waiving a requirement of a contract for local improvement is not legislative in character, but administrative, and not being impressed with the character of sovereignty, the motives that induced it are the subject of judicial investigation.⁷³ Here it was ruled that the city may defend an action against the corporation on a contract as modified by resolution of the council, on the ground that the resolution is void because corruptly procured.74

19 Barb. (N. Y.), 22; Weaver v. Devendorf, 3 Denio (N. Y.), 117.
Election of officers. Pike v. Megoun, 44 Mo., 491, per Wagner, J.
70 1 Dillon Mun. Corp. (4th Ed.), 311.

71 State v. Cincinnati Gas Co., 18
 Ohio St., 262, 300, citing Davis v.
 N. Y., 1 Duer (N. Y.), 451.

72 State v. Cincinnati Gas Co., 18 Ohio St., 262, 300.

73 Weston v. Syracuse, 158 N. Y., 274; 53 N. E. Rep., 12; 43 L. R. A., 678; see Talcott v. Buffalo, 125 N. Y., 280; 26 N. E. Rep., 263; Cooley's Const. Lim., secs. 186, 187, 208.

⁷⁴ Weston v. Syracuse, 158 N. Y., 274; 53 N. E. Rep., 12; 43 L. R. A., 678.

In Pennsylvania it has been held that the passage of a resolution by a council awarding a contract for street lighting is not a legislative, but a ministerial act in the nature of a business transaction relating to the management of municipal affairs. Seitzinger v. Tamaqua, 187 Pa. St., 539, 542; 41 Atl. Rep., 454; 43 W. N. C., 236; Shaub v. Lancaster City, 156 Pa. St., 362; 26 Atl. Rep., 1067; Howard v. Olyphant, 181 Pa. St., 191; 37 Atl. Rep., 258.

§ 163. Injunction to restrain passage of ordinance. Ordinarily the passage of an ordinance is a legislative act which, as a rule, a court of equity will not enjoin.⁷⁵

Whether act in ordering public improvements and passing ordinance therefor is judicial or ministerial, see Parks v. Boston, 8 Pick. (Mass.), 218; Camden v. Mulford, 26 N. J. L., 49, per Green, C. J.; State (Vanatta) v. Morristown, 34 N. J. L., 445; Rochester White Lead Co. v. Rochester, 3 N. Y., 463.

The adoption of an ordinance by a board of public works, giving permission to a railroad company to lay tracks in the streets was held to be a judicial act and is therefore voidable because done without previous notice to the interested persons. State (West Jersey Traction Co.) v. Board of Public Works, 56 N. J. L., 431; 29 Atl. Rep., 163.

75 United States—New Orleans Waterworks Co. v. New Orleans, 164 U. S., 471, 481; Angle v. C., St. P., M. & C. R. Co., 151 U. S., 3; U. S. v. Des Moines N. & R. Co., 142 U. S., 510; Alpers v. San Francisco, 32 Fed. Rep., 503; 12 Sawyer (U. S.), 631; Murphy v. East Portland, 42 Fed. Rep., 308.

Alabama—Montgomery Gaslight Co. v. Montgomery, 87 Ala., 245; 6 So. Rep., 113; 4 L. R. A., 616.

Colorado—Lewis v. Denver City Waterworks, 19 Colo., 236; 41 Am. St. Rep., 248; 34 Pac. Rep., 993.

Illinois—Stevens v. St. Mary's T. School, 144 Ill., 336; 18 L. R. A., 832; 32 N. E. Rep., 962; 36 Am. St. Rep., 438; Mason v. Shawneetown, 77 Ill., 533; Chicago v. Evans, 24 Ill., 52; Sherlock v. Winnetka, 59 Ill., 389.

Indiana-Muhler v. Hedekin,

119 Ind., 481; 20 N. E. Rep., 700; Valparaiso v. Gardner, 97 Ind., 1; 49 Am. Rep., 416.

Louisiana—Harrison v. New Orleans, 33 La. Ann., 222; 39 Am. Rep., 272; Crescent City L. S. & S. H. Co. v. Jefferson Police Jury, 32 La. Ann., 1192.

Michigan—Detroit v. Hosmer, Wayne Circuit Judge, 79 Mich., 384; 44 N. W. Rep., 622; Cape May & S. L. R. Co. v. Cape May, 35 N. J. Eq., 419.

New York—Kittinger v. Buffalo Y. Co., 160 N. Y., 377; People ex rel. v. Queens Co. Super., 153 N. Y., 370; Talcott v. Buffalo, 125 N. Y., 280; 26 N. E. Rep., 263; Waterloo W. Mfg. v. Shanahan, 128 N. Y., 345; 28 N. E. Rep., 358; People ex rel. v. Albertson, 55 N. Y., 50, 54; Warwick v. New York, 28 Barb. (N. Y.), 210; People v. New York, 32 Barb. (N. Y.), 35; 10 Abb. Pr. (N. Y.), 144; 19 How. Pr. (N. Y.), 155.

Ohio — Johnson v. Cincinnati (Ohio), 26 Wkly. Law Bul., 223.

Pennsylvania—Wheeler v. Philadelphia (Pa.), 23 Leg. Int., 75.

Tennessee—Trading Stamp Co. v. Memphis, 101 Tenn., 181; 47 S. W. Rep., 136.

Wisconsin—State ex rel. v. Circuit Court, 97 Wis., 1; 72 N. W. Rep., 193; State v. Superior Court, 105 Wis., 651; 81 N. W. Rep., 1046.

The judicial department "has no will in any case. * * * Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to

"The general assembly is a co-ordinate branch of the state government, and so is the law-making power of municipal corporations within the prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. But the unconstitutional acts of either may be annulled." "The exception to the rule would seem to be limit-

exercise discretion it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." Per Chief Justice Marshall in Osborn v. Bank of U. S., 9 Wheat. (U. S.), 738, 866.

Courts will not restrain executive and administrative officers. Cherokee Nation v. Georgia, 5 Pet. U. S., 1; Worcester v. Georgia, 6 Pet. (U. S.), 515; Mississippi v. Johnson, 4 Wall (U. S.), 475; Louisiana v. Texas, 176 U. S., 1.

76 "A void law is no law, and this without doubt is true as to an ordinance. No injury, much less one of an irreparable character, can be inflicted by such an ordinance." Des Moines Gas Co. v. Des Moines, 44 Iowa, 505; 24 Am. Rep., 756, distinguishing People v. Sturtevant, 9 N. Y., 263, and Davis v. Mayor, etc., 14 N. Y., 506; 1 Duer (N. Y.), 451, where a city council was restrained from passing an ordinance creating a public nuisance in the streets.

"It never can be a rightful subject of legislation to create a public nuisance and if the passage of an ordinance, without more, created the nuisance, the mischief resulting therefrom might be irreparable." Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 511; 24 Am. Rep., 756.

Question of injunction raised, but ordinance held valid. Gartside v. East St. Louis, 43 Ill., 47.

Injunction to restrain mayor from signing. New Orleans E. R. Co. v. New Orleans, 39 La. Ann., 127; 1 So. Rep., 434; Dailey v. New Haven, 60 Conn., 314; 14 L. R. A., 69; 22 Atl. Rep., 945.

Council restrained by injunction from passing resolution over mayor's veto. People v. Dwyer, 90 N. Y., 402; 1 Civ. Proc. Rep. (N. Y.), 484; Smith v. McCarthy, 56 Pa. St., 359; Negus v. Brooklyn, 62 How. Pr. (N. Y.), 291; 10 Abb. N. C. (N. Y.), 180.

Denied to prevent payment of alleged illegal claims. Merriam v. Yuba Co., 72 Cal., 517; 14 Pac. Rep., 137.

Passage of ordinance prescribing payment of money will not be restrained. Murphy v. East Portland, 42 Fed. Rep., 308.

Will not enjoin the passage of an ordinance granting franchise for street railway. Albright v. Fisher, 164 Mo., 56; 64 S. W. Rep., 106.

Court declined to restrain passage of ordinance giving exclusive privilege for 20 years of removing all dead animals not slain for food. Alpers v. San Francisco Co., 32 Fed. Rep., 503. Injunction refused to restrain passage of an ordinance permitting company to lay

ed to cases where the governing body of the municipality has no power to act on the particular subject, legislatively, at all, or where the threatened act is not legislative, but purely ministerial, or where such body is clothed with certain powers, but threatens to go beyond or outside of such powers, and thereby invade the property or property rights of complainant, or where such body threatens to squander or divert some fund or property held by it or some of its officials in trust for its tax. payers and citizens.''77

The rule of the English courts, that for the usurpation of authority by public bodies, the remedy, until the passage of their municipal corporation acts, was exclusively in the name of the attorney-general, acting in behalf of the public, and that the individual had no redress until his personal property was affected by enforcement of the illegal proceedings, has been so far modified by judicial decisions in New Jersey that the tax payer may resort to certiorari for his protection against

gas pipes violative of prior exclusive right to another company. Des Moines Gas Co. v. Des Moines, 44 Iowa, 505; 24 Am. Rep., 756; Montgomery Gas Light Co. v. Montgomery, 87 Ala., 245; 4 L. R. A., 616; 6 So. Rep., 113.

Ordinance vacating street will not be enjoined in absence of bad faith. Meredith v. Sayre, 32 N. J. Eq., 557.

77 Per Cassoday, C. J., in State ex rel. v. Milwaukee Co. Super. Ct., 105 Wis., 651, 677, 678; 81 N. W. Rep., 1046, reviewing and distinguishing many cases.

Courts may enjoin passage of an ordinance which is beyond scope of power of municipal corporation, where its passage would work irreparable injury. In such case the city has no authority of any kind, legislative, judicial or administrative, to deal with the question at all. Spring Valley Waterworks v. Bartlett, 8 Sawyer, 555; 16 Fed. Rep., 615; Trading Stamp Co. v.

Memphis, 101 Tenn., 181; 47 S. W. Rep., 136; Public Ledger Co. v. Memphis, 93 Tenn., 77; 23 S. W. Rep., 51; People v. Sturtevant, 9 N. Y., 263; 59 Am. Dec., 536; State v. Patterson, 34 N. J. L., 163; State v. Albright, 20 N. J. L., 644.

Where an ordinance would be void on its face by reason of its unconstitutionality, and no irreparable injury could result from its mere passage, there being an adequate remedy at law against any attempt to enforce it after its passage, a court of equity will not enjoin its enforcement. Spring Valley Waterworks v. Bartlett, 8 Sawyer, 555; 16 Fed. Rep., 615.

The passage of ordinances which confer no rights or authority are harmless until steps are taken to make them available. Chicago v. Evans, 24 Ill., 52, 57.

Generally, when no damage can result injunction will be denied. Harrison v. New Orleans, 33 La. Assn., 222; 39 Am. Rep., 272; Atan illegal ordinance or resolution, without waiting until the assessment is actually imposed.⁷⁸

A municipal corporation has a dual character: one, governmental or public; the other, private or proprietary.79 Hence, in a Kentucky case, it has been declared that, "the general proposition that a court of equity may not enjoin the passage of a municipal ordinance must be confined in its application to subjects over which the corporation in its governmental or public character has discretionary authority. And if it be conceded taxable inhabitants have a right to resort to equity at all, to restrain a municipal corporation and its officers from making an illegal or wrongful disposition of corporate property, whereby the plaintiffs will be injuriously affected, it reasonably follows the power exists to enjoin passage of the ordinance authorizing the act whenever irreparable injury will be done to the plaintiffs, and they have no adequate remedy at law; for, from its nature, a preventative remedy may be applied at the inception of a wrongful act; in fact, when it is about to be done or threatened."80

§ 164. Validating void ordinance by municipality. Irregular proceedings may be validated by subsequent acts on the part of the council or governing legislative body which conkinson v. Wykoff, 58 Mo. App., 86; ville, 92 Ky., 95, 107; 13 L. R. A., Whitney v. New York, 28 Barb. 844; 17 S. W. Rep., 216. With(N. Y.), 233.

78 Violated charter, State (Gregory) v. Jersey City, 34 N. J. L., 390, 398, et seq., per Depue, J.; State (Danforth) v. Paterson, 34 N. J. L., 163, 171; State v. Jersey City, 34 N. J. L., 31, 44.

Although ordinance is void, certiorari will not lie in favor of the prosecutors who have sustained no damage peculiar to themselves. State (Montgomery) v. Trenton, 36 N. J. L., 79, 86, relying on State (Kean) v. Bronson, 35 N. J. L., 468.

79 Oliver v. Worcester, 102 Mass., 489; Louisville v. Commonwealth, 1 Duval (Ky.), 295.

80 Restraining passage of an ordinance authorizing disposition of wharf property. Roberts v. Louisville, 92 Ky., 95, 107; 13 L. R. A., 844; 17 S. W. Rep., 216. Withdrawal of an illegal ordinance after institution of action will not defeat the right to injunction against its enactment. Roberts v. Louisville, 92 Ky., 95; 13 L. R. A., 844; 17 S. W. Rep., 216. Compare Sherlock v. Winnetka, 59 Ill., 389; Milhau v. Sharp, 15 Barb. (N. Y.), 194.

Acceptance of an ordinance granting franchise to street railway company will be enjoined where it constitutes an act *ultra vires*. Cincinnati Street R. R. Co. v. Smith, 29 Ohio St., 291.

City not liable for attempting to enforce void by-law, resulting from a misconception of its powers. Pocock v. Toronto, 27 Ontario Rep., 635.

stitute ratification of the former proceedings. This rule applies to the enactment of ordinances. Thus where an ordinance authorized the city to contract for curbing, and the work was done without a proper contract, the city council after the work was done can validate the action.81 So where the agent of the city in contracting for street improvement failed to comply with the ordinance under the provisions of which the contract should have been made, it was held that as the contract was one which the city could authorize, it could waive the irregularity and adopt the contract by subsequent ordinance.82 So a change of grade of a street which was made by the officers of a municipality without authority of ordinance may by subsequent ratification of the city council be validated.83 But the municipality cannot by a subsequent act validate an unauthorized ordinance, one which is ultra vires, or beyond the scope of the municipal corporation to enact.84 Thus an ordinance authorizing the execution of a contract for water works, which was passed before a constitutional amendment took effect giving the city power to create the indebtedness, is void, and the contract being ultra vires at the time it was made cannot be ratified afterwards by a subsequent ordinance.85 render subsequent proceedings evidence of the ratification of the ordinance, it must appear that the latter proceedings were taken with a full knowledge of the invalidity of such ordinance and all steps, if any, taken thereunder.86

§ 165. Curative power of legislature over void ordinances. Acts done under and by virtue of ordinances passed by a municipal corporation, and proceedings entered into by it, within the scope of its power to act, which are void or defective by reason of some irregularity, omission or want of compliance with the law in the passage of the ordinance, may be cured and

Atl. Rep., 43:

⁸¹ Chester v. Eyre, 181 Pa. St., 642; 37 Atl. Rep., 837.

⁸² O'Rourke v. Hays, 93 Pa. St.,72.

⁸³ Shilo Street, 165 Pa. St., 386;30 Atl. Rep., 986.

⁸⁴ Crofut v. Danbury, 65 Conn.,294; 32 Atl. Rep., 365.

⁸⁵ Ellis v. Cleburne (Tex. Civ. App., 1896); 35 S. W., 495; Cedar Rapids Water Co. v. Cedar Rapids

⁽Iowa, 1902); 91 N. W. Rep., 1081. "If the act was void, because ultra vires, and they had no power to authorize it before it was undertaken and commenced, they certainly had no power to adopt it after it was done." Horn v. Baltimore, 30 Md., 218, 222; Baltimore v. Ulman, 79 Md., 469; 30

⁸⁶ McCracken v. San Francisco, 16 Cal., 591.

rendered valid unless there be a constitutional inhibition, by a subsequent act of the legislature, where the legislature originally had power to authorize the thing done.87 Thus where a city by ordinance authorized a contract with a gas company and the issue of bonds of the city, but failed to observe a provision of the legislature requiring that where a debt is created the means of paying its principal must be provided in the same ordinance, it was held that it was competent for the legislature to impose upon the city, by a curative act making the bonds valid, the payment of claims just in themselves, for which an equivalent has been received, but which for some irregularity or omission in the proceedings creating them cannot be enforced.88 But where the city passed a void ordinance because not authorized by its charter, and not originally within the power of the legislature to grant the power to enact the ordinance, a curative act to validate the ordinance would be void.89

§ 166. Same—Proceedings to subscribe for railroad stock. Defects and irregularities in the passage of ordinances and in the proceedings to authorize an incorporated town to subscribe to the capital stock of a railroad company and to issue bonds for the same may be cured and ratified by a subsequent act of the legislature where the legislature had the power to authorize the act, or to impose or take away the conditions, the non-observance of which have caused the defects. However, this power is subject to the constitutional restrictions of the state, and cannot be exercised when it would interfere with vested rights.⁹⁰ Thus in a case where bonds for a rail-

87 Nottage v. Portland, 35 Or., 539; 58 Pac. Rep., 883; Emporia v. Norton, 13 Kan., 569; State v. Starkey, 49 Minn., 503; 52 N. W. Rep., 24; United States Mortgage Co. v. Gross, 93 Ill., 483; Schenley v. Com., 36 Pa. St., 29; 78 Am. Dec., 359; Com. v. Marshall, 69 Pa. St., 328; Truchelut v. Charleston, 1 Nott. & M. (S. C.), 227.

The legislature may confirm municipal ordinances and proceedings irregularly adopted. Hatzúng v. Syracuse, 92 Hun. (N. Y.), 203; 36 N. Y. Suppl., 521.

But an act of the legislature

passed subsequent to the passage of a void ordinance, purporting to empower the local corporation to enforce any regulation heretofore made upon a particular subject, but not naming the ordinance in question, is inadequate to render the ordinance valid. Chicago v. Rumpff, 45 Ill., 90; 92 Am. Dec., 196.

88 New Orleans v. Clark, 95 U. S., 644.

Stange v. Dubuque, 62 Iowa, 303; 17 N. W. Rep., 518; Cain v. Goda, 84 Ind., 209.

90 People v. Lynch, 51 Cal., 15;

road had been issued and the stock subscribed for, and the objection was raised that the proof of the preliminary consent by tax payers was defective, it was held that the legislature had power to heal the defect and to sanction the action of the town commissioner in bonding the town. The court said: "The measure of consent on the part of the town and its tax payers or electors was fixable at the will of the legislature originally. If not, then the whole power must be denied, for the people of a locality cannot confer power upon the legislature, and if it originally rested with the legislature to fix the terms on which the towns might act, the same power will suffice to remit a part of the conditions imposed, or to heal any defects which may have occurred in the performance by the town of those conditions."91 But where, by reason of a change in the constitution, a state has no power to authorize a municipal corporation to issue negotiable bonds, it cannot validate an issue of bonds by such a corporation made before the change in the constitution, and when the legislature had such a power.92 the voters of a city or county have expressed their consent by a requisite majority vote to subscribe for stock or issue bonds, which creates a debt upon the city, and the subscription is invalid either for the want of power to take the vote or some irregularity or defect in the proceedings, a curative act of the legislature legalizing and making valid the bonds, in the opinion of the Supreme Court of the United States, is not void as being in conflict with that clause of a state constitution which prohibited the legislature from creating a debt against a municipal corporation for municipal purposes, without its consent.93

Otoe Co. v. Baldwin, 111 U. S., 1, 15; Bridgeport v. Housatonuc Ry. Co., 15 Conn., 475; McMillen v. Boyles, 6 Iowa, 304; St. Joseph Township v. Rogers, 16 Wall. (U. S.), 644, 663.

"Unless there be a constitutional inhibition, a legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts or to ratify and confirm any act it might lawfully have authorized in

the first instance." United States Mortgage Co. v. Gross, 93 Ill., 483, 484. Quoted with approval in Anderson v. Santa Anna, 116 U. S., 356, 364, and Bolles v. Brimfield, 120 U. S., 759.

⁹¹ Duanesburgh v. Jenkins, 57 N. Y., 177, 194.

92 Katzenberger v. Aberdeen, 121
 U. S., 172, 177.

93 Anderson v. Santa Anna, 116
 U. S., 356; Bolles v. Brimfield, 120
 U. S., 759; Cowgill v. Long, 15 Ill.,

In holding that the curative act of the legislature did not violate the constitution, the court, in Bolles v. Brimfield, said: "We do not disregard those decisions of the state court which hold that the legislature cannot impose a debt, for local corporate purposes, upon a municipal body, against the will of its corporate authorities. For, as often held by the state court, the corporate authorities of a town like Brimfield are its legal voters, and they at the election gave their consent to the subscription and bonds in question. We do not see that the subsequent ratification by the legislature of what had been done by the voters can be regarded as imposing a debt upon them against their will. The legislature simply gave effect to the wishes of the people, as expressed in the customary mode of ascertaining the popular will."

§ 167. Same—To collect taxes. The legislature has power to legalize proceedings to collect taxes where the law has not been strictly pursued, in cases where the taxes were not invalid for want of jurisdiction, and where no constitutional rights of the tax payer have been violated. But where a city, without power to do so, by ordinance extended its corporate limits, a tax levied by said city on real estate within the extended limits was illegal and void, and an act of the legislature of a remedial nature, it was held, did not make the illegal tax valid. It was said that the remedial act could apply only to cases where the city attempting to annex property had the power to annex it, but exercised it irregularly, defectively or informally, but could not apply to cases where the city had no power to annex property. The

202; Keithsburg v. Frick, 34 Ill., 405; Grenada Co. v. Brodden, 112 U. S., 261; Cutler v. Board of Supervisors, 56 Miss., 115. But in Elmwood v. Marcy, 92 U. S., 289, the United States court following People v. Chicago, 51 Ill., 17, held the contra. In Elmwood v. Marcy there was a dissenting opinion, holding the rule to be as declared in Cowgill v. Long, 15 Ill., 202, and Keithsburg v. Frick, 34 Ill., 405.

In Marshall v. Silliman, 61 Ill., 218, where an election and vote to

subscribe to railroad stock was irregular and void, it was held that the legislature could not by a curative act pass a law rendering the election and subscription valid. The legislature being prohibited by the constitution from creating a debt against a municipal corporation for municipal purposes, without its consent. See also, Wiley v. Silliman, 62 Ill., 170.

94 120 U. S., 759, 764.

95 Smith v. Buffalo, 90 Hun. (N. Y.), 118; 35 N. Y. Suppl., 635.

tax in this case was not void for irregularity, but because the city had no power to tax the property.96

fornia had power to legalize defective and invalid assessments of delinquent taxes, and to provide for their collection. People v. Holladay, 25 Cal., 300.

Defects in the levy of assess-

Held that the legislature of Cali- ments for taxes may be cured by an act of the legislature and a new levy made. Dill v. Roberts, 30 Wis., 178.

> 96 Atchison & Neb. Ry. Co. v. Maquilkin, 12 Kan., 301.

CHAPTER V.

OF PENALTIES.

- § 168. Power to enforce ordinances by penalties.
 - 169. Charter method of enforcing ordinances exclusive.
 - 170. Power to inflict penalty of forfeiture.
 - 171. Same-Proceedings.
 - 172. Same—Animals running at large.
 - 173. Penalty by imprisonment.
 - 174. Other penalties—Costs.

- § 175. Penalty must be certain.
- 176. Same—New Jersey Doctrine.
- 177. Same—North Carolina doctrine.
- 178. Penalty must be reasonable —Limit.
- 179. Limit of fine—Continuous or separate offense.
- 180. Heavier fine for second offense authorized.
- § 168. Power to enforce ordinances by penalties. Power to enforce ordinances or by-laws by penalties, as by fine or imprisonment, or both, and sometimes by forfeiture, is usually expressly conferred by charter, either in general or specific terms.\(^1\) As stated in a Vermont case, \(^1\) since an ordinance without a penalty would be nugatory,\(^1\) the general doctrine uniformly prevails that, a municipal corporation which has power to pass the ordinance has, as a necessary incident

1 Power to impose penalty necessary. Willcock, Mun. Corp., 180; Rex v. Newdigate, Comb., 10; Denver City R. R. Co. v. Denver, 21 Colo., 350; 52 Am. St. Rep., 239; 41 Pac. Rep., 826; Calhoun v. Little, 106 Ga., 336; 71 Am. St. Rep., 254; 43 L. R. A., 630; 32 S. E. Rep., 86; Leavenworth v. Booth, 15 Kan., 627; Burlington v. Stockwell, 5 Kan. App., 569; 47 Pac. Rep., 988; State v. O'Neil, 49 La. Ann., 1171; 22 So. Rep., 352; State v. Boneil, 42 La. Ann., 1110; 21 Am. St. Rep., 413; 8 So. Rep., 298; People v. Detroit Citizens, etc., R. R. Co., 116 Mich., 132; 74 N. W. Rep., 520; In re Langston, 55 Neb., 310; 75 N. W. Rep., 828; In re O'Keefe, 19 N. Y. Supp., 676; Bol-

ton v. Vellines, 94 Va., 393; 64 Am. St. Rep., 737; 26 S. E. Rep., 847.

² Winooski v. Gokey, 49 Vt., 282, 286.

"It is an appropriate legal sanction which gives vitality and force to the ordinance and renders the prohibited act unlawful." State (Tomlin) v. Cape May, 63 N. J. L., 429; 44 Atl. Rep., 209; Massinger v. Millville, 63 N. J. L., 123; 43 Atl. Rep., 443; Smith v. Clinton, 53 N. J. L., 329; 21 Atl. Rep., 304; Smith v. Gouldy, 58 N. J. L., 562; 34 Atl. Rep., 748; Haynes v. Cape May, 52 N. J. L., 180; 19 Atl. Rep., 176; State v. Cleaveland, 3 R. I., 117.

"An ordinance would be a dead letter if the corporation were left thereto, implied power to provide for its enforcement by appropriate and reasonable fines against those who break it.3 Thus the power to require all able-bodied male inhabitants to work the streets in such manner as, by ordinance, may be prescribed, implies power to enforce such ordinance by the imposition of penalties for failure to discharge the duty prescribed.31/2 Ordinarily, municipal charters confer, either by general or particular enumeration, powers upon the local corporation in order to enable it to fulfill its functions as a municipal government. Authority to enact ordinances, to carry into effect the powers granted, is frequently expressed by the use of general terms. Thus general charter power to enact ordinances, etc., and particular power to open, widen, establish, grade and otherwise improve and keep in repair streets, etc., confers power to punish by fine any person who may obstruct a public highway within the corporate limits.4 So power to suppress bawdy houses carries with it by implication the power to adopt necessary and reasonable means to accom-

without any power to enforce its observance." Tipton v. Norman, 72 Mo., 380, 385.

It is no offense to violate or disregard a void ordinance. State v. Crenshaw, 94 N. C., 877, approving State v. Bean, 91 N. C., 554.

³ Alabama—Mobile v. Yuille, 3 Ala., 137; 36 Am. Dec., 441.

Georgia — Chambers v. Barnsville, 89 Ga., 739; 15 S. E. Rep., 634.

Illinois—Korah v. Ottawa, 32 Ill., 121; 83 Am. Dec., 255.

Michigan—Detroit v. Ft. Wayne, etc., R. R. Co., 95 Mich., 456; 54 N. W. Rep., 958; 35 Am. St. Rep., 580.

Missouri—Ulrich v. St. Louis, 112 Mo., 138; 34 Am. St. Rep., 372; 20 S. W. Rep., 466; Eyerman v. Blaksley, 78 Mo., 145, 152.

Pennsylvania—Fisher v. Harrisburg, 2 Grant Cases (Pa.), 291, 296.

Tennessee—Trigally v. Memphis, 6 Coldw. (Tenn.), 382.

Vermont—Winooski v. Gokey, 49 Vt., 282, 286.

"The right to make laws, necessarily implies the power of enforcing the law by some sanction, otherwise the power would be nugatory." Mobile v. Yuille, 3 Ala., 137, 143; 36 Am. Dec., 441.

3½ Tipton v. Nonnan, 72 Mo., 308, 385.

Compare Farnsworth v. Pawtucket, 13 R. I., 82, 87.

Penalty for getting on and off engines and cars, if not passengers, sustained. Bearden v. Madison, 73 Ga., 184.

Such fines must as a general rule be paid into the treasury of the city, town or other municipal corporation, unless the law specifically directs otherwise. People v. Sacramento, 6 Cal., 422, 425.

⁴ T. P. & W. Ry. Co. v. Chenoa, 43 Ill., 209, 212; Hamilton v. Carthage, 24 Ill., 22. plish such purpose, which includes the imposition of a fine.⁵ The general rule applied to municipal corporations is that charter power to restrain and prohibit a specific thing implies power to punish its commission.⁶

§ 169. Charter method of enforcing ordinances exclusive. The rule respecting enumerated powers has often been applied to penal provisions. Hence, where the charter specifically enumerates the various acts for which penalties may be imposed, such enumeration, by implication, excludes the right to impose penalties not named. In accordance with the general doctrine that where a power is conferred upon a municipal corporation, to be exercised in a manner particularly described,

Owensboro v. Simms, 17 Ky.
 Law Rep., 1393; 34 S. W. Rep.,
 1085; Shreveport v. Roos, 35 La.
 Ann., 1010.

⁶ Pekin v. Smelzel, 21 Ill., 464,
468; State v. Grimes, 49 Minn.,
443, 445; 52 N. W. Rep., 42; Chariton v. Barber, 54 Iowa, 360; 6 N.
W. Rep., 528.

Authority to prevent authorizes a penal provision. Centerville v. Miller, 57 Iowa, 56; 10 N. W. Rep., 293, questioning Mt. Pleasant v. Breeze, 11 Iowa, 399, which holds that power to suppress gambling does not authorize an ordinance providing for punishment. Compare New Hampton v. Conroy, 56 Iowa, 498; 9 N. W. Rep., 417.

Power to abate nuisances may not support a penalty for the maintenance of one. The punishment is by indictment under the statute. Where the statute makes a thing an offense, it appears in Iowa an ordinance cannot deal with the subject under general grant of power. Nevada v. Hutchins, 59 Iowa, 506; 13 N. W. Rep., 634; approved in Knoxville v. Chicago, etc., R. R. Co., 83 Iowa, 636, 638; 50 N. W. Rep., 61. See ch. XV.

TERMS OF GRANT LIMITS POWER TO IMPOSE—Authority "to prohibit and suppress all gambling houses"

held not to give power to prescribe punishment by ordinance. Owensboro v. Sparks, 18 Ky. Law Rep., 269; 36 S. W. Rep., 4; distinguishing Owensboro v. Simms, 17 Ky. Law Rep., 1393; 34 S. W. Rep., 1085. Denied as to nuisance. Knoxville v. C., B. & Q. R. R., 83 Iowa, 636; 32 Am. St. Rep., 321; 50 N. W. Rep., 61. Denied for nonpayment of license. State v. Mannessier, 32 La. Ann., 1308. Strict construction of grant. State v. Patamia, 34 La. Ann., 750. Grant should be in express terms. Burlington v. Kellar, 18 Iowa, 59, 65: State v. Lochte, 45 La. Ann., 1405; 14 So. Rep., 215; State v. Bright. 38 La. Ann., 1.

Power to impose a fine for nonpayment of inspection fee does not usually arise from general grant in the general welfare clause. Springfield v. Starke, 93 Mo. App., 70.

⁷ Grand Rapids v. Hughes, 15 Mich., 54, 58, per Cooley, J.

The maxim expressio unius exclusio alterius applied and the doctrine exhaustively discussed by Sawyer, J., in State v. Ferguson, 33 N. H., 424, 427, et seq. As to power to levy license tax on business, etc., not named, see ch. XIII.

as heretofore explained.8 it follows that where the charter or law applicable provides the manner in which the local laws or ordinances are to be enforced, such provision is to be construed as excluding any other manner. The remedy of enforcement prescribed operates as a negative on any other manner.9 Thus power to make by-laws, to restrain animals from running at large, and enforce such by-laws by appropriate penalties, does not give authority to provide for the impounding and sale of animals found running at large in violation of the by-law.10 This rule is well illustrated in a leading English case determined in 1786, the doctrine of which prevails in the courts of this country.11 The particular charter prescribed in what manner by-laws should be enforced, namely, by fine or amerciament. Under such grant of power Mr. Justice Buller held that the local corporation was precluded by the act from inflicting any other punishment, as by forfeiture of property, which was attempted.12

§ 170. Power to inflict penalty of forfeiture. But the chief question discussed in the English case was, whether a corporation which possessed a general power of making by-laws could make a by-law creating a forfeiture. Lord Mansfield held that no corporation possessed such extraordinary power, unless it was expressly given; it being against Magna Charta; and Mr. Justice Buller also said that, considering it a by-law creating a forfeiture, the act of Parliament not having given this corporation a power to make such a by-law, it was bad on that ground.¹³ Following this early English rule, the courts

118, 124; Bolte v. New Orleans, 10 La. Ann., 321.

Penalties can only be enacted and applied as directed by charter or statute. Burlington v. Kellar, 18 Iowa, 59, 65; People v. Hanrahan, 75 Mich., 611; 42 N. W. Rep., 1124; Re McCutchon and City of Toronto, 22 Up. Can. Q. B., 613; Re McLeod and Town of Kincardine, 38 Up. Can. Q. B., 617; Re Snell and Town of Belleville, 30 Up. Can. Q. B., 81; Re Clark and Tp. of Howard, 10 Up. Can. Com. Pleas, 576.

¹³ Kirk v. Nowell, 1 Term Rep., 118, 124; Adley v. Reeves, 2 M. &

⁸ Sec. 75, et seq., supra.

⁹ "When a corporation is empowered to enforce its ordinance by fine or in any other prescribed manner, it is by implication precluded from adopting any other method of punishing disobedience to them." Hart v. Albany, 9 Wend. (N. Y.), 571, 598; 24 Am. Dec., 165.

¹⁰ Miles v. Chamberlain, 17 Wis., 446.

¹¹ Statement of Judge Dillon, 1 Dill. Mun. Corp. (4th Ed.), sec. 339.

¹² Kirk v. Nowell, 1 Term Rep.,

of this country have generally held that, in the absence of express power given by charter or state law applicable, ordinances or by-laws of a municipal corporation cannot be enforced by forfeiture of property of the offender. Thus an ordinance, providing that baskets used for the sale of fruit and vegetables shall be marked and stamped in a particular manner, or they shall be forfeited with their contents, is void, where enacted in pursuance of power to impose fines or penalties or pecuniary forfeitures, which latter are simply penalties. So an ordinance merely authorizing the arrest and punishment of any person keeping or visiting an establishment for the purpose of gambling does not authorize the seizure and detention of instruments used for gaming. 16

It was early held in South Carolina that, an ordinance cannot provide for the forfeiture of licenses as a penalty unless the power is expressly conferred upon the local corporation; that a license duly issued is property, and hence, under the power to impose fines, the authority of forfeiture cannot be exercised.¹⁷ However, it has been held subsequently by other courts that a license may be revoked as a penalty, since such revocation does not constitute a technical forfeiture of property.¹⁸ Where a license is regarded as a mere permit and not

S., 60; Player v. Archer, 2 Sid., 121; Clark v. Tucker, 2 Vent., 183; Willcock, Mun. Corp., 179, 180; 2 Kyd on Corp., 110; Angel and Ames, Corp., 200; 1 Dillon, Mun. Corp. (4 Ed.), sec. 336; Grant, Corp., 84.

¹⁴ Alabama—Mobile v. Yuille, 3 Ala., 137, 144; 36 Am. Dec., 441.

Iowa—New Hampton v. Conroy, 56 Iowa, 498; 9 N. W. Rep., 417; Henke v. McCord, 55 Iowa, 378; 7 N. W. Rep., 623.

Kentucky—McKee v. McKee, 8 B. Mon. (Ky.), 433; Varden v. Mount, 78 Ky., 86.

New Jersey—White v. Tallman, 26 N. J. L., 67; Bergen v. Clarkson, 6 N. J. L., 352.

New York—New York v. Ordrenau, 12 Johns (N. Y.), 122.

Pennsylvania-Kneedler v. Nor-

ristown, 100 Pa. St., 368; 45 Am. Rep., 383; Barter v. Commonwealth, 3 Pa., 253, 259, per Gibson, C. J.

The right to declare a forfeiture of property does not exist in this country by usage. 1 Dillon, Mun. Corp. (4th Ed.), 345; Taylor v. Carondelet, 22 Mo., 105, 124.

Phillips v. Allen, 41 Pa. St.,
 481; 82 Am. Dec., 486, citing 2
 Kyd on Corp., 110, and Grant on
 Corp., 84.

¹⁶ Ridgeway v. West, 60 Ind., 371, 376.

¹⁷ State *ex rel*. Heise v. Town Council of Columbia, 6 Rich. Law (S. C.), 404, 412, per Frost, J.

¹⁸ Hurber v. Baugh, 43 Iowa, 514, disapproving State *ex rel*. Heise v. Town Council of Columbia, 6 Rich. Law (S. C.), 404, 412.

a contract, it may be terminated by a repeal of the law under which it was granted.¹⁹ In Colorado, an ordinance providing that upon a second conviction for the offense of keeping a dramshop open at times forbidden, the license and the money paid therefor shall be forfeited and remain forfeited, though upon appeal and trial *de novo* an acquittal takes place, was held to be so oppressive and unreasonable as to be void in this respect.²⁰

§ 171. Same—Proceedings. Where the power to declare a forfeiture exists, the courts generally enforce the rule of due notice and legal inquiry.²¹ Laws authorizing the divestiture of title of property by summary proceedings must be strictly pursued. The citizen may only be deprived of his property in accordance with law, and to do otherwise would not only

19 Fell v. State, 42 Md., 71, 89;
20 Am. Rep., 83; Parkinson v.
State, 14 Md., 185; State ex rel. v.
Bonnell, 119 Ind., 494; 21 N. E.
Rep., 1101; State v. Cooke, 24 Minn., 247.

A MUNICIPAL OCCUPATION TAX is not a contract within the protection of the state or federal constitution. Under the police power a municipality may prohibit the occupation during the term for which it was licensed. But whether it may not then be under a duty to return the license fee is left an open question. St. Charles v. Hackman, 133 Mo., 634; 34 S. W. Rep., 878.

Although a license is a privilege yet it is equivalent to a contract right to the extent that it cannot be abrogated at any time without sufficient cause. State ex rel. v. Baker, 32 Mo. App., 98; Hannibal v. Guyott, 18 Mo., 515; McElhany v. McHenry, 26 Mo., 174.

The ordinance may enforce the penalty of forfeiture for violating ordinances exacting licenses, etc. St. Louis v. Sternberg, 69 Mo. 289; St. Louis v. Green, 70 Mo., 562.

20 McInerney v. Denver, 17 Colo.,

302; 29 Pac. Rep., 516. Compare State v. Anderson, 63 Minn., 208; 65 N. W. Rep., 265; State (Staates) v. Washington, 45 N. J. L., 318.

²¹ Illinois—Poppen v. Holmes, 44 Ill., 360; Bullock v. Geomble, 45 Ill., 218; Willis v. Legris, 45 Ill., 289.

Indiana—Slessman v. Crozier, 80 Ind., 487, 489.

Iowa—Gosselink v. Campbell, 4 Iowa, 296.

Kentucky—Varden v. Mount, 78 Ky., 86.

Louisiana—Rost v. New Orleans, 15 La., 129, approving Lanfear v. New Orleans, 4 La., 97.

Ohio—Cotter v. Doty, 5 Ohio, 393, 398; Rosebaugh v. Saffin, 10 Ohio, 31.

Wisconsin—Compare Wilcox v. Hemming, 58 Wis., 144; 15 N. W. Rep., 435; 46 Am. Rep., 625.

An ordinance authorizing a sale, under orders of the mayor, of property which is suffered to remain on the levee for a longer period than the police regulations of the city permit, held void. Here it was said that the power conferred by the ordinance "makes

be unjust, but despotic. Hence, courts are rigid in requiring strict compliance with laws allowing such procedure.²²

§ 172. Same—Animals running at large. Without express authority, nunicipal corporations cannot provide in their ordinances for the forfeiture of animals found running at large, in violation of such ordinances. The power to impose penalties for infraction of such police regulations does not include the power to impound and sell.²³ In Georgia it has been held that general power over the subject, conferred authority on the local corporation to enact an ordinance requiring that stray cattle found within the corporate limits be impounded, and after being advertised for five days, sold, unless the owner should claim them and pay the charges.²⁴ Similar ordinances have been sustained when passed under express charter power to impose such forfeiture.²⁵

the corporation judges and parties in the same cause and enables them to enforce a forfeiture and divest the owner of his property without trial in due course of law." It was declared that such power could not be conferred constitutionally. In the judgment of the court, the authority exercised in removing nuisances was "widely different," for such power is shared by the city in common with individuals, arises from necessity, and ceases with that necessity. Lanfear v. New Orleans, 4 La., 97, 98.

Under power "to regulate everything which relates to bakers," an ordinance which provided for seizing, by officers, of bread unstamped or deficient in weight, and conducting the offender before the court, and in event of conviction, a forfeiture of the bread seized might be ordered, was held valid. Guillotte v. New Orleans, 12 La. Ann., 432.

22 Glark v. Lewis, 35 Ill., 417,
 421; Poppen v. Holmes, 44 Ill.,
 360; Bullock v. Geomble, 45 Ill.,

218; Rex v. Croke, 1 Cowp., 26.

TRIAL AND HEARING NECESSARY.

Mississippi—Donovan v. Vicksburg, 29 Miss., 247; 64 Am. Dec., 143.

Missouri—Johnson v. Dow, 53 Mo. App., 372.

Ohio-Rosebaugh v. Saffin, 10 Ohio, 31.

West Virginia—Burdett v. Allen, 35 W. Va., 347; 14 L. R. A., 337; 13 S. E. Rep., 1012.

²³ Miles v. Chamberlain, 17 Wis.,

Such ordinances contravene the constitutional provisions that no person can be deprived of property without due course of law, and the right of trial by jury shall inviolate. Donovan v. Vicksburg, 29 Miss., 247, 249; 64 Am. Dec., 143, approving Fisher v. McGirr, 1 Gray (Mass.), 1, per Shaw, C. J.; White v. Tallman, 26 N. J. L., 67; Darst v. People, 51 Ill., 286; Willis v. Legris, 45 Ill., 289; Poppen v. Holmes, 44 Ill., 360. 24 Cartersville v. Lanham, 67 Ga., 753.

²⁵ Alabama—Folmar v. Curtis, 86 Ala., 354; 5 So. Rep., 678.

An ordinance providing for a notice of sale and the payment of the proceeds thereof to the owner of the animal, after deducting the costs of the proceedings, was held, in Colorado, not to be a forfeiture of animals.²⁶

Ordinarily, courts of equity have no power to relieve against the valid forfeiture of property in pursuance of municipal ordinances.²⁷

§ 173. Penalty by imprisonment. Unless the power is expressly conferred, a municipal corporation cannot inflict the penalty by imprisonment of the offender, either in the first instance or for non-payment of a fine duly imposed for viola-

Arkansas—Fort Smith v. Dodson, 46 Ark., 296.

Connecticut—Whitlock v. West, 26 Conn., 406.

Illinois—Friday v. Floyd, 63 Ill., 50.

Kansas—Gilchrist v. Schmidling, 12 Kan., 263.

Kentucky—Armstrong v. Brown, 20 Ky. Law Rep., 1766; 50 S. W. Rep., 17.

Michigan—Grover v. Huckins, 26 Mich, 476, per Cooley, J.; Campau v. Langley, 39 Mich., 451.

North Carolina—Rose v. Hardie, 98 N. C., 44; 4 S. E. Rep., 41, approving Hellen v. Noe, 3 Ired. (N. C.), 493; Whitfield v. Longest, 6 Ired. (N. C.), 268.

South Carolina—Crosby v. Warren, 1 Rich. (S. C.), Law, 385, distinguishing Kennedy v. Sowden, 1 McMullan Law (S. C.), 323.

Tennessee—Knoxville v. King, 7 Lea (75 Tenn.), 441; Moore v. State, 11 Lea (79 Tenn.), 35.

Wisconsin—Wilcox v. Hemming, 58 Wis., 144; 46 Am. Rep., 625; 15 N. W. Rep., 435.

²⁶ Brophy v. Hyatt, 10 Colo., 223,227; 15 Pac. Rep., 399.

Similar ruling in Iowa. Gosselink v. Campbell, 4 Iowa, 296.

WHAT CONSTITUTES RUNNING AT LARGE. Escape of horses from an

enclosure against the will of the owner who immediately goes in search of them, is not a running at large. "There must be some guilty intention or wilful neglect before a party can be made liable to the penalties imposed by the ordi-He must permit or suffer his stock to run at large." Kinder v. Gillespie, 63 Ill., 88, 89. "The knowledge and sufferance is the gist of the offense. The penalty is not to be enforced because the hogs were running at large but because the owner suffered them to run at large." Case v. Hall, 21 Ill., 632, 636, per Breese, J. So the ordinance does not apply where the escape of the hogs was unavoidable-as a flood-and the owner uses due diligence in attempting to reclaim them. Spitler v. Young, 63 Mo., 52, per Wagner, J.

Power to kill dogs. Stebbins v. Mayer, 38 Kan., 573; 16 Pac. Rep., 745; People v. Police Board, 24 How. Pr. (N. Y.), 481; 15 Abb. Pr. (N. Y.), 167. See § 469, post.

²⁷ In Taylor v. Carondelet, 22 Mo., 105, 112, where a forfeiture of a lease was involved, it was said that "in giving the corporation powers on the subject of leases the general assembly must have necessarily intended that its ordinances

tion of its ordinance.²⁸ Thus power to impose a sentence to "hard labor on the streets," does not authorize imprisonment.²⁹ Such imprisonment is not in satisfaction of judgment, but merely a means of enforcing its payment. Therefore it constitutes no defense to an action of scire facias against the sureties on the appeal bond of the offender, to recover the amount of such judgment and costs.³⁰ Generally, charters confer the power to imprison in express terms.³¹

The penalty of imprisonment imposed by charter for violation of an ordinance is not a debt within the constitutional provision forbidding imprisonment for debt.³²

should operate as laws and not as contracts."

The state may by subsequent law release a penalty incurred under former law. State v. B. & O. R. R. Co., 3 How. (44 U. S.), 534.

28 Ex parte Moore, 62 Ala., 471; Ex parte Slattery, 3 Ark., 484; Kinmundy v. Mahan, 72 Ill., 462; State ex rel. v. Baton Rouge, 40 La. Ann., 209; 3 So. Rep., 541; Willcock, Mun. Corp., 181; Clark's Case, 5 Co., 64; Bab v. Clerk, Moore, 411; London v. Wood, 12 Mod., 686.

Power to punish by fine or imprisonment does not include authority to coerce the payment of a fine by imprisonment. "When the punishment inflicted is imprisonment, that is the penalty to be enforced. When the penalty is a fine, that is the penalty to be enforced in the manner provided by law." Brieswick v. Brunswick, 51 Ga. 639, 642; 21 Am. Rep., 240; S. P. Bregguglia v. Vineland, 53 N. J. L., 168; 11 L. R. A., 407; 20 Atl. Rep., 1082.

A fine assessed may be collected either by commitment of the person upon whom the fine is imposed or by *fieri facias*. Huddleson v. Ruffin, 6 Ohio St., 604.

Charter power to enforce ordi-

nances "by a proper fine, imprisonment or other penalty" does not permit the infliction of both fine and imprisonment as substantive punishment for the same offense. McInerney v. Denver, 17 Colo., 302; 29 Pac. Rep., 516.

Under an ordinance permitting imprisonment only, in event there is no appeal, if upon conviction an appeal is taken, the defendant cannot be imprisoned. Carson v. Bloomington, 6 Ill. App., 481.

²⁹ Ordering the defendant into official custody until the fine and costs duly imposed are paid is imprisonment. *Ex parte* Moore, 62 Ala., 471, 475.

30 Sheffield v. O'Day, 7 Ill. App., 339.

31 Ex parte Green, 94 Cal., 387; 29 Pac. Rep., 783, distinguishing Ex parte Rosenheim, 83 Cal., 388; 23 Pac. Rep., 372; Ex parte Chin Yan, 60 Cal., 78; Ex parte Ellis, 54 Cal., 204; Ex parte Bollig, 31 Ill., 88; Flora v. Sachs, 64 Ind., 155; Miltonvale v. Lanoue, 35 Kan., 603; 12 Pac. Rep., 12.

32 Chicago v. Kenney, 35 Ill. App., 57; Hardenbrook v. Lingonier, 95 Ind., 70; Ex parte Hollwedell, 74 Mo., 395; St. Louis v. Sternberg, 69 Mo., 289; Canton v. Ligon, 71 Mo. App., 407; Ex parte Kiburg, 10 Mo. App., 442.

The enforcement of ordinances by imprisonment depends upon the provisions of the particular charter. Usually it may only be exercised after trial and hearing.³³ And the judgment, sentence, or order of commitment is controlled by the law conferring the power to impose.³⁴ Thus where the council is vested with the exclusive power to make direction respecting the duration of imprisonment of violators of ordinances, failure on its part to do so will not authorize the trial court to fix such time in the judgment or sentence.³⁵ So under a charter authorizing sentence to "hard labor on the streets * * * not exceeding thirty days," a sentence directing the marshal to take the offender "into custody and detain him until the fine and costs are fully paid," is void, because (1) it imposes "imprisonment," whereas the charter provides "hard labor."

And this is true, although there be a general law of the state imposing a fine for a like offense. St. Louis v. Schoenbusch, 95 Mo., 618; 8 S. W. Rep., 791; St. Louis v. Bentz, 11 Mo., 61; St. Louis v. Cafferata, 24 Mo., 94; Independence v. Moore, 32 Mo., 392; State v. Wister, 62 Mo., 592; State v. Harper, 58 Mo., 530; State ex rel. v. Walbridge, 119 Mo., 383; 24 S. W. Rep., 457. See ch. XV.

33 Power to inflict imprisonment must be expressly conferred. Ex parte Montgomery; In re Knox, 64 Ala., 463; Ex parte Burnett, 30 Ala., 461; Ex parte Green, 94 Cal., 387; 29 Pac. Rep., 783; Burlington v. Kellar, 18 Iowa, 59, 65; State v. Ruff, 30 La. Ann., 497; Barter v. Commonwealth, 3 Pa., 253; Low v. Evans, 16 Ind., 486.

34 Where the law limits imprisonment to six months, an order that defendant be imprisoned and remain until such time as would make the amount of such debt \$1.50 per day when he should be discharged, is void. Kanouse v. Lexington, 12 Ill. App., 318.

Provision that offender, on conviction, shall be fined not exceed-

ing \$500, and may be imprisoned for a period not exceeding sixty days, or both, does not authorize a sentence "to pay a fine of \$100 or perform sixty days work on the public streets" of the city. The sentence is void for uncertainty, being in the alternative. Ex parte Martini, 23 Fla., 343; 2 So. Rep., 689.

Under charter authority to inflict punishment by fine not to exceed \$100, or in default of the payment of the same by labor on the streets, an ordinance providing a fine specifying the amount of imprisonment is invalid since it allows imprisonment without first giving the offender an opportunity to pay the fine. Calhoun v. Little, 106 Ga., 336; 71 Am. St. Rep., 254; 43 L. R. A., 630; 32 S. E. Rep., 86. Compare Papworth v. Fitzgerald, 106 Ga., 378; 32 S. E. Rep., 363.

Where the charter authorizes imprisonment in the county jail only, a commitment to the county penitentiary is void. Merkee v. Rochester, 13 Hun. (N. Y.), 157.

35 Merkee v. Rochester, 13 Hun. (N. Y.), 157. and (2) is indefinite in duration, whereas the limit prescribed is thirty days.³⁶

The duration of imprisonment cannot exceed the charter limit.³⁷ But an ordinance providing for a term of imprisonment which might exceed that authorized by the state constitution but does not necessarily do so, is not void and may be enforced within the constitutional limit.³⁸ Imprisonment for 2,160 days in default of payment of fines aggregating \$720 on conviction of 72 distinct violations of one ordinance within one hour and forty minutes is unusual and unreasonable punishment.³⁹

\$174. Other penalties—Costs. In accordance with the rule that the charter method of enforcing ordinances is exclusive, charter power to commit to the city prison, work house, or place of correction, does not authorize a sentence to perform labor on the public streets. So a fine for violating an ordinance and a simple judgment of imprisonment until the fine and costs are paid, cannot be enforced by compelling the defendant to perform manual labor on the streets. But under express charter power, hard labor may be inflicted as a punishment. In the opinion of the Supreme Court of Michigan, hard labor, in itself, is not infamous or degrading; on the contrary, it is ennobling and is the foundation upon which reposes all true progress in mental and moral development.

³⁶ Ex parte Moore, 62 Ala., 471, 475.

37 Brown v. Asbury Park, 44 N. J. L., 162; Keokuk v. Dressell, 47 Iowa, 597; Ex parte Moore, 62 Ala., 471, 475; New Orleans v. Costello, 14 La. Ann., 37; State ex rel. v. Bringier, 42 La. Ann., 1095; 8 So. Rep., 298; State v. Boneil, 42 La. Ann., 1110; 21 Am. St. Rep., 413; 10 L. R. A., 60; 8 So. Rep., 298.

38 Keokuk v. Dressell, 47 Iowa, 597.

39 State *ex rel.* v. Whitaker, 48 La. Ann., 527; 35 L. R. A., 561; 19 So. Rep., 457.

Where under the law one imprisoned could be discharged on

the payment of fine and costs one in custody does not entitle himself to a release by merely tendering sufficient property upon which to levy the execution. *In re* Miller, 44 Mo. App., 125. See sec. 178 post.

³⁹½ Ex parte Martini, 23 Fla., 343; 2 So. Rep., 689.

40 Torbert v. Lynch, 67 Ind., 474. Sentence to chain gang is void without express charter power. Carr v. Conyers, 84 Ga., 287; 20 Am. St. Rep., 357; 10 S. E. Rep., 630.

41 Keokuk v. Dressell, 47 Iowa, 597; Ex parte Montgomery, In re Knox, 64 Ala., 463.

But power to impose must be ex-

"The infamy and degradation consists in its being involuntary. The distinction is the difference between liberty and slavery." 42

Without express provision, costs of the proceedings form no part of the penalty.⁴³ Costs were unknown to the common law, and the power to impose must be found in the charter or legislative act applicable or it does not exist.⁴⁴ Thus where the charter authorizes the penalty, fine and imprisonment, an ordinance adding "costs of the prosecution" is void as to such clause.⁴⁵

§ 175. Penalty must be certain. The fundamental rule requiring all ordinances to be precise, definite and certain in their terms is especially applicable to penal provisions. It is very common for penal ordinances to leave a margin to the discretion of the court so that the fine or imprisonment imposed may be graded in some proportion to the aggravation of the circumstances. Where the power exists to inflict penalties for the violation of ordinances, and the charter does not forbid, the ordinance may specify a reasonable margin. Thus it may provide that the fine shall not be less than a named sum, nor greater than a specified amount; or that the imprisonment shall not be less than a specified time, nor greater than a time named; or that the fine shall not exceed a named sum, or the

pressly given. Ex parte Reynolds, 87 Ala., 138; 6 So. Rep., 335.

Under charter power to provide that those committed to jail shall be required to work at such labor as their strength permits, an ordinance imposing imprisonment at hard labor is unauthorized. Lead v. Klatt, 13 S. D., 140; 82 N. W. Rep., 391.

42 Per Champlin, J., in People v. Hanrahan, 75 Mich., 611, 621; 42 N. W. Rep., 1124, quoting:

"An angel's wing would droop if long at rest,

And God himself, inactive, were no longer blest."

Disfranchisement cannot be inflicted as a punishment. Will-cock, Mun. Corp.; Rex v. London, 2 Lev., 201,

Corporal punishment denied. Exparte Deane, 2 Cranch C. C., 125; 7 Fed. Cas. No. 3, 712.

The clipping of the hair of the offender is unreasonable punishment. Ho Ah Kow v. Nunan, 5 Sawyer, 552; 12 Fed. Cas. No. 6, 546. See sec. 227 post.

⁴³ Bayonne v. Herdt, 40 N. J. L., 264.

44 State v. Kinne, 41 N. H., 238; State v. Cantieny, 34 Minn., 1; 24 N. W. Reþ., 458; Bishop, Crim. Proc., sec. 1313.

45 State v. Cantieny, 34 Minn., 1;
 24 N. W. Rep., 458.

So costs in criminal cases are not within the provision. Caldwell v. State, 55 Ala., 133. See sec. 339, post,

imprisonment extend beyond a specified time.⁴⁶ Adopting the rule of the older English authorities that by-laws would be held void for uncertainty, unless the penalties therein named were fixed at a definite amount, the Supreme Court of Alabama early held that a by-law which provided a penalty in such sum, not exceeding \$50, as the corporation court might think proper to impose as a fine, was too vague to be supported.⁴⁷ Subsequently, this court departed from this doctrine and sustained a by-law which left the amount of the fine within fixed limits (e. g., not exceeding \$50) to the discretion of the court.⁴⁸ The courts of this country generally sustain this rule.⁴⁹

§ 176. Same — New Jersey doctrine. However, in New Jersey, where the *penalty* for the violation of ordinances is to be recovered by action of debt, the rule is that the ordinance must fix the precise penalty to be imposed, and where the amount is left to the discretion of the court, as that it shall not be less than \$10, nor more than \$50, or shall not exceed \$50,

46 Per Lowrie, J., in Fisher v. Harrisburg, 2 Grant Cas. (Pa.), 291, 296; Atkins v. Phillips, 26 Fla., 281; 8 So. Rep., 429; State v. Cantieny, 34 Minn., 1; 24 N. W. Rep., 458, relying on 1 Dil. Mun. Corp., sec. 341 (275).

47 "The penalty must be a certain sum, and cannot be left to the arbitrary assessment of the corporation court, to be determined according to the nature of the offense." Fixing a limit beyond which the fine cannot extend does not remove the objection. "The reason assigned is that it permits the corporation to be a judge of its own cause." Mobile v. Yuille, 3 Ala., 137, 144; 36 Am. Dec., 441.

48 Huntsville v. Phelps, 27 Ala., 55, overruling Mobile v. Yuille, 3 Ala., 137; 36 Am. Dec., 441, on this point. The court said (p. 58): "A reasonable discretion is given to be exercised within certain limits, and we can see no objection which could be urged to such a by-law, which could not, with equal pro-

priety, be made to any by-law investing courts or juries with discretion in apportioning the fine to the offense, being restricted within reasonable bounds. The lower power of making just discrimination, so as to advance the ends of justice, and mete out to every violator of the law a punishment proportioned to its demerits, should reside somewhere; and since the charter invests the corporation with the power to pass such bylaw, and to create proper sanctions, we do not conceive that the law in question is at all unreasonable, or uncertain, in that sense which renders it void." Per Chilton, C. J.

⁴⁹ Judge Dillon supports this doctrine as "just and reasonable," and observes that "the older English authorities as far as they hold such a by-law void for uncertainty are regarded as unsound in principle, and ought not to be followed." 1 Dillon (4th Ed), 341, and n. 2, page 414.

the ordinance will be held bad for uncertainty.⁵⁰ The doctrine is that, the charter requirement that the penalty shall be recovered by action of debt is equivalent to a declaration that the common council must prescribe a precise penalty so that the action of debt can be supported. It is argued that "an action of debt can only be maintained for a sum capable of being ascertained at the time of the action brought." So it has been held in New Jersev that where the power is given to enforce an ordinance or by-law by reasonable penalties which may be "imposed for revenue," the ordinance must fix the precise penalty. Here it was said that the singular provision that the penalty was to be "imposed for revenue" seems to invoke the exercise of the taxing power in conjunction with the police power and to require that the imposts should be graduated, not so much by the circumstances of the particular case, as by the needs of the municipality within reasonable bonds. "The ascertainment of the sum to be charged for the latter object is not a judicial function."52

In one case in that state, where the charter involved did not require the penalty to be collected by action of debt, a conviction was sustained under an ordinance providing a penalty not exceeding a stated sum (e. g., \$50).⁵³ And in another case it was declared that the ordinance may confer upon the magistrate the power of adjusting the penalty within the statutory limit to the circumstances of each case, unless the statute evinced an intention that the governing body of the corporation should itself fix the precise limit.⁵⁴

The question of certainty of penalty in ordinances is fully discussed in Re Frazee, 63 Mich., 396; 30 N. W. Rep., 72, per Campbell, C. J.

50 State v. Zeigler, 32 N. J. L., 262, 269, distinguishing Piper v. Chappell, 14 Exch., 649; Massinger v. Millville, 63 N. J. L., 123; 43 Atl. Rep., 443; White v. Tallman. 26 N. J. L., 67; Melich v. Washington, 47 N. J. L., 254; Tomlin v. Cape May, 63 N. J. L., 429; 44 Atl. Rep., 209.

51 State (Smith) v. Clinton, 53
 N. J. L., 329; 21 Atl. Rep., 304.
 52 Young & McShea A. Co. v.

Atlantic City, 60 N. J. L., 125, 126; 37 Atl. Rep., 444.

⁵³ McConvill v. Jersey City, 39 N. J. L., 38.

⁵⁴ Young & McShea A. Co. v. Atlantic City, 60 N. J. L., 125, 126; 37 Atl. Rep., 444.

Where the charter authorizes the penalty by fine or imprisonment, an ordinance imposing a penalty of fine or imprisonment or both, at the discretion of the magistrate, held void. State (Leland) v. Long Branch Comrs., 42 N. J. L., 375, approved in State (Staates) v. Washington, 44 N. J. L., 605, 612.

§ 177. Same—North Carolina doctrine. The doctrine that the fine for the violation of the ordinance cannot be committed to the discretion of the court is also supported by decisions in North Carolina. In that state the fines must be definitely fixed in amount; therefore, ordinances prescribing a fine of not more than a named sum, or imprisonment not to exceed a specified number of days, have been declared void for uncertainty. And the same court held that an ordinance is not void for uncertainty by reason of a provision giving the mayor discretion to impose a fine of \$50, or imprisonment for thirty days, upon conviction, where the statute makes the violation of the ordinance a misdemeanor, and the constitution of the state makes exactly the same provision as to the punishment for misdemeanors. 6

§ 178. Penalty must be reasonable—Limit. There must be a limitation in the amount of the penalty. This may be provided either in the state statute or the charter authorizing the ordinance, or it may be in the ordinance itself, and if in the latter, the courts may determine whether the amount so fixed is reasonable. The term reasonable, as used, means what is reasonable under the circumstances, taking into account the character of the offense. What would be a reasonable penalty cannot from the nature of things admit of a general rule applicable to all cases, but must in every case be determined by the nature of the offense intended to be prohibited.⁵⁷ Where

55 State v. Worth, 95 N. C., 615; State v. Crenshaw, 94 N. C., 877; State v. Cainan, 94 N. C., 883; State v. Rice, 97 N. C., 421; 2 S. E. Rep., 180; Commissioners of Louisburg v. Harris, 7 Jones Law (N. C.), 281.

⁵⁶ State v. Higgs, 126 N. C., 1014, 1020; 48 L. R. A., 446; 35 S. E. Rep., 473.

⁵⁷ Mobile v. Yuille, 3 Ala., 137, 144; 36 Am. Dec., 441; *In re* Ah You, 88 Cal., 99; 25 Pac. Rep., 974; Austin v. Murray, 16 Pick. (Mass.), 121; *Ex parte* Bedell, 20 Mo. App., 125.

Penalty in forbidding sale of liquor. Toledo v. Edens, 59 Iowa, 352, 354; 13 N. E. Rep., 313.

Penalty of \$15 for failure to pay license as attorney of \$10, as pre-

scribed by ordinance, held not exorbitant. Baker v. Lexington, 21 Ky. Law Rep., 809; 53 S. W. Rep., 16.

A fine of \$250 for carrying concealed weapons is reasonable. *In* re Cheney, 90 Cal., 617; 27 Pac. Rep., 436.

A fine of \$50 for gambling is not excessive punishment. Greenville v. Kemmis, 58 S. C., 427; 50 L. R. A., 725; 36 S. E. Rep., 727.

A fine not exceeding \$1,000 or imprisonment not exceeding six months, or both, for uttering, etc., profane and obscene language and words having a tendency to create a breach of the peace, held reasonable. *In re* Miller, 89 Cal., 41; 26 Pac. Rep., 620.

A fine of \$100 or imprisonment

the penalty prescribed is reasonable, the ordinance will not be declared unconstitutional because the charter or statute authorizing its enactment does not limit the penalty the ordinance may impose.⁵⁸

In the absence of legal restriction, it has been held that the penalty may be fixed at any sum within the jurisdiction of the municipal or police court, provided it be not unreasonable in view of the nature of the offense.⁵⁹ Where the penalty is precisely fixed by the organic law, of course, it cannot be exceeded by ordinance.⁶⁰ Thus where the law authorizes the infliction of such penalty as may be provided "for like offenses against the laws of the state," an ordinance fixing the fine for assault at from \$5 to \$50, is void, where the minimum fine for such offenses is \$3 under the state law.⁶¹ If the maximum fine is within the charter limits, its reasonableness cannot be questioned.⁶²

The decisions present some conflict respecting the question whether the penalty of the ordinance should exactly correspond with the penalty of the state statute where the unlawful act is made an offense against both the state and the local corporation. By constitution in Kentucky the penalty must not be less than that provided by state statute for the same act. 63 In such case, if the penalty is not limited, decisions

for 90 days for failure to obtain a license by drivers of stages used for the transportation of passengers, held not to be cruel and unusual punishment. Belmar v. Barkalow, 67 N. J. L., 504; 52 Atl. Rep., 157.

58 State v. Carpenter, 60 Conn.,
97; 22 Atl. Rep., 497; Bowman v.
St. John, 43 Ill., 337; Ashton v.
Ellsworth, 48 Ill., 299.

CHANGING PENALTY DURING PROSECUTION. Where an ordinance is passed mitigating the penalty during the prosecution, defendant cannot complain that the penalty imposed by the original ordinance is so exorbitant as to invalidate the ordinance. Baker v. Lexington, 21 Ky. L. Rep., 809; 53 S. W. Rep., 16.

59 A fine beyond court's juris-

diction is void. Zylstra v. Charleston, 1 Bay (S. C.), 382.

60 State v. Boneil, 42 La. Ann., 1110; 8 So. Rep., 298; Commonwealth v. Wilkins, 121 Mass., 356; Zylstra v. Charleston, 1 Bay (S. C.), 382.

⁶¹ Petersburg v. Metzker, 21 Ill., 205.

Where the law prescribes a fine of not less than \$10, the imposition of a fine of only \$5 is erroneous. Taylor v. State, 35 Wis., 298.

Contra—Ordinance cannot impose a greater fine than that fixed by the charter, but may impose less. Ex parte Caldwell, 138 Mo., 233, 241; 39 S. W. Rep., 761.

⁶² Tarkio v. Cook, 120 Mo., 1;
 41 Am. St. Rep., 678; 25 S. W. Rep., 202.

63 Owensboro v. Sparks, 18 Ky.

exist to the effect that it may be greater than that provided in the state law.⁶⁴ However, this proposition has been denied.⁶⁵

§ 179. Limit of fine—Continuous or separate offense. ordinance may impose a fine not exceeding the charter limit for each separate and distinct offense. 66 Thus several distinct fines for separate acts, e. g., of retailing liquor on different days, may be imposed at one sitting of the council, notwithstanding the aggregate of the fines exceed the charter limit.67 In one case the ordinance forbade cutting down cedar and other trees, and imposed a penalty of \$5 "for each and every offense;" in one proceeding and one judgment the offender was convicted of forty different offenses and fined \$5 for each. making an aggregate of \$200—each offense being supposed to consist in each tree by him cut down. Here it was held that the matter charged amounted to no more than a single offense, for, as the court observed, it may well be that every tree cut down of which the offender stood convicted was cut down in one day, and under the ordinance the cutting down of more trees than one at one time would be but one offense. court held that but one offense had been committed, and as

Law Rep., 269; 36 S. W. Rep., 4. Charter limit \$50, ordinance from \$20 to \$100, void as to excess, but valid as to rest. Greenfield v. Mook, 12 Ill., App., 281.

If within charter, valid. Opelousas v. Giron, 46 La. Ann. (pt. 2), 1364; 16 So. Rep., 196.

Charter, not exceeding \$20, ordinance not less than \$3, nor exceeding \$10, inconsistent and ordinance void. Landis v. Vineland, 54 N. J. L., 75; 23 Atl. Rep., 357.

If penalty conflicts with general law of state it is void. Ex parte Solomon, 91 Cal., 440; 27 Pac. Rep., 757; In re Ah You, 88 Cal., 99; 25 Pac. Rep., 974.

64 Deitz v. Central, 1 Colo., 323, 327; Pekin v. Smelzel, 21 Ill., 464, 469; Baldwin v. Murphy, 82 Ill., 485, 490; Quincy v. O'Brien, 24 Ill. App., 591; State v. Ludwig, 21 Minn., 202,

65 Taylor v. Owensboro, 98 Ky.,
271; 56 Am. St. Rep., 361; 32 S. W.
Rep., 948; Schroeder v. Charleston,
3 Brev. (S. C.), 533.

Assault and battery, ordinance penalty cannot be greater than state law. Petersburg v. Metzker, 21 Ill., 205.

Ordinance penalty to be the same as that provided by statute. State v. Chase, 33 La. Ann., 287; Amboy v. Sleeper, 31 Ill., 499.

Ordinance penalty less than statute. Robbins v. People, 95 Ill., 175; Rice v. State, 3 Kan., 141, 164.

DURATION OF IMPRISONMENT, see Section 173, supra.

66 Hart v. Albany, 9 Wend. (N. Y.), 571.

67 State ex rel. Heise v. Town Council of Columbia, 6 Rich. L. (S. C.), 404,

the aggregate fines exceeded the charter limit, the conviction was void. 98

In an English case, one by-law required party walls to be of a prescribed thickness, under fixed penalty, and another by-law provided that if the offense should continue the offender should be liable to a further prescribed penalty for each day during which the offense should continue, after due written notice. Defendant was fined under the first by-law and afterwards again fined under the second by-law "for continuing the offense." On appeal, it was held that suffering the party wall to remain unaltered was not a "continuing offense" within the second by-law, or, if it was, that the by-law was unreasonable—the appropriate remedy being the removal of the structure as authorized by law. 69

In a Massachusetts case the organic law limited the penalty to \$25 for each offense. The ordinance authorized the imposition of a penalty of not less than \$1, nor more than \$5, for every hour that a person should keep his wagon in the market without legal permission, after notice to remove and until actual removal. Here it was said: "The offense thus punished is a single continuous offense; and the ordinance affixing a penalty which, computed according to its terms, may exceed \$25 for a single offense upon one and the same day, is void."70 In an English case, defendant was convicted for exercising the trade of a baker on the Lord's Day and for selling hot loaves contrary to the statute, and fined for forty different sales of bread. On appeal, Lord Mansfield held that under the law but one offense for exercising his ordinary calling could be committed on the same day.71 Where the charter limit is fixed at \$100, an ordinance imposing a fine of \$5 for every barrel of

68 State ex rel. Truesdale v. Moultrieville, 1 Rice Law (S. C.), 158

⁶⁹ Marshal v. Smith, L. R., 8 C. P., 416.

70 Per Gray, C. J., in Commonwealth v. Wilkins, 121 Mass., 356.
71 Lord Mansfield said: "The offense is exercising his ordinary trade on the Lord's day, and, that without any fraction of the day, hours or minutes; it is but one entire offense, whether longer or

shorter in point of duration, or whether it consists of one or a number of particular acts; that there was no idea conveyed by the act that if a tailor sews on the Lord's day, every stitch he takes is a separate offense, and (he adds) there can be but one entire offense on one and the same day; killing a single hare is an offense, but the killing of ten more on the same day will not multiply the offense, or the penalty imposed

flour sold in violation of the inspection regulation cannot be enforced beyond the limit. The transaction of sale was held to be but one offense, and the ordinance was construed to impose a fine of \$5 for each barrel sold in violation of its provision until the sum reaches one hundred dollars in the same sale. The court said that any other construction would invalidate the ordinance.⁷² So where the limit was \$250 fine, an ordinance providing a fine of \$125 for every one hundred pounds of gunpowder unlawfully kept in violation of its provisions, was held void, for a violation of the by-law in any one prosecution could not exceed the charter limit.73 For the offense of keeping a dramshop without a license, the ordinance cannot make each sale of liquor a separate and distinct offense.74 So under an ordinance forbidding the sale and exposing for sale of certain commodities on Sundays, one single act of selling cannot be divided into two offenses, one exposing to sale and another selling.⁷⁵ In one case the ordinance provided a license of 50 cents per pole per year on each electric pole within the city, required owners thereof to number and designate with initials each pole, and imposed a penalty of five dollars for each and every offense upon any person "who shall violate any of the provisions of any section thereof." It was held that a company refusing to mark and number its poles and take out a license was guilty of but one offense and liable to but one penalty; that a penalty could not be imposed for failure as to each separate pole.76

§ 180. Heavier penalty for second offense authorized. A municipal corporation empowered to impose penalties for the violation of its ordinances, may distinguish between a first and second offense, and may provide for a heavier penalty for such

for killing one." Crepp v. Durden, Cowp., 640.

72 "This ordinance is repugnant to their charter so far as it operates to impose a penalty beyond one hundred dollars, and is to that extent inoperative. It being a single transaction, a recovery, if otherwise authorized, could only be had to the extent of one hundred dollars, and as the penalty could not be split, such a recovery would be

a bar to any future proceedings for the balance." Quincy v. Quimby, 38 Ill., 274, 279.

73 New York v. Ordrenan, 12 Johns (N. Y.), 122.

74 Eureka Springs v. O'Neal, 56
 Ark., 350; 19 S. W. Rep., 969.

75 Brooklyn v. Toynbee, 31 Barb.(N. Y.), 282.

⁷⁶ Lancaster v. Edison Electric Illuminating Co., 8 Pa. Co. Ct. Rep., 178.

violation subsequent to the first, provided the penalty in no case exceeds the limit fixed by the charter.77

penalties, one of a general, and N. J. L., 318, 322. another and higher penalty for a second offense, but neither exceed- of a trade corporation sustained. ed the charter limit. Held valid. Butcher's Co. v. Bullach, 3 Bos. &

77 The ordinance affixed two State (Staat) v. Washington, 45

Gradation of penalties in by-law Pul., 434.

CHAPTER VI.

OF REASONABLENESS OF ORDINANCES

AND HEREIN ORDINANCES IN RESTRAINT OF TRADE.

- § 181. Express power to pass.
 - 182. Implied or incidental powers.
 - 183. Mode of exercise of express power must be reasonable.
 - 184. Same—uniform rule necessary.
 - 185. Reasonableness a question of law for the court.
 - 186. Rules as to reasonableness under implied powers.
 - Same—English cases—custom and usage.

- § 188. Same—illustrative cases.
 - 189. Ordinances in restraint of trade.
 - 190. Same—monopoly and exclusive privileges.
 - Water and gas franchises as monopolies—ferries.
 - 192. Exclusive market privileges.
 - 193. Ordinances must not unreasonably discriminate classification.
 - 194. Same-illustrative cases.
- § 181. Express power to pass. Ordinances may be passed, first, by virtue of express grant of power; second, under a grant of power general in its nature; or, third, under incidental or implied municipal powers. Where passed by virtue of express power, not inconsistent with the federal constitution or laws or the state constitution, and such power is substantially followed, or is exercised in a reasonable manner, the ordinance will be sustained, regardless of the opinion of the court respecting its reasonableness.¹ "Where the power to

1 Alabama—Lindsay v. Anniston, 104 Ala., 257; 53 Am. St. Rep.,
 44; 16 So. Rep., 545.

Colorado—Phillips v. Denver, 19 Colo., 179; 41 Am. St. Rep., 230; 34 Pac. Rep., 902.

Illinois—Peoria v. Calhoun, 29 Ill., 317, 320.

Indiana—Pittsburgh, etc., R. W. Co. v. Crown Point, 146 Ind., 421; 45 N. E. Rep., 587; Shelbyville v. Cleveland, etc., R. W. Co., 146 Ind., 66; 44 N. E. Rep., 929; Beiling v. Evansville, 144 Ind., 644; 42 N. E. Rep., 621; Rund v. Fowler, 142

Ind., 214; 41 N. E. Rep., 456; Skaggs v. Martinsville, 140 Ind., 476; 49 Am. St. Rep., 209; 33 L. R. A., 781; 39 N. E. Rep., 241; Champer v. Greencastle, 138 Ind., 339; 35 N. E. Rep., 14; Steffy v. Monroe City, 135 Ind., 466; 41 Am. St. Rep., 436; 35 N. E. Rep., 121; Cleveland, etc., R. R. Co. v. Harrington, 131 Ind., 426; 30 N. E. Rep., 37; Chamberlain v. Evansville, 77 Ind., 542.

Louisiana—State v. Payssan, 47 La. Ann., 1029; 49 Am. St. Rep., 390; 17 So. Rep., 481. enact the particular ordinance is specifically conferred on the municipality, the question whether it is reasonable can no more be raised so as to affect its validity than could the same objection be raised against the statute so as to affect its validity." "The power of a court to declare an ordinance unreasonable and therefore void is practically restricted to cases in which the legislature has enacted nothing on the subjectmatter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed incidental power of the corporation merely." This rule is well illustrated in a Missouri case where the charter of the City of St. Louis authorized that city to regulate bawdy houses. Napton, J., said: "It is a naked assumption to say that any matter allowed by

Missouri—Morse v. Westport, 136 Mo., 276; 37 S. W. Rep., 932; Heman v. Ring, 85 Mo. App., 231.

Minnesota—St. Paul v. Colter, 12 Minn., 41; 90 Am. Dec., 278.

New York—People v. Pratt, 129 N. Y., 68; 29 N. E. Rep., 7; Brooklyn v. Breslin, 57 N. Y., 591, 596.

New Jersey—Haynes v. Cape May, 50 N. J. L., 55; 13 Atl. Rep., 231; Breninger v. Belvidere, 44 N. J. L., 350.

South Carolina—Darlington v. Ward, 48 S. C., 570; 26 S. E. Rep., 906.

United States—District of Columbia v. Waggaman, 4 Mackey (D. C.), 328.

Ex parte Chin Yan, 60 Cal., 78, 83, where it is said that this rule "is sustained by common law and authority. It is the outcome of a judicious application of legal principles."

Where a statute expressly authorizes a municipal board to designate the number of street railway tracks that shall be laid in any street, lane or avenue of the city, the court cannot set aside as unreasonable an ordinance which authorizes the laying of a double track. State (Kennelly) v. Jer-

sey City, 57 N. J. L., 293; 30 Atl. Rep., 531; 26 L. R. A., 281.

"It is now pretty generally conceded that if a statute gives power to any person or body of persons to make rules for a specific purpose, the reasonableness of such rules, provided they are strictly confined to the purpose for which they are authorized to be made, is not examinable by the judges." Biggar, Mun. Manual of Canada, p. 331, citing Simmons v. Malling Rural District Council, 13 Times L. R., 447, per Wright, J.

"The question, therefore, whether a municipal by-law is or is not reasonable appears to be, as a rule, only a branch of the question whether it is or is not *ultra vires*," Biggar, Mun. Manual of Canada, p. 331; Reg. v. Gravelle, 10 Ontario Rep., 735.

If the by-law simply follows the words of the statute it will not be held unreasonable. *Re* Croome and City of Brantford, 6 Ontario Rep., 188, 191, 192; *Re* Milloy and Tp. of Onondaga, 6 Ontario Rep., 573, 577.

Shea v. Muncie, 148 Ind., 14,
23; 46 N. E. Rep., 138.

³ Coal Fleet v. Jeffersonville, 112 Ind., 15, 19; 13 N. E. Rep., 115. the legislature is against public policy. The best indication of public policy is to be found in the enactments of our legislature. To say that such a law is of immoral tendency is disrespectful to the legislature, who no doubt designed to promote morality, and it is altogether unwarranted to suppose that the object of the law or the ordinance is for any purpose but to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object, is a question with which the courts have no concern."

But where authority to tax land for a local improvement is not expressly granted, but is to be implied from the authority delegated, an ordinance involving the exercise of it may be declared invalid because unreasonable.⁵ And in a Missouri case, it was held that in a suit on a special tax bill for the building of a sidewalk, evidence was admissible to show that the ordinance authorizing its construction was unnecessary and oppressive, it being located in an uninhabited portion of the city and disconnected with any other street or sidewalk. This case may be said to be exceptional, for it appears that there was ample charter power to construct sidewalks by special taxation.⁶

§ 182. Implied or incidental powers. Courts will review the question as to reasonableness of ordinances passed under a grant of power general in its nature or under incidental or implied municipal powers, and if any given ordinance is found unreasonable will declare it void as a matter of law.⁷ The

4 State v. Clarke, 54 Mo., 17, 36.
5 Skinker v. Heman, 64 Mo. App., 441.

6 Corrigan v. Gage, 68 Mo., 541.

⁷ Yates v. Milwaukee, 10 Wall. (U. S.), 497; Springfield v. Starke, 93 Mo. App., 70; Lamar v. Weidman, 57 Mo. App., 507; Livingston v. Wolf, 136 Pa. St., 519; 20 Am. St. Rep., 936; 20 Atl. Rep., 551.

Ordinances "must be such as prudence and reason require, not necessarily prejudicial to private rights and interests." Hayes v. Appleton, 24 Wis., 540.

"By-laws which are nugatory and vexatious, unequal, oppressive or manifestly detrimental to the interest of the corporation are void." Angell & Ames on Corp., Sec. 347.

"If by-laws (passed under an authority conferred in general terms) are found to be partial and unequal in their operation as between different classes; if they are manifestly unjust; if they disclose bad faith; if they involve such oppressive or gratuitous interference with the rights of those subject to them as can find no justification in the minds of reasonable men-the court may well say 'Parliament never intended to give authority to make such rules. They are unreasonable and

grounds upon which an ordinance may be declared void for unreasonableness have been said to be three: First, where it is oppressive, unequal and unjust; second, when it is altogether unreasonable; and third, when unreasonable.8 "Whenever a by-law seeks to alter a well settled and fundamental principle of the common law, or to establish a rule interfering with the rights, or endangering the security of individuals or the public, a statute, or other special authority, emanating from the creating power, must be shown to legalize it." Where the ordinance is fairly within the incidental or implied powers of the municipal corporation, is positive, definite and certain in its terms, general, uniform and impartial in its operation, and is not in restraint of trade, oppressive or in contravention of common rights, it will not be declared unreasonable.10

Mode of exercise of express power must be reasonable. The mode prescribed for the exercise of the power must be strictly followed, 11 and where the ordinance provisions are more specific and detailed than the expression of general power conferred, the court will determine the reasonableness of such provisions.¹² And where the mode of the exercise of a power expressly granted is not prescribed, courts will assume to determine whether the provisions of the ordinance respecting the mode adopted is reasonable. Thus, notwithstanding ultra vires." Per Lord Russell, C. J., in Kruse v. Johnson, 2 Q. B., 91; 14 Times L. R., 416; Davies v. Morgan, 1 Cromp. & J., 587; Chamberlain of London v. Crompton, 7 D. & R., 597; Clark v. Le Cren, 9 B. & C., 52; Gosling v. Veley, 12 Q. B., 328; Society of Scriveners v. Brooking, 3 Q. B., 95; Elwood v. Bullock, 6 Q. B., 383; Re McCutchon and City of Toronto, 22 Up. Can. Q. B., 613; Waite v. Garston Local Board of Health, L. R. 3 Q. B., 5; Hall v. Nixon, L. R. 10 Q. B., 152.

"It is elementary that ordinances other than those passed by virtue of express grant of power must be reasonable and not oppressive." Lane v. Concord, 70 N. H., 485, 488; 49 Atl. Rep., 687, relating to nuisances.

8 Cape Girardeau v. Riley, 72 Mo., 220; Plattsburg v. Riley, 42 Mo. App., 18; Kansas City v. Cook, 38 Mo. App., 660; State v. Beattie, 16 Mo. App., 131.

9 Per Hornblower, C. J., in Taylor v. Griswold, 14 N. J. L., 222, 235.

10 Phillips v. Denver, 19 Colo., 179; 41 Am. St. Rep., 230; 34 Pac. Rep., 902; Tugman v. Chicago, 78 Ill., 405. See Sec. 14, supra.

11 Biggar, Municipal Manual of Canada, p. 331; State (Delaware, L. & W. R. Co.) v. East Orange, 41 N. J. L., 127; People v. Armstrong, 73 Mich., 288; 16 Am. St. Rep., 578; 2 L. R. A., 721; 41 N. W.

12 State (Trenton Horse R. Co.) v. Trenton, 53 N. J. L., 132; 20 Atl. Rep., 1076.

the existence of express power, an ordinance was held unreasonable in a Virginia case, which provided for the time of election of certain city officers by the council where the effect of which was to allow the expiring council to select such officers, who would serve during the incumbency of the new council, only three days before the council would go out of existence. Under the circumstances the court was of the opinion that the policy of the electors, as shown by the election of the new council, should not be set at naught by the action of the old council.13 Where the charter gave the city express authority to construct and regulate the use of sewers. an ordinance was sustained in a Missouri case which denied permits to connect private sewers with the city's sewers until the applicant had paid a special tax bill due the contractor who built the sewer with which connection was sought.14 the other hand, in a New Jersey case an ordinance was declared void which refused a supply of water from the city water works on proper application of the owner, because his tenant was in arrears for water furnished to him by the city. while such tenant rented another house, owned by another person. The court said that to refuse to furnish water to the tenant, unless the owner should pay a debt due from the tenant to the city for water furnished to him elsewhere on premises not belonging to the applicant, would obviously be to compel him to pay the tenant's debt as a condition precedent to obtaining the water for his premises while occupied by the tenant.¹⁵ In the Missouri case, the court, in effect, compels the applicant to pay his debt, not due to the city, but to a contractor who built the sewer. The power to regulate sewers is entirely different from the power to enforce payment of valid indebtedness. Undoubtedly the city was authorized to make all reasonable regulations in order to secure and protect the public, but a regulation for the sole benefit of contractors, to enable them to collect special tax bills, could hardly be considered as a regulation for the benefit of the public. contractor was fully protected. The city had issued him valid tax bills which were enforceable against the applicant's prop-Under a charter authorizing the town to require all

 ¹³ Kirkham v. Russell, 76 Va., 15 Dayton v. Quigley, 29 N. J.
 956. Eq., 77.

¹⁴ Hill v. St. Louis, 159 Mo., 159; 16 The St. Louis Court of Appeals prior to the decision of the

male citizens between the ages of twenty-one and fifty to work on the streets, an ordinance imposing such duty on those between twenty and forty-five years was held to be a reasonable exercise of the power, although those between forty-five and fifty were not included.¹⁷

§ 184. Same — Uniform rule necessary. Notwithstanding express power may exist to enact, the ordinance must provide a uniform rule of action; it must contain permanent legal provisions, operating generally and impartially, for its enforcement cannot be left to the will or unregulated discretion of the municipal authorities or any officer of the corporation. Where the ordinance, as, for example, regulates the use of steam boilers, which, in effect, commits to the unrestrained will of a public officer practically absolute power over the subject,

Supreme Court made a contrary ruling which appears to be entirely sound. State ex rel. v. Hermann, 84 Mo. App., 1.

In authorizing the connection of private drains with city sewers where the apportionment of the expenses is unequal the ordinance providing therefor will be held unreasonable. Boston v. Shaw, 1 Met. (Mass.), 130.

17 Tipton v. Norman, 72 Mo., 380. 18 An ordinance "cannot be sustained on the ground that the borough officers understand it and will use it fairly. It does not deserve to be called an ordinance at all, and especially a penal one, when it is so elastic in its provis-(The ordinance related to licensing wagons of non-resi-Per Lowrie, J., in Bendents.) nett v. Birmingham, 31 Pa. St., 15, 18.

REGULATION OF STREET PARADES and permits therefor. In re Frazee, 63 Mich., 396, 407; 30 N. W. Rep., 72; Chicago v. Trotter, 136 Ill., 430; 26 N. E. Rep., 359; Anderson v. Wellington, 40 Kan., 173; 19 Pac. Rep., 719. See secs. 416 and 466, post.

REGULATING NAVIGATION. Horn v. People, 26 Mich., 221, 226.

GRANTING OR WITHHOLDING LICENSES. Yick Wo v. Hopkins, 118 U. S., 356; In re Tie Loy, 26 Fed. Rep., 611; State v. Conlon, 65 Conn., 478; 33 Atl. Rep., 519; State Center v. Barenstein, 66 Iowa, 249; 23 N. W. Rep., 652.

SMOKING IN STREET CAR. State v. Heidenhain, 42 La. Ann., 483; 21 Am. St. Rep., 388; 7 So. Rep., 621.

SMOKE ORDINANCE—Dictum as to enforcing. St. Louis v. Heitzeberg P. & P. Co., 141 Mo., 375; 39 L. R. A., 551; 64 Am. St. Rep., 516; 42 S. W. Rep., 954.

MISCELLANEOUS INSTANCES.

Arkansas—Helena v. Dwyer, 64 Ark., 424; 62 Am. St. Rep., 206; 42 S. W. Rep., 1071.

Colorado—May v. People, 1 Colo. App., 157; 27 Pac. Rep., 1010.

Florida—Jacksonville v. Ledwith, 26 Fla., 163; 23 Am. St. Rep., 558; 7 So. Rep., 885.

Illinois—Lake View v. Letz, 44 Ill., 81; Braceville v. Doherty, 30 Ill. App., 645.

Indiana—Bills v. Goshen, 117 Ind., 221; 20 N. E. Rep., 115; Evansville v. Martin, 41 Ind., 145; Richmond v. Dudley, 129 Ind., 112; 28 N. E. Rep., 312.

Kansas-Kansas City v. McDon-

it is unreasonable.¹⁰ But in Massachusetts, ordinances giving limited discretionary powers to public officers have been sustained, as an ordinance providing that awnings extending over the streets shall not be maintained without the consent of the mayor and alderman, and conferring power to forbid the use of awnings altogether respecting particular buildings.²⁰ So an ordinance of St. Paul regulating cabs, hacks and carriages, which provided that hackmen and drivers of hacks, etc., when at any railroad depot, station or theater, etc., shall obey the commands and direction of the police officer on duty at such place and shall take the places assigned them, was sustained as proper police regulations for the preservation of order, etc.²¹

ald, 60 Kan., 481; 57 Pac. Rep., 123; Crawford v. Topeka, 51 Kan., 756; 37 Am. St. Rep., 323; 33 Pac. Rep., 476.

Louisiana—State v. Morris, 47 La. Ann., 1660; 18 So. Rep., 710.

Massachusetts—Newton v. Belger, 143 Mass., 598; 10 N. E. Rep., 464.

Mississippi — Pieri v. Shieldsboro, 42 Miss., 493.

New York—New York v. Dry Dock, etc., R. R. Co., 133 N. Y., 104; 30 N. E. Rep., 563; 28 Am. St. Rep., 609.

North Carolina—State v. Webber, 107 N. C., 962; 12 S. E. Rep., 598; State v. Hunter, 106 N. C., 796; 11 S. E. Rep., 366; State v. Tenant, 110 N. C., 609; 14 S. E. Rep., 387.

South Carolina—St. Luke's Ch. v. Mathews, 4 Des. (S. C.), 578; 6 Am. Dec., 619.

United States—Barthet v. New Orleans, 24 Fed. Rep., 563.

¹⁹ Baltimore v. Radecke, 49 Md., 217; 21 Alb. L. Journal, 117.

²⁰ Pedrick v. Bailey, 12 Gray (Mass.), 161.

By statute a city was made liable to damages resulting from the fall of awnings dangerous to pedestrians. Drake v. Lowell, 13 Metc. (Mass.), 292.

21 "It is a matter of common knowledge that at and about the hours of the arrival and departure of trains, confusion and disorderly howling and breaches of the peace are very apt to occur at and about depots and stations in considerable towns, especially among those who are engaged in carrying passengers and baggage from such depots and stations. The only efficient preventive or remedy in the premises appears to be to put a police officer upon the spot, whose duty it shall be to enforce such applicable ordinances as the city council, in the exercise of chartered powers, may have seen fit to adopt. This seems to be the general if not universal practice in all large cities and towns. As it is manifestly impracticable and impossible to define minutely every case of disorder or confusion it is proper-in fact, it is necessary-that the officer on duty should be invested with some general authority to preserve order, and thus determine on the emergency what acts are disorderly or likely to lead to disorder, though, of course, this authority would not justify him in arbitrary or unreasonable action. Upon these grounds we think the ordinance in ques§ 185. Reasonableness a question of law for the court. The doctrine is uniformly supported that the question whether an ordinance is reasonable is one of law for the court.²² In passing on the reasonableness of ordinances, the court will consider all of the circumstances, the necessity of such regulations, and will usually consider somewhat in detail the various provisions

tion valid and justifiable. The assigning of a particular place to each hackman would appear to be peculiarly and happily adapted to the preservation of order. By this practice every one is informed exactly where his proper place is, so that the strife and contention for particular places which would otherwise ensue is measurably, at any rate prevented. The authority thus to assign places must necessarily be committed to some policeman on duty at the depot or station." St. Paul v. Smith, 27 Minn., 364; 7 N. W. Rep., 734.

Ordinance forbidding the conducting of a house of ill-fame in an "indecent manner," necessarily clothes the magistrate with discretion in determining whether particular acts proved are indecent, but it is not void for that reason. Shreveport v. Roos, 35 La. Ann., 1010.

Discretion may be vested in officer respecting enforcement of law, e. g., as to use of bicycle or tricycle or other non-horse vehicles, on highways, where the discretion is for the lawful purpose of effectuating the just intent of the law. State v. Yopp, 97 N. C., 477, 482; 2 Am. St. Rep., 305; 2 S. E. Rep., 458.

But arbitrary powers conferred upon officers cannot be sustained. Yick Wo v. Hopkins, 118 U. S., 356.

²² Alabama—Greensboro v. Ehrenreich, 80 Ala., 579; 60 Am. Rep., 130.

California—Ex parte Frank, 52 Cal., 606; 28 Am. Rep., 642, Illinois—Hawes v. Chicago, 158 Ill., 653; 42 N. E. Rep., 373.

Maine—State v. Boardman, 93 Me., 73; 44 Atl. Rep., 118.

Massachusetts—Austin v. Murray, 16 Pick. (Mass.), 121; Boston v. Shaw, 1 Met. (Mass.), 130; In re Goddard, 16 Pick. (Mass.), 504; Commonwealth v. Worcester, 3 Pick. (Mass.), 462.

New Jersey—State (Long) v. Jersey City, 37 N. J. L., 348, 351; Paxson v. Sweet, 13 N. J. L., 196.

New York—Brooklyn v. Breslin, 57 N. Y., 591; Hudson v. Thorne, 7 Paige Ch. (N. Y.), 261; Dunham v. Rochester, 5 Cow. (N. Y.), 462; Buffalo v. Webster, 10 Wend. (N. Y.), 100; People ex rel. v. Throop, 12 Wend. (N. Y.), 183, 186.

Pennsylvania—Commissioners of Northern Liberties v. Northern Liberties Gas Co., 12 Pa. St., 318, 321; Kneedler v. Norristown, 100 Pa. St., 368; 45 Am. Rep., 383; Fisher v. Harrisburg, 2 Grant Cas. (Pa.), 291.

Texas—Austin v. Austin City Cemetery Assn., 87 Tex., 330; 47 Am. St. Rep., 114; 28 S. W. Rep., 528.

As to power to pass. Peoria v. Calhoun, 29 Ill., 317, 320.

Private corporation. State v. Overton, 24 N. J. L., 435, 440; Marion v. Chandler, 6 Ala., 899; South Florida R. R. Co. v. Rhodes, 25 Fla., 40; 5 So. Rep., 633; 23 Am. St. Rep., 506; Hibernia L. E. Co. v. Com., 93 Pa. St., 264.

As to speed of train. Zumault v. K. C. & I. Air Line, 71 Mo. App., 670.

of the ordinance.²³ A few Wisconsin cases have held that, under particular circumstances, it was entirely proper to look into the facts and submit the question of reasonableness of the ordinances to the jury.²⁴

§ 186. Rules as to reasonableness under implied powers. has been well said that, "the legal rule that by-laws must be reasonable is perhaps as definite as it can be made with safety.''25 However, certain judicial expressions may serve as general guides. It must appear from the inherent character of the act, or by evidence of the operation of the ordinance. that it is unreasonable.²⁶ The reasonableness of the ordinance is not to be tested in all cases by its application to extreme illustrations.²⁷ "An ordinance, general in its scope, may be adjudged reasonable as applied to one state of facts and unreasonable when applied to circumstances of a different character.''28 Thus an ordinance regulating the use of streets by railroads, although unreasonable in its application to one or two streets, will not be vacated in its entirety on such account—the remedy is to resist its enforcement in such local-So an ordinance may be valid in its general purpose,

Regualting pawnbrokers. Launder v. Chicago, 111 Ill., 291.

²³ Los Angeles Co. v. Hollywood Cemetery Assn., 124 Cal., 344; 71 Am. St. Rep., 75; 57 Pac. Rep., 153; In re Vandine, 6 Pick. (Mass.), 187; Commonwealth v. Stodder, 2 Cush. (Mass.), 562, 569; Evison v. Chicago, etc., R. R. Co., 45 Minn., 370; 48 N. W. Rep., 6; Lamar v. Weidman, 57 Mo. App., 507; Hannibal v. Mo. & K. T. Co., 31 Mo. App., 23; Austin v. Austin City Cemetery Assn., 87 Tex., 330; 47 Am. St. Rep., 114; 28 S. W. Rep., 528.

24 Clason v. Milwaukee, 30 Wis.,
316; Hayes v. Appleton, 24 Wis.,
542; Atkinson v. Goodrich Transp.
Co., 60 Wis., 141, 160; 18 N. W.
Rep., 764.

²⁵ Per Campbell, C. J., *In re* Frazee, 63 Mich., 396, 407; 30 N. W. Rep., 72.

"The question whether a by-law

is reasonable or not usually depends upon whether it can reasonably be considered as authorized by general words used in the charter or statute under the presumed authority of which it has been passed. In many of the earlier cases, the judges in determining upon the reasonableness of by-laws assumed a much larger jurisdiction in this respect than would at present be deemed proper." Biggar, Mun. Manual of Canada, p. 330.

²⁶ Consolidated Traction Co. v.
 Elizabeth, 58 N. J. L., 619; 32 L.
 R. A., 170; 34 Atl. Rep., 146.

27 Commonwealth v. Plaisted, 148 Mass., 375, 382; 19 N. E. Rep., 224; Commonwealth v. Cutter, 156 Mass., 52, 56; 29 N. E. Rep., 1146.

Nicoulin v. Lowrey, 49 N. J. L.,
 391, 394; 8 Atl. Rep., 513; Skinker
 v. Heman, 64 Mo. App., 441.

29 State (Pa, R. R. Co.) v. Jersey

but unreasonable and oppressive as applied to certain property.³⁰ The ordinance must be reasonable as applied to the particular subject matter.³¹ Judicial authority to declare an ordinance unreasonable is a power to be cautiously exercised.³² The rule is generally recognized that municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of their ordinances,³³ and hence the legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence.³⁴ Thus, while an ordinance requiring street railways to run not less than one

City, 47 N. J. L., 286, 289. See Secs. 29, 30, supra.

30 If an ordinance is oppressive as applied to certain property, the owner thereof may, by proper proceedings, test its validity, if done within seasonable time. Heman'v. Ring, 85 Mo. App., 231.

³¹ Willow Springs v. Withaupt, 61 Mo. App., 275; People v. Armstrong, 73 Mich., 288; 16 Am. St. Rep., 578; 41 N. W. Rep., 275; 2 L. R. A., 721.

32 Commonwealth v. Robertson, 5 Cush. (Mass.), 438.

33 Alabama—Greensboro v. Ehrenreich, 80 Ala., 579; 60 Am. Rep., 130; Van Hook v. Selma, 70 Ala., 361; 45 Am. Rep., 85.

California—Ex parte Delaney, 43 Cal., 478; Ex parte Smith, 38 Cal., 702.

Kentucky—Louisville v. Roupe, 6 B. Mon. (Ky.), 591.

Maryland — Sprigg v. Garrett Park, 89 Md., 406.

Massachusetts — Commonwealth v. Patch, 97 Mass., 221.

Missouri—Lamar v. Weidman, 57 Mo. App., 507; Hannibal v. M. & K. Tel. Co., 31 Mo. App., 23.

Pennsylvania—Bailey v. Philadelphia, 184 Pa. St., 594; 63 Am. St. Rep., 812; 39 Atl. Rep., 494.

"As by-laws are the rules of action which the inhabitants of a place prescribe for their own government, there is a peculiar propriety in permitting them to be the judges of what rules are necessary and proper, and such is the constant, the invariable practice." Mobile v. Yuille, 3 Ala., 137, 143; 36 Am. Dec., 441.

"Where the municipal legislature has authority to act it must be governed not by our, but by its own discretion; and we shall not be hasty in convicting them of being unreasonable in the exercise of it." Fisher v. Harrisburg, 2 Grant Cases (Pa.), 291, 296.

"As a rule the municipality is the best judge of its own affairs; and it is probably an extreme case in which the court would interfere." Per Wilson, C. J., In re O'Meara and City of Ottawa, 11 Ontario Rep., 603, 609; Re Prince and City of Ottawa, 25 Up. Can. Q. B., 175; Re Snell and Town of Belleville, 30 Up. Can. Q. B., 81; Re Cribbin and City of Toronto, 21 Ontario Rep., 325; Reg. v. Petersky, 4 British Columbia Rep., 384.

34 Standard Oil Co. v. Danville,
199 Ill., 50, 54; 64 N. E. Rep., 1110;
Swift v. Klein, 163 Ill., 269; 45 N.
E. Rep. 219; People v. Cregier,
138 Ill., 401; 28 N. E. Rep., 812.

There is a legal presumption that the ordinance is reasonable and the burden is upon the one car every twenty minutes, between certain hours, will be presumed to be reasonable, it may be avoided by proving that the convenience of passengers does not require the running of cars as specified.³⁵ In questions of doubt, the courts are inclined to defer to the discretion and judgment of the municipal authorities.²⁶ "To arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city which would be absurd in the country."37 Likewise, a reasonable regulation, intended to operate in a densely populated part of a city, might be unreasonable as applied to parts of the same city sparsely populated.³⁸ Therefore all of the surrounding conditions must be carefully considered. It is thus manifest that, as a rule, the municipal authorities are more competent to pass on such questions than judicial tribunals. In recognition of this fact, the rule is of universal application that a clear case should be made out to authorize the court to interfere with the exercise of the police powers of a municipal corporation on the ground of unreasonableness.³⁹

§ 187. Same—English cases—Custom and usage. It is important to observe that the ancient English cases cannot always be taken as satisfactory precedents and guides in this country, "inasmuch as it is quite obvious that in many of them, and

who denies its validity. State (Trenton Horse R. Co.) v. Trenton, 53 N. J. L., 132; 20 Atl. Rep., 1076.

³⁵ Mayor, etc., of New York v.
D. D. E. B. & B. R. Co., 133 N. Y.,
104; 28 Am. St. Rep., 609; 30 N. E.
Rep., 563.

36 North Chicago City R. R. v. Lake View, 105 III., 207; 44 Am. Rep., 788; Hannibal v. M. & K. Tel. Co., 31 Mo. App., 23; St. Louis v. Green, 7 Mo. App., 468; 70 Mo., 572; St. Louis v. Griswold, 58 Mo., 175, 192; Plattsburg v. Riley, 42 Mo. App., 18; Kansas City v. Cook, 38 Mo. App., 660; State v. Able, 65 Mo., 357.

"In determining whether it is reasonable, the court should not substitute its discretion for that of the municipal legislature." Kansas City v. McAleer, 31 Mo. App., 433, 436.

³⁷ Per Putnam, J., In re Vandine, 6 Pick. (Mass.), 187, 191; 17 Am. Dec., 351.

38 Ordinance prohibiting interments in sparsely settled portion of the city held unreasonable. Austin v. Murray, 16 Pick. (Mass.), 121. See Sec. 32, supra.

39 Com. v. Mulhall, 162 Mass., 496; 39 N. E. Rep., 183; 44 Am. St. Rep., 387; Com. v. Ellis, 158 Mass., 555; 33 N. E. Rep., 651; Com. v. Elliott, 121 Mass., 367; Plattsburg v. Riley, 42 Mo. App., 18; State v. Pond, 93 Mo., 606; Kansas City v. Cook, 38 Mo. App., 660; Chillicothe v. Brown, 38 Mo. App., 609; State v. Beattie, 16 Mo. App., 131; St.

particularly those where the ordinance seemed most questionable as not being within the ordinary exercise of municipal authority, the by-laws were sustained upon the ground of ancient and long continued usage, ripening into a prescriptive right on the part of the municipal corporation. No such ground can be urged here."⁴⁰ Therefore, when any given ordinance is objected to as being unreasonable, if it is to be sustained, as stated in a well considered Massachusetts case, it "must be shown to be authorized by the express provision of the charter, or be derived as an incidental power resulting from its incorporation as a city, or be found in some general or special statute."⁴¹

§ 188. Same—Illustrative cases. An ordinance passed under general powers prohibiting the opening of streets for the purpose of laying gas mains during the winter season, as from December 1st to the following March, was held reasonable and binding on the gas company, but where such ordinance forbids the gas company from opening a paved street for the purpose of laying pipes from the main to the opposite side of the street it is unreasonable and void.⁴² So, under general power, an ordinance forbidding the running of a steamboat unless provided with a spark-catcher, screen or other device, "substantially attached in or upon the smoke-stack, * * * so as to prevent the escape of sparks or burning cinders therefrom as effectually as the same can be prevented by any means known or in use for that purpose." was held unreasonable.⁴³ So.

Louis v. Weber, 44 Mo., 547; St. Louis v. Spiegel, 8 Mo. App., 478; Allentown v. Western Union Tel. Co., 148 Pa. St., 117; 23 Atl. Rep., 1070; 33 Am. St. Rep., 820; Milwaukee v. Gross, 21 Wis., 241; 91 Am. Dec., 472.

⁴⁰ Per Dewey, J., in Commonwealth v. Stodder, 2 Cush. (Mass.), 562, 569; 48 Am. Dec., 679.

⁴¹ Per Dewey, J., in Commonwealth v. Stodder, 2 Cush. (Mass.), 562, 569; 48 Am. Dec., 679; Herzo v. San Francisco, 33 Cal., 134, 145.

42 In this case it was said, per Rogers, J., "The effect of the ordinance is, to compel the company to construct two mains, one on

each side of the street, instead of one, thereby materially increasing the expense (p. 323) to the company, and consequently enhancing the price of gas to the inhabitants of the district. This, we think, an unreasonable exercise of authority, and consequently not within the power of the board. A by-law must be reasonable and for the common benefit; it must not be in restraint of trade, nor ought it to impose a burden without an apparent benefit." Comrs. of Northern Liberties v. Northern Liberties Gas Co., 12 Pa. St., 318, 322, 323.

43 "Under this ordinance every steamboat owner, no matter how

without special grant, a police regulation requiring the city constable to attend theater performances and requiring the proprietor to pay the constable, is unreasonable and void.44 An ordinance making the owner of a dog liable to a penalty if such dog bite any person on the street was held reasonable. Here it appears that the state law made the owner of the dog liable "to the party injured for all damages done by such dog," without proof of scienter. 45 Under general power, an ordinance forbidding circulars, handbills, advertising matter, etc., from being distributed or circulated on the streets or public places was held unreasonable.46 But in Massachusetts it has been held that under the power to make all "such salutary and needful by-laws," etc., as deemed necessary, an ordinance prohibiting the carrying on the sidewalk of show boards, placards or signs, etc., for the purpose of display, was reasonable where passed for a populous city, as Boston.⁴⁷ Further illustrations appear in the cases in the notes, 48 in the chapters on Ordinances

careful he had been to use the means of preventing the sparks from escaping from the smokestack of his boat while navigating the harbor, would still be liable for a violation of the ordinance if a jury could be satisfied that his device was not the best known or in use; and if the ordinance is to be strictly enforced he would be equally liable although the device used was as effective for the purpose as any other, if it were not substantially attached in or Amidst the to the smokestack. hundreds of devices known or used it would be very difficult, indeed, for the steamboat owner to satisfy the requirements of the ordinance and more difficult to satisfy a jury that he had in fact adopted the best known one in use. A law which inflicts a penalty or punishment ought to be so plainly drawn as to clearly point out the act to be punished. This ordinance fails to do that, and is therefore, we think, unreasonable." Atkinson v. Goodrich Transp. Co., 60 Wis., 141,

160; 50 Am. Rep., 352; 18 N. W. Rep., 764.

44 Waters v. Leech, 3 Ark., 110.

45 Commonwealth v. Steffee, 7 Bush. (Ky.), 161.

46 People v. Armstrong, 73 Mich., 288; 16 Am. St. Rep., 578; 2 L. R. A., 721; 41 N. W. Rep., 275. Compare Philadelphia v. Brahender, 201 Pa. St., 574, 578; 51 Atl. Rep., 374.

⁴⁷ Commonwealth v. McCafferty, 145 Mass., 384; 14 N. E. Rep., 451. ⁴⁸ Board of Directors of bank passed resolutions excluding one of its members from an inspection of its books; held unreasonable. "A by-law, to be entitled to the name, must be some regulation which operates on all alike." Per Savage, C. J., in People ex rel. v. Throop, 12 Wend. (N. Y.), 183, 186.

Rule denying admission to public school on account of deficient knowledge of grammar held unreasonable. Trustees v. People, 87 Ill., 303,

Relating to Municipal Police Powers,⁴⁹ and the Constitutionality of Ordinances.⁵⁰

§ 189. Ordinances in restraint of trade. All ordinances, having the effect of interfering with or restraining trade or commerce, are void.⁵¹ An ordinance requiring coal, grains and heavy products sold in the city to be weighed by city weigher, held not to be in restraint of trade.⁵² So, one forbidding fast driving is not in restraint of trade.53 But ordinances and contracts limiting or restraining competition for public work are generally held void, notwithstanding the charter may not expressly forbid them.⁵⁴ Ordinances or by-laws which necessarily restrain competition and tend to create monopolies or confer exclusive privileges are generally condemned. ordinance, conferring the exclusive right on one firm to slaughter animals, is void.55 But in Missouri an ordinance was sustained as a proper police regulation against the contention that it was in restraint of trade and created a monopoly, which conferred upon certain persons therein named the exclusive privilege of removing all animals and allowing them to boil, steam and render the carcasses of the same on boats outside of the city, and prohibiting all other persons from in any

49 Chapter XIV.

50 Chapter VIII.

51 California—Ex parte Frank,
 52 Cal., 606; 28 Am. Rep., 642; Ex parte McKenna, 126 Cal., 429; 58
 Pac. Rep., 916.

Illinois—Inman v. Chicago, 78 Ill., 405; Caldwell v. Alton, 33 Ill., 416; 85 Am. Dec., 282.

Massachusetts—Com. v. Stodder, 2 Cush. (Mass.), 562; 48 Am. Dec., 679.

Minnesota—St. Paul v. Laidler, 2 Minn., 190; 72 Am. Dec., 89.

Mississippi—Kosciusko v. Slomberg, 68 Miss., 469; 24 Am. St. Rep., 281; 9 So. Rep., 297.

New York—Dunham v. Rochester, 5 Cow. (N. Y.), 462.

Pennsylvania—Sayre v. Phillips, 148 Pa. St., 482; 24 Atl. Rep., 76. Ordinances forbidding the sale without license at temporary stands or tables of "any lemonade,

ice cream, cakes, nuts, fruits, etc.," held to be in restraint of trade. Barling v. West, 29 Wis., 307, 315; 9 Am. Rep., 576.

52 Davis v. Anita, 73 Iowa, 325;
 35 N. W. Rep., 244; O'Malley v. Freeport, 97 Pa. St., 24. See sec. 485, post.

53 Sec. 464, post.

54 Atlanta v. Stein, 111 Ga., 789; 36 S. E. Rep., 932; Elliott v. Pittsburgh, 6 Pa. Dist. Rep., 455; St. Louis Quarry & C. Co. v. Van Versen, 81 Mo. App., 519; St. Louis Quarry & Cont. Co. v. Frost, 90 Mo. App., 677; Adams v. Brenan, 177 Ill., 194; 52 N. E. Rep., 314; Holden v. Alton, 179 Ill., 318, 324; 53 N. E. Rep., 556, holding that restriction must increase cost of work, to render contract therefor void. See sec. 553, post.

⁵⁵ Chicago v. Rumpff, 45 Ill., 90, 96; 92 Am. Dec., 196,

manner interfering or removing or using the carcasses except as specified in the legislative act under whose express authority the ordinance was enacted. So, in a well considered Massachusetts case, a by-law was sustained which prohibited those not duly licensed from removing house dirt and offal from the city, against the contention that the regulation was in restraint of trade. Here it was observed: "Every regulation of trade is in some sense a restraint upon it; it is some clog or impediment, but it does not therefore follow that it is to be vacated. If the regulation is unreasonable, it is void; if it is necessary for the good government of society, it is good." 57

56 The court, per Wagner, J., observed: "A law which unnecessarily and oppressively restrains a citizen from engaging in any traffic, or disposing of his property as he may see fit, although passed under the specious pretext of a preservative of the health of the inhabitants, would be void. Such a law would be unreasonable, and would deprive the people of the rights guaranteed to them by the organic law of the land. But if the regulation or prohibition contains nothing more than the necessary limitations, and is passed in good faith for the purpose of preserving the public health, and abating nuisances, it is not liable to objection. No man has an inalienable right to produce disease, or trade in that which is noxious, and in every society some minor rights are surrendered for the general good. It is perfectly apparent that nothing can be more obnoxious or offensive, or even detrimental to the public health than the boiling, steaming and rendering the carcasses of dead animals. If the privilege of purchasing such animals was unrestricted and depended on the mere volition of the parties, then no absolute arrangement could be effected by which the sanitary or police regulations

could be carried out. Before they were sold, or the price agreed upon by the parties, they would lie and putrify, and produce infection and disease. Therefore the only safe and practicable mode of arresting and destroying the evil is to confine the removal to, persons who act under a license or contract, and who are bound to remove the carcasses promptly, and dispose of them in a way and at a place where the health of the inhabitants will not be interfered with or endangerd. The act does not molest the owners of such dead ani-They have a right to use the same if they choose to do so, and butchers and pork packers, when they possess the animals, either by purchase or consignment, are allowed the privilege of steaming, boiling and rendering them for their own purposes, and for their own account." State v. Fisher, 52 Mo., 174, 177, 178.

57 In re Vandine, 6 Pick. (Mass.), 187, 190; 17 Am. Dec., 351. Compare this and other cases in this section on this subject with sec. 220, post.

MISCELLANEOUS ILLUSTRATIONS—AUCTION SALES.

Ordinance forbidding auction sales on streets, alleys, sidewalks and public grounds, held not to

Same—Monopolies and exclusive privileges. Monopolies may be created, but they can only be called into being by the sovereign power. Hence exclusive franchises or privileges in the nature of monopolies cannot be granted by a municipal corporation,58 even where no express prohibition is found in its charter or legislative act applicable; for in no instance will such power be implied.⁵⁹ Thus a municipal corporation cannot grant, without authority from the legislature in direct and express terms, to any fuel or gas supply company a monopoly of its streets,60 nor can such exclusive authority be be in restraint of trade. White v. Minnesota—Kolff v. St. Paul Kent, 11 Ohio St., 550, 553, per Fuel Exchange, 48 Minn., 215; 50 Scott, C. J.

Ordinance regulating the killing and bleeding of meats is not in restraint of trade. Brooklyn v. Cleves, Hill and Denio Supp. (N. Y.), 231, per Nelson, C. J.

Regulating peddling meat, game, poultry, etc. Shelton v. Mobile, 30 Ala., 540; 68 Am. Dec., 143.

Sale of cider. Monroe v. Lawrence, 44 Kan., 607; 27 Pac. Rep., 1113.

Storage of petroleum, etc. Waters-Pierce Oil Co. v. New Iberia, 47 La. Ann., 863; 17 So. Rep., 343.

Reports of street car companies. St. Louis v. St. Louis R. R. Co., 89 Mo., 44; 1 S. W. Rep., 305; 14 Mo. App., 221; 58 Am. Rep., 82.

Forbidding slaughtering within city. Milwaukee v. Gross, 21 Wis., 241; 91 Am. Dec., 472.

BY-LAWS OF GUILDS, SOCIETIES AND PRIVATE CORPORATIONS in restraint of trade have always been condemned.

California — California Steam Nav. Co. v. Wright, 6 Cal., 258; 65 Am. Dec., 511.

Illinois-American Live Stock Com. Co. v. Chicago Live Stock Exchange, 143 Ill., 210; 32 N. E. Rep., 274; 36 Am. St. Rep., 385.

Kentucky-Sayre v. Louisville Union Benevolent Assn., 1 Duv. (Ky.), 143; 85 Am. Dec., 613.

N. W. Rep., 1036.

Missouri-Goddard v. Merchants' Exchange, 78 Mo., 609; 9 Mo. App.,

New York-Matthews v. Associated Press, 136 N. Y., 333; 32 N. E. Rep., 981; 32 Am. St. Rep., 741.

England-Green v. Durham, 1 Burr, 127; Rex v. Sturgeous, 2 Burr, 892; Cuddon v. Eastwick, 1 Salk., 193.

58 Logan v. Pyne, 43 Iowa, 524; 22 Am. Rep., 261; Brenham v. Brenham Water Co., 67 Tex., 542; 4 S. W. Rep., 143; Chicago v. Rumpff, 45 Ill., 90; 92 Am. Dec., 196: Re Brodie and Town of Bowmanville, 38 Up. Can. Q. B., 580; Biggar, Mun. Manual of Canada, p. 343, sec. 330.

59 Kirkwood v. Meramec Highlands Co., 94 Mo. App., 637; Davenport v. Kleinschmidt, 6 Mont., 502, 528; 13 Pac. Rep., 249; Tuckahoe Canal Co. v. Railroad Co., 11 Leigh (Va.), 42. But see State ex rel. v. Schweickardt, 109 Mo., 496; 19 S. W. Rep., 47; Illinois, etc., Co. v. St. Louis, 2 Dillon C. C., 70.

60 Norwich G. L. Co. v. Norwich City Gas Co., 25 Conn., 19; Capital City L. & F. Co. v. Tallahassee (Fla., 1900), 28 So. Rep., 810; Citizens' Gas Co. v. Elwood, 114 Ind.,

granted to a railroad company to lay its tracks in the streets. 61 And while it has been held that the legislature may grant such exclusive privilege,62 the weight of authority denies this power.63 Exclusive franchises in the nature of monopolies are not only presumed to be against public policy because prejudicial to the public welfare, but the granting of them may have the effect, or at least a tendency, to impede or hamper the city in effectually executing its municipal functions, and if this results, all such grants would be void.64 While it is a settled maxim of the law that municipal corporations cannot grant a perpetual franchise, or exclusive privilege constituting a monopoly which will enable the grantee at some future time to take advantage of the necessities of the people by fixing exorbitant and oppressive rates, the view taken by the courts is that the circumstances of each case must largely determine the nature and effect of such grant.65 "Courts of last resort have generally refrained from propounding an authoritative affirmative definition of the 'monopoly' so odious to the common law and the genius of a free government. It would try the power of expression of most judges, if not human speech. to frame such a definition outside of which the grant or contract must wholly and clearly rest to escape the stroke of nullity. It has, therefore, been generally deemed wise and safe to use rather the process of exclusion, and determine what is 332; 16 N. E. Rep., 624; 20 Am. & and B. R. Co., 20 N. J. Eq., 360; Eng. Corp. Cas., 263; Parkersburg Cincinnati Ry. Co. v. Tel. Assn., 48 Gas Co. v. Parkersburg, 30 W. Va., Ohio St., 390; 29 Am. St. Rep., 435; 4 S. E. Rep., 650; Hamilton

166.

61 Des Moines St. R. R. Co. v. Des Moines B. G. St. Ry. Co., 73 Iowa, 513; 33 N. W. Rep., 610; 35 N. W. Rep., 602; Sherlock v. K. C. B. Ry. Co., 142 Mo., 172; 43 S. W. Rep., 629; Detroit C. S. Ry. v. Detroit, 110 Mich., 384; 68 N. W. Rep., 304; 64 Am. St. Rep., 350, note p. 359; 171 U. S., 48; Long v. Duluth, 49 Minn., 280; 32 Am. St. Rep., 547; Traphagen v. Jersey City. 52 N. J. L., 65; 18 Atl. Rep., 586, 696; Jersey City v. Jersey City

Gas Light & Coke Co. v. Hamilton,

port v. Newport Light Co., 84 Ky.,

Contra. New-

37 Fed. Rep., 832.

and B. R. Co., 20 N. J. Eq., 360; Cincinnati Ry. Co. v. Tel. Assn., 48 Ohio St., 390; 29 Am. St. Rep., 559; Jackson County Horse Power Co. v. Interstate Rapid Transit Co., 24 Fed. Rep., 306; 32 Am. & Eng. Ry. Cas., 216; New Jersey v. Yard, 95 U. S., 104, 111.

⁶² In re N. Y. E. R. Co., 70 N. Y., 327.

63 Eliott on Roads and Streets, page 506 and cases.

64 See New Orleans Gas Co. v. Louisiana, 115 U. S., 650, 672; East St. Louis v. East St. Louis G. L. & C. Co., 98 Ill., 415; Carlyle W. L. & P. Co. v. Carlyle, 31 Ill. App., 325; Decatur G. L. Co. v. Decatur, 24 Ill. App., 544.

65 See 1 Eddy on Combinations, secs. 25 to 35; Beach on Monopo-

not a monopoly so far as the case in hand required." In Kansas an ordinance of Topeka provided that the mayor and council may appoint two or more persons as scavengers, who shall have the exclusive privilege of removing garbage from private premises, as well as public. This was held to be an attempt to create a monopoly, and therefore the ordinance was declared void.⁶⁷

§ 191. Water and gas franchises as monopoly—Ferries. There are classes of exclusive privileges which are held not to be monopolies within the meaning of the common law, as exclusive right to erect a bridge and take tolls.⁶⁸ Thus it appears that exclusive privileges to supply water or gas are not considered monopolies according to the common law, because they do not deprive a class of persons of privileges of which they had anterior to the time of granting, been in possession.⁶⁹ At present this test of monopoly is certainly not applicable in

lies and Industrial Trusts, sec. 117, et seq.

66 Laredo v. International Bridge& T. Co., 66 Fed. Rep., 246, 248.

⁶⁷ In re Lowe, 54 Kan., 757, 762; 39 Pac. Rep., 710.

As to contract giving exclusive privilege of receiving and cremating garbage and authorizing the collection of a fixed charge therefor. Sanitary R. Works v. California R. Co., 94 Fed. Rep., 693.

Giving power to a street railway to acquire the whole or part of any existing railway, by purchase or otherwise, held not to create a monopoly. Wood v. Seattle, 23 Wash., 1; 62 Pac. Rep., 135.

License to sell goods as exclusive privilege. State v. Conlon, 65 Conn., 478; 33 Atl. Rep., 519.

68 Enfield Toll Bridge v. H. & N. H. R. R. Co., 17 Conn., 40; Power v. Athens, 99 N. Y., 592, 598; 2 N. E. Rep., 609; 10 Am. & Eng. Corp. Cas., 54; Hudson v. Emigration Co., 47 Tex., 56; Bridge Proprietors v. Hoboken, 1 Wall (U. S.), 116; Binghamton Bridge, 3 Wall (U. S.), 51; West

River Bridge Co. v. Dix, 6 How. (U. S.), 507; Conway v. Taylor, 1 Black. (U. S.), 603.

69 THE COMMON LAW DEFINITION. as given by Sir Edward Coke, who gave much study to the matter of monopolies, and who was chairman of the committee of the House of Commons to which the bill was referred, which afterwards became the English "Statute of Monopolies" (21 James I, Ch. 3, A. D. 1624) under which monopolies in England were abolished, thus defines a monopoly: "A monopoly is an institution or allowance by the king (the sovereign power), by his grant, commission, or otherwise, to any person or persons. bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade." 3 Inst., 181. In the early English law this definition may have been technically correct, and

all cases.⁷⁰ However, the courts hold that such grant is a contract presumably conferred, not as a special favor upon the grantee, but for the public welfare. The main condition is to render the public a special service, and breach of this invalidates the grant. As such grants are not void at common law, they are held not to be in contravention of public policy, but they are protected by the constitutional provisions against impairing the obligations of contracts.⁷¹

§ 192. Exclusive market privileges. A contract with a village to build a market house and to put it under control of the village for ten years, in consideration that the rents thereof would be paid to the grantee, to appoint a person to superintend it, permit no other market house to be erected or used. nor articles specified sold elsewhere in the village during the ten years, was held void by the Supreme Court of Michigan as against public policy. The reasons for the doctrine are thus clearly given by Cooley, J., who delivered the opinion of the court: "If a municipal corporation can preclude itself in this manner from establishing markets whenever they may be thought desirable, or from abolishing them when thought undesirable, it must have the right also to agree that it will not open streets, or grade or pave such as are opened, or introduce water for the supply of its citizens, except from some specified source, or buy fire engines of any other than some stipulated kind, or contract for any public work except with persons named; and if it might do these things, it is easy to perceive

it may also harmonize with definitions found in standard dictionaries, and thus serve to puncture the many careless descriptions of and monopolies everywhere; however, it is clear that the popular idea of a monopoly is not that given by Coke, for that sort has been forgotten. The monopoly fear is not granted; it is usurped, and it is possible that a practical, absolute control of products is obtained, and thereby persons, etc., are "restrained of any freedom or liberty that they had before, or hindered in their lawful trade," as completely as if an "allowance by the king."

For definition and elements of monopoly in grants, etc., see 1 Eddy on Combinations, ch. I.

70 "The very essence of a monopoly is the grant of a power to control products and prices. The existence of the monopoly is not affected by the manner in which the power is exercised. If the power to control production and prices arises from a grant of an exclusive nature and is unrestricted the monopoly is absolute."

1 Eddy on Combinations, sec. 27.

⁷¹ See sections 240 to 242, inclusive, *post*. New Orleans W. W. Co. v. Rivers, 115 U. S., 674; Louisville Gas Co. v. Citizens' Gas Co.,

that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interest, might, in various directions, engage it in permanent contracts, which, while ostensibly for the public benefit, should impose obligations precluding further improvements and depriving the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless. For if the village might bind itself to one market house for ten years, it might do so for all time to come; and if it might agree that improvements and conveniences of one class ought to be confined by contract to one quarter of the town, a reckless or improvident board might agree with a greedy or

115 U. S., 683, 694; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650; Citizens' Water Co. v. Bridgeport Hydraulic Co., 55 Conn., 1; 10 Atl. Rep., 170.

WATER-EXCLUSIVE PRIVILEGE TO SUPPPLY. Thrift v. Elizabeth City, 122 N. C., 31; 30 S. E. Rep., 349; 44 L. R. A., 427; Re Brooklyn, 143 (N. Y.), 596; 26 L. R. A., 270; 38 N. E. Rep., 983; Illinois Trust and Sav. Bank v. Arkansas City, 76 Fed., 271; 34 L. R. A., 518; Brenham v. Brenham Water Co., 67 Tex., 542; 4 S. W. Rep., 143; Walla Walla v. Walla Walla Water Co., 172 U. S., 1; 19 U. S. Sup. Ct. Rep., 77; State v. Harrison, 46 N. J. L., 79; San Diego Water Co. v. Flume Co., 108 Cal., 549; 41 Pac. Rep., 495; Davenport v. Kleinschmidt, 6 Mont., 502; 13 Pac. Rep., 249.

Gas contracts and franchises. Indianapolis v. Indianapolis Gas Light & C. Co., 66 Ind., 396; Western Sav. Fund Soc. v. Philadelphia, 31 Pac. St., 175; Parkersburg Gas Co. v. Parkersburg, 30 W. Va., 435; 4 S. E. Rep., 650.

The power to regulate and con-

trol the enjoyment of an exclusive privilege or franchise—a power unquestioned as regards public life and health—should also extend to the protection of the public from extortion. 1 Eddy on Combinations, sec. 26.

Certain state statutes seek to prevent extortion. Thus contracts for water and light in the various classes of Missouri cities may be granted by the local authorities. but the statutes provide a time limit, and usually permit the authorities to fix rates, and, in most instances, require a ratification by a two-thirds majority of the quali-The purpose of such fied voters. provisions is clearly intended to protect the public against monopolies. Cities of the Second Class, R. S. 1889, secs. 1255, par. XIV. 1436, Laws of Mo. 1899, sec. 1435. p. 82; Cities of the Third Class. Laws of Mo., 1893, p. 86; Cities of the Fourth Class, Laws of Mo., 1895, p. 80. An ordinance granting an exclusive water right for twenty years held valid though a provision for an extension for anunscrupulous proprietor of town lots, that all improvements of every description should be so located or made as to conduce to his benefit, irrespective to the general good. * * It is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust today are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that free government, with restrictions for the protection of individual or municipal rights, could long exist without its recognition."

In Iowa it has been held that a city has the power to authorize an individual to erect a building upon private property and lease or rent the stalls therein for a market, regulate it and allow such person to exact rents, and may protect the owner in the exclusive privilege of such market.⁷³

other twenty years was invalid, the grant for each period being distinct and severable. Neosho Water Co. v. Neosho, 136 Mo., 498; 38 S. W. Rep., 89; Saleno v. Neosho, 127 Mo., 627; 30 S. W. Rep., 190; R. S. Mo., sec. 1589.

Without express charter power an attempt to grant an exclusive water privilege is void. Kirkwood v. Meramec Highlands Co., 94 Mo., App., 637.

A EXCLUSIVE FERRY PRIVILEGES. cannot corporation municipal grant exclusive ferry privileges. Thus, a city ordinance which granted an exclusive ferry privilege for the period of ten years was held void under the constitution which forbids the granting of rights, privileges exclusive monopolies. Carroll v. Campbell, 110 Mo., 557; 19 S. W. Rep., 809; Minturn v. Larue, 23 How. (U.S.), 435; see State ex rel. v. Cramer, 96 Mo., 75; 8 S. W. Rep., 788. Although the state may delegate the power to grant the right to establish a ferry to the city, the legislature may exercise supervisory control unless the state in conferring this power upon the city has by the terms of the grant surrendered such control. Harrison v. State, 9 Mo., 530. Ferry privileges may be granted on conditions. State v. Sickmann, 65 Mo. App., 499.

⁷² Gale v. Kalamazoo, 23 Mich.,344; 9 Am. Rep., 80.

73 The court stated that if the lessee should establish or exact such rates as to operate as a restraint upon the trade of the city, then it would be within the power of the city to interfere and pass the necessary ordinance for the protection of the public; but the possibility that the lessee might do this ought not to invalidate the

§ 193. Ordinances must not unreasonably discriminate—Classification. Ordinances must be fair, impartial and uniform in their operation.⁷⁴ "Where privileges are granted by an ordinance, they should be open to the enjoyment of all upon the same terms and conditions." An ordinance cannot make a particular act penal when done by one person and impose no penalty for the same act done under like circumstances by another. So an ordinance directing a named person to do specified acts, as, for example, to abate an alleged nuisance, caused by a building, and prescribing a penalty on failure to comply, is void.⁷⁷

All discriminations in ordinances against those of the same class are bad.⁷⁸ The regulation must apply to all of a class.⁷⁹ No arbitrary distinction between different kinds and classes of business can be sustained, the conditions being otherwise similar.⁸⁰ Classification for legislative purposes is permitted, but it must be reasonable. Differences which would serve for classification for some purposes do not always furnish classification for legislation. The difference which will support class legislation must be such as in the nature of things furnishes a

ordinance, for the court would not presume that "he will so conduct his affairs as to conflict with those rules which experience has demonstrated are essential for the public welfare." The court would not find that the city had "clearly surrendered all control over the rents ' to be charged," nor that "the lessee could adopt such rates as to restrain trade and thus injuriously affect the public interest." Claire v. Davenport, 13 Ia., 210, 212, 213, overruling Davenport v. Kelly, 7 Ia., 102. See Palestine v. Barnes, 50 Tex., 538; Slaughter House Cases, 16 Wall. (U.S.), 36; New Orleans v. Guillotte, 12 La. Ann., 818. Intoxicating Liquor Cases, 25 Kan., 751; 37 Am. Rep., 284: In re Ruth, 32 Iowa, 250.

74 Secs. 82-84, supra.

⁷⁵ An ordinance regulating slaughtering of animals which confines such business to a small

lot, or even a particular block of ground is unreasonable and tends to create a monopoly. Chicago v. Rumpff, 45 Ill., 90, 97; 92 Am. Dec., 196; Hudson v. Thorne, 7 Paige (N. Y.), 261.

76 Tugman v. Chicago, 78 Ill.,
 405; May v. People, 1 Colo. App.,
 157; 27 Pac. Rep., 1010.

Ordinance dividing territory into two railroad districts, held void. Lake View v. Tate, 130 Ill., 247; 22 N. E. Rep., 791, affirming 33 Ill. App., 78.

77 Municipality v. Blineau, 3 La. Ann., 688. S. P. Canajoharie v. Buel, 43 How. Pr. (N. Y.), 155.

78 Reg. v. Flory, 17 Ontario Rep.,
 715; Reg. v. Johnson, 38 Up. Can.
 Q. B., 549.

⁷⁹ Re Pirie and Town of Dundas, 29 Up. Can. Q. B., 401.

80 State ex rel. v. Ramsey, 48 Minn., 236, 240, 241; 51 N. W. Rep., 112.

reasonable basis for separate laws and regulations.81 relating to persons and things as a class, and not to persons or things of a class, are common and usually sustained.82 The law will be held valid if it operates equally upon all subjects within the class for which the rule is applied.83 It thus follows that local police regulations are not to be condemned because not specifically aimed at all persons in whatever business engaged, as they may have an express design of reaching certain classes in certain characters of work.⁸⁴ Where all persons engaged in the same business (as laundry) within the prescribed limits are treated alike and subject to the same restrictions, the ordinance will be sustained. The rule is thus stated by the Supreme Court of the United States, per Mr. Justice "The specific regulation for one kind of business." Field: which may be necessary for the protection of the public, can never be a just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws." 85

§ 194. Same—Illustrative cases. Ordinance regulations, respecting the width of tires, etc., of vehicles which except cer-

81 State v. Loomis, 115 Mo., 307,314; 22 S. W. Rep., 350.

82 State v. Bishop, 128 Mo., 373;
31 S. W. Rep., 9; 29 L. R. A., 200;
St. Louis v. Weber, 44 Mo., 547;
Chillicothe v. Brown, 38 Mo. App., 609;
Kansas City v. Cook, 38 Mo. App., 660.

83 Nichols v. Walters, 37 Minn., 264.

Such laws must embrace all and exclude none whose conditions and wants render such legislation necessary or appropriate to them as a class. State *ex rel.* v. Ramsey, 48 Minn., 236, 240; 51 N. W. Rep., 112; Yick Wo v. Hopkins, 118 U. S., 256; Randolph v. Wood, 49 N.

J. L., 85; 7 Atl. Rep., 286; Low v. Printing Co., 41 Neb., 127, 138; 59 N. W. Rep., 362; Johnson v. St. Paul & D. R. R., 43 Minn., 222; 45 N. W. Rep., 156; In re Eight Hour Law, 21 Colo., 29, 32; 39 Pac. Rep., 328; American Furn. Co. v. Batesville 139 Ind., 77; 38 N. E. Rep., 408; Shinkle v. Covington, 83 Ky., 420; Covington v. East St. Louis, 78 Ill., 548; State ex rel. Kellogg v. Currens, 111 Wis., 431; 87 N. W. Rep., 561.

84 Kansas City v. Sutton, 52 Mo. App., 398.

85 Soon Hing v. Crowley, 113 U.S., 703, 708, 709.

tain vehicles, as those transporting particular merchandise, are void.86 So ordinance regulations discriminating against particular class of laundrymen, as Chinese, are void.87 However, as stated, regulations may be validly made applicable only to a class, as, for example, those engaged in conducting laundries. Thus an ordinance was sustained which forbid, within certain defined limits, washing and ironing in public laundries and wash houses from 10 at night to 6 in the morning. The fact that the ordinance prohibited one kind of business only did not render it objectionable on the ground of discrimination.88 An ordinance providing different rates for license for the sale of goods is discriminating and void.89 So an ordinance will be held void which discriminates between residents and non-residents respecting the license tax.90 So an ordinance is void which discriminates between corporations respecting the location and use of telephone and telegraph poles.⁹¹ An ordinance granting permission to certain persons to erect a private hospital was sustained in Louisiana, although there was a general valid existing ordinance forbidding such hospitals.92 ordinance requiring bicycles to carry lights after dark was held not to discriminate as to other riders of silently running vehicles.93 An ordinance requiring railroad companies to keep their tracks watered so as to lay the dust is not partial, since "it embraces all who exercise the same right and work the same inconveniences to occupants of houses on the streets."94 A smoke law was held valid notwithstanding it exempted dwelling houses.95 So such law exempting dwelling houses was held valid, although it did not cover steamboats and loco-

See Reg v. Pipe, 1 Ont. Rep., 43.
See Yick Wo v. Hopkins, 118 U.
S., 356; 14 L. R. A., 584, note; In re Tie Loy, 26 Fed. Rep., 611;
State ex rel. Toi v. French, 17 Mont., 54; 30 L. R. A., 415; 41
Pac. Rep., 1078.

Soon Hing v. Crowley, 113 U.
 703; Barbier v. Connolly, 113 U.
 703.

89 Ex parte Frank, 52 Cal., 606;28 Am. Rep., 642.

90 Nashville v. Althrop, 5 Cold. (Tenn.), 554; Jonas v. Gilbert, 5 Sup. Ct. of Canada, 356. See chap.

XIII, Of Ordinances Relating to Taxation and License Tax.

91 Hannibal v. Mo. & Kansas Telephone Co., 31 Mo. App., 23.

92 Bozant v. Campbell, 9 Rob. (La.), 411. See Com. v. Goodrich, 13 Allen (Mass.), 545.

98 Des Moines v. Keller, 116Iowa, 648; 88 N. W. Rep., 827.

94 City & Suburban Ry. Co. v. Savannah, 77 Ga., 731; 4 Am. St. Rep., 106.

95 People v. Lewis, 86 Mich., 273;
37 Am. & Eng. Corp. Cas., 481; 49
N. W. Rep., 140. See sec. 32, supra.

motives.⁹⁶ Numerous illustrations of discriminating ordinances appear in the cases in the note.⁹⁷

⁹⁶ Moses v. United States, 16 App. Cases, D. C., 428; 50 L. R. A., 532.

97 Same class of business. May
v. People, 1 Colo. App., 157; 27
Pac. Rep., 1010; In re Jacobs, 98
N. Y., 98; Butcher's Union v. Crescent City, 111 U. S., 746, 757;
Braceville v. Doherty, 30 Ill. App., 645.

Speed of trains. Buffalo v. N. Y., etc., R. R. Co., 23 N. Y. Supp., 303, 309; 6 Misc. Rep., 630; 27 N. Y. Supp., 297.

Fixing loads for teams, etc. Kansas City v. Sutton, 52 Mo. App., 398.

Discrimination as to religion. Shreveport v. Levy, 26 La. Ann., 671; 21 Am. Rep., 553.

In location of livery stable. St. Louis v. Russell, 116 Mo., 248; 20 L. R. A., 721; 22 S. W. Rep., 470; Chicago v. Stratton, 162 Ill., 494; 44 N. E. Rep., 853, reversing 58 Ill. App., 539.

Ordinance forbidding the casting of paper, hand bills and advertising matter on streets and private hallways which excepted newspapers and addressed envelopes, held valid. Philadelphia v. Brabender, 201 Pa. St., 574, 578; 51 Atl. Rep., 374.

Miscellaneous illustrations:

California—Ex parte Haskell, 112 Cal., 412; 32 L. R. A., 527; 44 Pac. Rep., 725; Ex parte McKenna, 126 Cal., 429; 58 Pac. Rep., 916; Ex parte Chin Yan, 60 Cal., 78.

Illinois—Zanone v. Mound City, 103 Ill., 552.

Indiana—Citizens' Gas & Mfg.Co. v. Elwood, 114 Ind., 332; 16 N.E. Rep., 624.

Louisiana—Baton Rouge v. Cremonini, 36 La. Ann., 247; De Ben v. Gerard, 4 La. Ann., 30; Municipality v. Blineau, 3 La. Ann., 688.

Missouri—Kansas City v. Rich-

Missouri—Kansas City v. Richardson, 90 Mo. App., 450.

Montana—Bozeman v. Cadwell, 14 Mont., 480; 36 Pac. Rep., 1042.

New Jersey—State v. East Orange, 41 N. J. L., 127; Red Star Steamship Co. v. Jersey City, 45 N. J. L., 246.

United States—Richmond, etc., Railroad v. Richmond, 96 U. S., 521.

An ordinance that applies to the entire city is not special legislation. Foster v. Board of Police Comrs., 102 Cal., 483; 41 Am. St. Rep., 194; 37 Pac. Rep., 763.

An ordinance requiring a particular street car company to sell tickets on its cars does not contravene the principle that ordinances shall be general and impartial in their operation, as such principle has no application to ordinances originating by virtue of a reservation in a franchise which is in its essence a contract. Detroit v. Ft. Wayne & B. I. Ry. Co., 95 Mich., 456; 35 Am. St. Rep., 580; 20 L. R. A., 79; 54 N. W. Rep., 958.

For farther illustrations, see ch. VIII, Of Constitutionality of Ordinances; ch. XIII, License Tax, and ch. XIV, Relating to Police Powers.

CHAPTER VII.

OF AMENDMENT AND REPEAL OF ORDINANCES.

- § 195. Amendment Method of making.
 - 196. Void ordinance cannot be amended.
 - 197. Amendment of franchise and contract ordinances.
 - 198. Amendment of improvement ordinances.
 - 199. Power to repeal ordinances.
 - 200. Same—Franchise and contract ordinances.
 - 201. Same—Illustrative cases.
 - Repeal of improvement ordinances.
 - 203. Implied repeals.
 - 204. Same subject—General and special ordinances.
 - 205. Effect of repeal-Revival.
 - 206. Same—Penal ordinances.
 - 207. Same Improvement ordinances.
 - Effect of repeal and reenactment.

- § 209. Effect of revision of ordinance as to repeal.
 - 210. Repeal of ordinance by ordinance only.
 - 211. When ordinance superseded by charter amendments.
 - 212. Rule relating to repeals of charter and ordinance provisions by general laws.
 - 213. Same subject—Question of intent.
 - 214. When charter provisions supersede general laws.
 - 215. When ordinances supersede general laws.
 - 216. Effect on ordinances by surrender of special charter— Change in class or grade.
- 217. Same—Dissolution and reorganization.
- 218. Same—By consolidation or change of corporate limits.
- § 195. Amendment—Method of making. The power to enact ordinances, unless restricted, carries with it the power to make reasonable alterations and amendments.¹ The courts generally hold that the method prescribed for amending ordinances must be followed substantially.² Constitutional provisions as to the method of amending the state laws have no application to ordinances unless made so by express terms.³
- ¹ Foster v. Board of Pol. Comrs., 102 Cal., 483; 41 Am. St. Rep., 194; 37 Pac. Rep., 763; Swindell v. State, 143 Ind., 153; 42 N. E. Rep., 528. Compare Pratt v. Litchfield, 62 Conn., 112; 25 Atl. Rep., 461.
- ² Sometimes ordinances may be modified by subsequent legislation without direct amendment. Bozant v. Campbell, 9 Rob. (La.), 411.

A charter provision requiring that an ordinance revising or amending another shall contain a copy of the latter, held not to apply to an ordinance which, being repugnant to a prior ordinance on the same subject, repeals it. Des Moines v. Hillis, 55 Iowa, 643; 8 N. W. Rep., 638.

3 State v. Cozzens, 42 La. Ann.,1069; 8 So. Rep., 268.

An ordinance cannot be amended by mere resolution; but, only by ordinance. Charters, following like provisions in state constitutions, often provide that no ordinance shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the ordinance or section amended shall be set forth in full as amended. This provision is generally held to mean that where a part of an act only is amended, the amended part only need be set out.

⁴ Jones v. McAlpine, 64 Ala., 511; People ex rel. v. Mount, 186 Ill., 560, 578, 579; 58 N. E. Rep., 360; Cascaden v. Waterloo, 106 Iowa, 673; 77 N. W. Rep., 333.

An ordinance cannot be amended, repealed or suspended by an order or resolution, or other act by a council of less dignity than the ordinance itself. C. & N. P. Ry. Co. v. Chicago, 174 Ill., 439; 51 N. E. Rep., 596; Galt v. Chicago, 174 Ill., 605; 51 N. E. Rep., 653.

A resolution that the mayor be instructed to purchase certain property cannot, in a suit for specific performance, be amended by parol on the ground of mistake. Carskadden v. South Bend, 141 Ind., 596; 39 N. E. Rep., 667; 41 N. E. Rep., 1.

For distinction between ordinance and resolution, see sec. 2, et seq., supra.

⁵ Charter, City of St. Louis, art. III, sec. 19; Mun. Code of St. Louis, p. 206; 2 R. S. of Mo., 1899, p. 2483, sec. 19; charter, San Francisco, art. II, ch. 1, sec. 10; Stat. & Amend. to Codes of Cal., p. 245; Cowley v. Rushville, 60 Ind., 327.

⁶ Morrison v. St. L. I. M. & S. Ry. Co., 96 Mo., 602; 9 S. W. Rep., 626; 10 S. W. Rep., 148; State v. Thurston, 92 Mo., 325; 4 S. W. Rep., 930; State v. Chambers, 70 Mo., 625; State ex rel. v. Draper, 47 Mo., 29; Boonville v. Trigg, 46 Mo., 288.

An amended ordinance which does not attempt to amend the old by adding to or taking from one of its sections, but contains in full the section as it was designated to be when amended, sufficiently complied with a charter which requires that an amended ordinance shall contain the ordinance or parts thereof which it attempts to review or amend. Larkin v. Burlington, C. R. & N. Ry. Co., 85 Iowa, 492; 52 N. W. Rep., 480; Pentecost v. Stiles, 5 Okla., 500; 49 Pac. Rep., 921.

Where the act undertakes to amend a former statute, it is not sufficient to say that certain words are stricken out or certain words are inserted, but that the section as amended must be set out in full; however, in addition to setting out the section in full, as amended, it is not required that the amendatory act should recite the designated words stricken out, or the others inserted or both. State *ex rel.* v. Miller, 100 Mo., 439; 13 S. W. Rep., 677.

Mere reference to a section, adding "the same is hereby amended so as to authorize," etc., is bad. French v. Woodward, 58 Mo., 66.

When a section of an ordinance is amended, the section only, and not the entire ordinance in which it is contained, need be set out. Decorah v. Dunstan Bros., 38 Iowa, 96,

316

§ 197. Amendment of franchise and contract ordinances. If vested rights are not disturbed or the obligation of contracts impaired, franchise and contract ordinances are subject to reasonable amendment. Where the state or a municipality has lawfully granted rights and privileges to either a private or public corporation, which have been accepted and valuable improvements have been made on the faith of such grant, a contract has been thereby entered into, and the rights acquired by such act of the legislature or municipality cannot be impaired or altered by a subsequent act, unless the right to alter or amend the franchise was expressly reserved. The right to

An amendment should be made by reference to the section and chapter, and by setting out in full such section or chapter as it is intended to read when amended. Lowry v. Lexington, 24 Ky. Law Rep., 516; 68 S. W. Rep., 1109.

striking out such parts.10

61/2 Schwartz v. Oshkosh, 55 Wis., 490; 13 N. W. Rep., 450.

improvement ordinance merely defective may be amended. East St. Louis v. Albrecht, 150 Ill., 506; 37 N. E. Rep., 934.

7 O'Niel v. Tyler, 3 N. D., 47;

53 N. W. Rep., 434; Cowley v. Rushville, 60 Ind., 327.

8 In re Beekman, 11 Abb. Pr. (N. Y.), 164.

9 Ex parte Wolf, 14 Neb., 24; 14 N. W. Rep., 660.

10 State v. Kantler, 33 Minn., 69; 21 N. W. Rep., 856. See sec. 198, post.

11 Baltimore Trust & Guarantee Co. v. Baltimore, 64 Fed., 153; Citizens' St. R. Co. v. Memphis, 53 Fed., 715; St. Louis v. Western Union Telegraph Co., 148 U.S., 92;

alter, amend or repeal is usually expressly reserved by the state or municipality in the act granting the right or privilege. and when the franchise is accepted by the individual or corporation, the reservation becomes a part of the contract, and the franchise may be amended by subsequent legislation.12 The right to alter or amend acts granting special privileges to individuals or a corporation is not always expressed in the act itself, but is sometimes found in the constitution of the state.¹³ In New Jersey it is a question, in every case of a contract made by the legislature, whether that body intended that the right to change or repeal it should inhere in it, or whether, like other contracts, it was perfect, and not within the power of the legislature to impair its obligation.14 Under a provision of the Ohio constitution that "no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly," it has been held that franchises granted after the adoption of the constitution are subject to repeal and alteration, just as if they had been expressly declared to be so by the act granting the franchise.15 Even where the power to alter and amend is reserved, the amendments made must be reasonable, and must be made in good faith, and be consistent with the scope and object of the act of incorporation.¹⁶ Such a reservation will not authorize the imposing of a serious burden upon the corporation which was of no benefit to it.17 Where the statute under which a street

Wright v. Nagle, 101 U. S., 791; State ex rel. v. The Corrigan Street Ry. Co., 85 Mo., 263.

Such a grant is a contract within the meaning of that clause of the constitution of the United States which declares that no state shall make any law impairing the obligation of contracts. Dartmouth College v. Woodward, 4 Wheat. (U. S.), 518.

¹² Greenwood v. Freight Co., 105U. S., 13.

Shields v. Ohio, 95 U. S., 319.
 New Jersey v. Yard, 95 U. S.,
 104.

¹⁵ Shields v. Ohio, 95 U. S., 319. ¹⁶ Shields v. Ohio, 95 U. S., 319; Worcester v. Norwich Ry. Co., 109 Mass., 103; Commonwealth v. Eastern Ry. Co., 103 Mass., 254; Roxbury v. Boston & Providence Ry., 6 Cush. (Mass.), 424; Fitchburg Ry. Co. v. Grand Junction Ry. Co., 4 Allen (Mass.), 198; Commonwealth v. Essex Co., 13 Gray, 239.

¹⁷ Miller v. New York and Erie Ry. Co., 21 Barb. (N. Y.), 513.

Although the right of a railroad company to construct its road through a city was acquired under an ordinance which reserved the right to alter and amend, such an ordinance can not be amended or repealed so as to affect essential and vested rights, or to take away rights previously granted. Chi-

railroad company was authorized to construct its road, provides that the company shall be subject to such reasonable rules and regulations as the council may, by ordinance, prescribe, and to the payment to the city of a license fee, an ordinance afterwards passed by the city fixing the amount of-license is valid. But where the right to exact the payment of a license fee was not reserved or stipulated in the charter of the company, it was held that the city could not amend the charter and impose additional burdens by ordinances prescribing a license duty on cars. Where a city grants to a railway company the right to lay tracks on the streets of the city, upon the condition that the company assumes the cost of paving the streets, the city may, by a subsequent ordinance, relieve the railway company of the conditions imposed in the original grant. On the streets of the city in the original grant.

§ 198. Amendment of improvement ordinances. Subject to the constitutional provision forbidding the impairment of the obligation of contracts, as explained elsewhere,²¹ improvement ordinances which are not wholly void may be amended, even after the contract is let and the work begun, in like manner as other ordinances.²² Thus an ordinance providing for street

cago, M. & St. P. Ry. Co. v. Minn. Cent. R. Co., 14 Fed., 525.

¹⁸ Mayor v. Broadway, etc., Ry. Co., 97 N. Y., 275.

Reserved right in statute to fix water rates. Power to regulate held to be a continuing one. Rogers Park Water Co. v. Fergus, 180 U. S., 624, affirming 178 Ill., 571; 53 N. E. Rep., 363.

19 New York v. Second Ave. Ry.,
 32 N. Y., 261; New York v. Third
 Ave. Ry. Co., 33 N. Y., 42.

The grant by a city to a railroad company of the right to lay and maintain its track over and along a bridge belonging to the city, in an ordinance which contains no reservation respecting toll or other charges, cannot be amended by a subsequent ordinance imposing such charges. Des Moines v. C., R. I. & P. R. Co., 41 Iowa, 569; Burlington v. Burlington Street

Ry. Co., 49 Iowa, 144; 31 Am. Rep., 145.

An ordinance which grants to a horse railway company the privilege of using its streets, and provides that such railway shall keep portions of the street, on which it operates, in good repair, the city cannot, by a subsequent ordinance, compel the company to pave such portions of its streets with specific materials. Kansas City v. Corrigan, 86 Mo., 67; State ex rel. v. Corrigan St. Ry. Co., 85 Mo., 263.

Philadelphia v. Bowman, 175
 Pa. St., 91; 34 Atl., 353. See sec.
 238, et seq.

21 Chapter VIII.

²² An ordinance for paving a street cannot be amended so as to change the character of the paving material by certain "orders" passed by the council on motion. The amendment must be by ordi-

improvements which proves to be defective and insufficient to support an assessment, if not absolutely void, may be amended, and a reassessment made thereunder.23 So a division of special assessments into installments may be authorized by amendment to the original ordinance providing for the improvement.24 But an ordinance providing that a pavement be laid to conform to the established grade of the street as shown by an ordinance fixing the grade of said street, now on file in the office of the city clerk, prima facie sufficient in its description of the grade, is fatally defective if it appears the ordinance so referred to was not then in existence, and the defect cannot be cured by the subsequent passage of an ordinance fixing the grade.25 Under the Illinois statute the illegality of an amendment to a valid improvement ordinance in respect to the mode of assessment, and the setting aside of an assessment made thereunder. will not affect the validity of the original ordinance, so as to prevent the levy and collection under it of a special tax to pay the cost of the improvement in the manner provided therein.²⁶

§ 199. Power to repeal ordinances. The power to pass ordinances or regulations affecting the government of a municipality carries with it, by implication, the power to modify or repeal such ordinances or regulations, unless the power is restricted in the law conferring the right.²⁷ Thus an ordinance

nance. Galt v. Chicago, 174 III., 605; 51 N. E. Rep., 653. Sec. 195, supra.

²³ East St. Louis v. Albrecht, 150
 Ill., 506; 37 N. E. Rep., 934.

24 Trimble v. Chicago, 168 Ill.,
 567; 48 N. E. Rep., 416.

25 C. & N. P. Ry. Co. v. Chicago,
 174 Ill., 439; 51 N. E. Rep., 596.
 See sec. 196, supra.

26 Davis v. Litchfield, 155 Ill.,384; 40 N. E. Rep., 354. See sec.243, et seq.

²⁷ Delaware—Rice v. Foster, 4 Harr. (Del.), 479.

Florida—Greeley v. Jacksonville, 17 Fla., 174.

Indiana—Welch v. Bowen, 103 Ind., 252; 2 N. E. Rep., 722.

Iowa—Santo v. State, 2 Iowa, 165; 63 Am. Dec., 487.

Maryland-Robinson v. Balti-

more, 93 Md., 208; 49 Atl. Rep., 4.
Missouri—Kaime v. Harty, 4 Mo.
App., 357.

Nebraska—In re Hall, 10 Neb., 537; 7 N. W. Rep., 287.

New Jersey—Hudson Tel. Co. v. Jersey City, 49 N. J. L., 303; 8 Atl. Rep., 123; 60 Am. Rep., 619.

New York—Chenango Bank v... Brown, 26 N. Y., 467.

South Carolina—Charleston v. Wentworth Street Baptist Church, 4 Strob. (S. C.), 306.

Canada—In re Great Western Ry. Co., 23 Up. Can. C. P., 28.

England—Rex v. Bird, 13 East., 367; Rex. v. Ashwell, 12 East., 22. Charter provisions vesting in the superior court power to "repeal any by-law which it shall deem unreasonable or contrary to

fixing the fiscal year of a municipal corporation is an administrative measure and is subject to repeal.28 Generally speaking, all ordinances are subject to repeal. The corporation cannot abridge its own legislative powers and pass irrevocable ordinances. The members of the legislative body are trustees of the public, and the tenure of their office impresses their ordinances with liability to change.²⁹ And where an ordinance granting rights to the streets expressly reserved the power of repeal, reasons which induced the passage of a repealing ordinance cannot be inquired into by the courts, to affect its validity.³⁰ In repealing an ordinance the city may impose such conditions as it deems proper, but the conditions, of course, must not conflict with the charter, the constitution or laws of the state. Hence an ordinance to suppress gaming may be repealed except as to offenses committed and forfeitures incurred prior thereto.31 The restrictions heretofore observed respecting the enactment of ordinances apply with equal force to the repeal of ordinances, and, indeed, to all legislative acts. Therefore changes cannot be made so as to affect any vested right lawfully acquired under an ordinance or regulation lawfully adopted.³² But where it becomes necessary in order to protect the health of the city, or where the thing has become an actual nuisance, ordinances under which rights have become vested may be repealed, by authority of the city in the exercise of its police and governmental powers.33 An ordinance may be repealed in part.34

the laws or constitution of this state or of the United States," does not empower such court to amend a by-law. Pratt v. Litchfield, 62 Conn., 112; 25 Atl. Rep., 461.

²⁸ Du Quoin First National Bank
 v. Keith, 84 Ill. App., 103, affirmed
 183 Ill., 475; 56 N. E. Rep., 179.

State v. Graves, 19 Md., 351;
 Am. Dec., 639; Goszler v. Georgetown, 6 Wheat. (U. S.), 593.

30 Southern Bell T. & T. Co. v. Richmond, 98 Fed., 671, affirmed by U. S. Circuit Ct. App., 103 Fed. Rep., 31.

31 Kansas City v. White, 69 Mo., 26.

32 Stoddard v. Gilman, 22 Vt.,

568; New Orleans v. St. Louis Church, 11 La. Ann., 244; Musgrove v. Catholic Church, 10 La. Ann., 431; State v. Ross., 49 Mo., 416; State ex rel. v. Baker, 32 Mo. App., 98; Terre Haute v. Lake, 43 Ind., 480; Nelson v. St. Martin's Parish, 111 U. S., 716.

³³ Fertilizing Co. v. Hyde Park, 97 U. S., 659; Beer Co. v. Massachusetts, 97 U. S., 25.

The city of New York conveyed certain lands for the purpose of a church and cemetery, with a covenant for quiet enjoyment; afterwards acting under power granted by the legislature the city passed a by-law prohibiting the use of the

§ 206. Same—Franchise and contract ordinances. The authorities seem to be uniform to the effect that the reservation of the right to repeal, in a franchise granted to a private person or corporation, which is accepted by the grantee, enables the legislative body granting the franchise to repeal the same at any time it may see fit.35 But where the right or privilege has been acquired by an individual or corporation from the common council of the city under an act of the legislature authorizing the granting of such a privilege, it is in its nature a contract, and if the power to repeal has not been reserved, the right cannot be taken away.36 Such a contract, if within the power of the municipality to grant, it seems in the case of a franchise authorizing a private person to construct a railroad in the streets of a city without reserving the power of revocation, or limitation as to time, would create in the grantee an immediate freehold interest in the streets, and the right to use them perpetually.37 To guard against this absolute right,

lands as a cemetery. It was held that the ordinance was a repeal of the covenant, and that since the act was a necessary police regulation for the preservation of the lives of its citizens the city by repealing the covenant was not liable for a breach of it. Brick Pres. Church v. New York, 5 Cow. (N. Y.), 538.

But in New Orleans v. Church of St. Louis, 11 La. Ann., 244, where an injunction brought by the city to restrain the defendant from using a certain piece of ground as a cemetery which use had been authorized by ordinance, which was afterwards repealed, the injunction was dissolved.

34 Noonan v. People, 183 Ill., 52;
55 N. E. Rep., 679; Partridge v. Hyde Park, 131 Ill., 537; 23 N. E. Rep., 345; Hyde Park v. Corwith, 122 Ill., 441; 12 N. E. Rep., 238.

35 People v. O'Brien, 111 N. Y.,
1, 48; 18 N. E. Rep., 692; 7 Am. St.
Rep., 684; People ex rel. Kimball
v. B. & A. R. R. Co., 70 N. Y., 569;
Southern Bell Tel. & Tel. Co. v.

Richmond, 98 Fed., 671; Greenwood v. Freight Co., 105 U. S., 13.

An act granting a franchise which is a mere license to enjoy the privilege conferred for the time, and on the terms specified, is subject to future legislative control and may be taken away by an act of the body granting it. Stone v. Mississippi, 101 U. S., 814.

36 Brooklyn Central Ry. Co. v. Brooklyn City Ry. Co., 32 Barb. (N. Y.), 358; People v. O'Brien, 111 N. Y., 1, 42; 18 N. E. Rep., 692; 7 Am. St. Rep., 684.

A legislative act ratifying ordinances and conferring the same power of repeal as in ordinances enacted under its general powers does not authorize the repeal of an ordinance which creates a contract in the absence of general power in the city to do so. Baltimore Trust and Guarantee Co. v. Baltimore, 64 Fed. Rep., 153.

37 Milhau v. Sharp, 27 N. Y., 611; Dartmouth College v. Woodward, 4 Wheat. (U. S.), 518.

many of the state constitutions contain a provision that, "no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the general assembly;" legislatures in granting special charters to cities and public corporations, have reserved the right to alter, amend or repeal them, and municipalities, in granting special privileges under their charters, have reserved the same right.38 privilege or franchise containing a reservation of the right to appeal has been accepted by the grantee, it becomes a contract and both parties are bound by its terms.³⁹ But the power to alter and amend the charter of a private corporation under such a reservation is certainly not without limit. It is admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation.40 Such a reservation, it has been held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another.41 or to compel sub-

scribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract,⁴² or to change the vested rights acquired by the corporation under the charter, and to add new parties and managers without the consent of the corporations,⁴³ or to change the object of the incorpora-

38 Shields v. Ohio, 95 U. S., 319; Greenwood v. Freight Co., 105 U. S., 13; Southern Bell Tel. & Tel. Co. v. Richmond, 98 Fed., 671; Miller v. State, 15 Wall. (U. S.), 478; New York v. Broadway Ry. Co., 97 N. Y., 275; Hyatt v. McMahon, 25 Barb. (N. Y.), 457, 467.

39 Richmond v. Southern Bell Tel. & Tel. Co., 85 Fed., 19; People v. C. W. D. Ry. Co., 18 Ill. App., 125; Fletcher v. Peck, 6 Cranch (U. S.), 87; Zabriskie v. H. & N. Y. Ry. Co., 18 N. J. Eq., 178; Meadow Dam Co. v. Gray, 30 Me., 547.

tion or to substitute another for it.44

Right to fix water rates, held under Illinois statute to be a continuing power. Rogers Park Water Co. v. Fergus, 180 U. S., 624, affirming 178 Ill., 571; 53 N. E. Rep., 363; Freeport Water Co. v. Freeport, 180 U. S., 587; Danville Water Co. v. Danville, 180 U. S., 619.

40 Miller v. State, 15 Wall (U. S.), 478, 498; Holyoke Co. v. Lyman, 15 Wall (U. S.), 500, 519; Commonwealth v. Essex Co., 13 Gray (Mass.), 239, 253; Miller v. Railroad Co., 21 Barb. (N. Y.), 513; Coast Line Ry. Co. v. Savannah, 30 Fed. Rep., 646.

⁴¹ State ex rel. Pittman v. Adams, 44 Mo., 570.

⁴² Railroad Co. v. Veazie, 39 Me., 571, 581.

48 Sage v. Dillard, 15 B. Mon. (Ky.), 340, 357.

44 Zabriskie v. H. & N. Y. Ry. Co., 18 N. J. Eq., 178.

"However, the reserved power may be exercised, and to almost any extent, to carry into effect the original purpose of the grant, or to secure the due administration of its affairs, so as to protect the rights of the stockholders and of creditors and for the proper disposition of its assets." A reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the federal constitution upon legislation impairing the obligation of contracts.⁴⁶

As we have seen, all rights granted by a municipality are subject to the police power of the state, and if the public safety or the public morals require the discontinuance of any manufacture or traffic which has been granted to an individual or corporation, it has power to provide for its discontinuance, even where no right has been reserved to alter or amend the charter of the corporation.⁴⁷

Same-Illustrative cases. A franchise granted by ordinance to a corporation to furnish water for the use of the inhabitants is a contract which the city cannot repeal, alter or impair without the consent of the corporation; hence an ordinance attempting to reduce the water rates, which the corporation was authorized to charge, was held invalid where the right to change was not reserved in the original grant of the franchise.48 So where the right to lay double tracks in the streets is granted to a railroad company and the company expends a large amount of money in the construction of its railway, the city cannot afterwards, by another ordinance, limit the company to a single track.49 So where a city, by ordinance, grants the right to one to construct water works at his expense to supply the city and its inhabitants with water, with the right to lay water pipes under the surface of the streets and alleys, for a period of years, which grant is accepted

⁴⁵ Per Justice Clifford in Miller v. State, 15 Wall. (U. S.), 478, 498. To the same effect, Holyoke Co. v. Lyman, 15 Wall. (U. S.), 500, 519; Tomlinson v. Jessup, 15 Wall. (U. S.), 454; Railroad Co. v. Maine, 96 U. S., 499, 510; Sinking Fund Cases, 99 U. S., 700, 720.

⁴⁶ People v. O'Brien, 111 N. Y.,

^{1, 48; 18} N. E. Rep., 692; 7 Am. St. Rep., 684; Munn v. Illinois, 94 U. S., 113, 125.

⁴⁷ Beer Co. v. Massachusetts, 97 U. S., 25; Fertilizing Co. v. Hyde Park, 97 U. S., 659.

⁴⁸ Ashland v. Wheeler, 88 Wis., 607; 60 N. W. Rep., 818.

⁴⁹ Burlington v. Burlington St.

and the work partially performed, the privilege of the use of the streets is not a mere license, revocable at the pleasure of the city council, but it is a grant under an express contract, for an adequate consideration, and is binding as a contract.⁵⁰ And where a contract is made with a municipal corporation upon the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition.⁵¹ where a police jury having canvassed and compiled the returns of an election, proclaim the result of the same to have been in favor of a special tax in aid of a railway enterprise, and in accordance therewith thereafter passed an ordinance levying the tax, it is without legal capacity to subsequently pass another ordinance repealing the former and annulling the tax: the railway having been, in the meantime, completed and put in operation.⁵² An ordinance which regulates the use of a certain street, upon which railroad tracks had been laid under a prior ordinance, by prohibiting the use upon it of any car or other vehicle drawn by steam, does not repeal or take away the former right, and does not destroy vested rights.⁵³ has been held that an ordinance giving to a gas light company the exclusive right to light a city with gas for thirty years is not repealed nor the rights acquired under it "impaired" by a subsequent contract with another company to light the streets with electricity.54

Where a telephone company under the code of Virginia must obtain consent of the council of a city or town to authorize the use of its streets by a telephone or telegraph line, and the company acquired the right to erect and maintain its poles and wires in the streets of a city through an ordinance, the terms of which it accepted, it is bound by a provision of such ordi-

Ry. Co., 49 Iowa, 144; 31 Am. Rep., 145.

50 Quincy v. Bull, 106 III., 337. Right to regulate water rates reserved by statute. Rogers Park Water Co. v. Fergus, 180 U. S., 624, affirming 178 III., 571; 53 N. E. Rep., 363; Freeport Water Co. v. Freeport, 180 U. S., 587; Danville Water Co. v. Danville, 180 U. S., 619.

Nelson v. St. Martin's Parish,
 111 U. S., 716; Louisiana v. Pilsbury, 105 U. S., 278.

52 Missouri, Kansas & T. Trust
 Co. v. Smart, 61 La. Ann., 416;
 25 So. Rep., 443.

53 Railroad Co. v. Richmond, 96 U. S., 521.

⁵⁴ Saginaw Gas Light Co. v. Saginaw, 28 Fed. Rep., 529. See sec. 240, post.

nance reserving to the council the right to repeal the same at any time, the condition being that the repeal take effect twelve months from its date, and its right to maintain its lines in the streets terminates at the expiration of a year from the date of the passage of the repealing ordinance.⁵⁵

§ 202. Repeal of improvement ordinances. Unless the violation of constitutional rights result, improvement ordinances may be repealed under like conditions and restrictions as other municipal legislation. Thus where no steps have been taken under an ordinance for paving a street, the city council may, by a later ordinance for paving intersecting streets with different kinds of pavement, repeal so much of the earlier ordinance. as applies to the area covered by the street intersection, without otherwise affecting its validity.⁵⁶ The rules hereinafter stated respecting repeals of ordinances by implication apply to those providing for improvements as shown by the cases in the notes.⁵⁷ An ordinance for paving and curbing the middle portion of a street and for grading the space on each side of the pavement, is not repealed by a subsequent ordinance authorizing a street railway company to lay its tracks on one side of the street, over the graded portion but outside the curb line fixed by the prior ordinance, even though the late ordinance requires the company at its own expense to pave the part of street

⁵⁵ Southern Bell Telephone & Telegraph Co. v. Richmond, 98 Fed., 671.

The company by accepting the privilege has placed itself within the absolute dominion of the city council. Richmond v. Southern Bell Tel. & Tel. Co., 85 Fed., 19, 27.

⁵⁶ Noonan v. The People, 183 Ill., 52: 55 N. E. Rep., 679.

57 REPEALS OF IMPROVEMENT ORDINANCES BY IMPLICATION.

Where successive ordinances appropriating money for the paving of different streets were passed, and the aggregate sum appropriated exceeded the sum available for such purpose, it was held that the rule "that where two acts are repugnant in any of their provisions the latter act without any

repealing clause operates as a repeal of the first," did not apply, and that the last ordinance passed did not repeal the prior ordinances. Smyrk v. Sharp, 82 Md., 97; 33 Atl. Rep., 411.

After an injunction was granted restraining a contractor and the city from proceeding with the opening and improvement of a proposed street, the ordinance directing the work to be done was repealed, and upon motion to dissolve the injunction it was held that the repeal of the ordinance was conclusive in favor of the injunction. Kaime v. Harty, 4 Mo. App., 357.

Where a new charter is adopted which provides that all ordinances shall continue in force until re-

occupied by its tracks.⁵⁸ Where an ordinance for the improvement of a street is repealed in part by a subsequent one, or such ordinance is so changed as to provide for the construction of a viaduct in a certain part of the street, whereby a part of the improvement is abandoned, a special assessment for the whole cost of the work as originally intended will not be sustained.59

Any change by amendment, repeal or otherwise in the improvement ordinance which contravenes the legal rights of the property owner, or which affects the method of payment for the work so as to subject the contractor to greater risk or requires him to accept less money than he contracted to receive, or otherwise affects the method of payment to his detriment, is within the constitutional provision prohibiting the impairment of the obligation of contracts. This principle is fully considered and illustrated in the chapter on the Constitutionality of Ordinances.60

§ 203. Implied repeals. Ordinances may be repealed by implication. 61 Thus where an ordinance contains a provision plainly repugnant to a former ordinance, to the extent that there is a conflict, the former ordinance is repealed by implication.62 So a subsequent ordinance fully covering the subject-

pealed, and public work is let to be done in the manner provided by a later ordinance, the latter repeals the old ordinances as to the mode of letting such work. Barber Asphalt Paving Co. v. Ullman, 137 Mo., 543; 38 S. W. Rep., 458.

A statute under which an ordinance authorizing street improvements was passed, was expressly repealed and another statute substituted therefor which contained similar provisions. It was held that the ordinance authorizing the improvements was not repealed, since it was not in conflict with the new provisions. Allen v. City of Davenport, 107 Iowa, 90, 95; 77 N. W. Rep., 532.

58 Thomson v. People, 184 Ill., 17; 56 N. E. Rep., 383.

59 St. John v. East St. Louis, 136 Ill., 207; 27 N. E. Rep., 543.

A special assessment cannot be levied to pay for a part of the improvement required by an ordinance, nor can a special assessment be levied to pay for the whole after a part has been abandoned. St. John v. East St. Louis, 136 Ill., 207; 27 N. E. Rep., 543; Dorathy v. Chicago, 53 Ill., 79; Holmes v. Hyde Park, 121 Ill., 128; 13 N. E. Rep., 540.

60 Sections 243 to 248, post.

61 Wethington v. Owensboro, 21 Ky. L. Rep., 960; 53 S. W., 644; Grand Rapids v. Norman, 110 Mich., 544; 68 N. W. Rep., 269; De Lano v. Doyle, 120 Mich., 258: 79 N. W. Rep., 188.

62 Ex parte Wolf, 14 Neb., 24, 30; 14 N. W. Rep., 660.

The rule relating to repeal of state statutes applies. Johnson v. Hahn, 4 Neb., 139, 146; Goddard matter of an earlier ordinance, being a substitute therefor, repeals the former by implication, without words to that effect. 63 But an ordinance which is described in the caption as amending a former ordinance, but in fact amending only one section thereof, and making no reference to the subjects of the other sections of the original ordinance, does not repeal the latter sections by implication where there is no repugnancy between the section as amended and the others which were left un-

v. Boston, 20 Pick. (Mass.), 407, 410; Whitney v. Blanchard, 2 Gray (Mass.), 208; Pierpont v. Crouch, 10 Cal., 315.

63 Indiana—Coghill v. State, 37 Ind., 111; Blakemore v. Dolan, 50 Ind., 194.

Iowa-Decorah v. Dunstan Bros., 38 Iowa, 96.

Michigan—Lenz v. Sherrott, 26 Mich., 139.

New Jersey—Burlington v. Estlow, 43 N. J. L., 13.

New York—Dexter v. Allen, 16 Barb. (N. Y.), 15.

Ohio-Lorain Plank Road v. Cotton, 12 Ohio St., 263.

Tennessee—Schmalzreid v. White, 97 Tenn., 36; 32 L. R. A., 782; 36 S. W. Rep., 393.

United States—Norris v. Crocker, 13 How. (U. S.), 429.

West Virginia—Knight v. West Union, 45 W. Va., 194; 32 S. E. Rep., 163.

The rule that the later statute clearly intended to prescribe the only rule which should govern the case provided for should be construed to repeal the earlier has been applied to ordinances. Roche v. Jersey City, 40 N. J. L., 257.

An ordinance prohibiting the sale of spirituous liquors under a penalty is repealed by a subsequent ordinance prohibiting their sale without a license. Barton v. Gadsden. 79 Ala., 495.

A subsequent ordinance revising the whole subject of selling or delivering any spirituous liquors will be held to be a substitute for all prior regulations on the same subject although words of repeal are not used. Booth v. Carthage, 67 Ill., 102.

And upon such repeal the general law immediately prevails unless the subsequent ordinance provides a penalty for such sale. Von Der Leith v. State, 60 N. J. L., 46; 37 Atl. Rep., 436.

A subsequent ordinance provided that a former one "is hereby amended so as to read as follows," repeals all provisions of the former ordinance not contained in the latter. Ashland Water Co. v. Ashland Co., 87 Wis., 209; 58 N. W. Rep., 235.

When subsequent ordinance repeals a prior one by implication in particular case, statute as to repeals held not to apply to ordinances. Naylor v. Galesburg, 56 Ill., 285, 287.

A statute perfect in itself may repeal another part of a law by implication, although such repeal is not expressed in the title of the repealing statute. Union Trust Co. v. Trumbull, 137 Ill., 146; 27 N. E. Rep., 24.

A statute is impliedly repealed by a subsequent one revising the whole subject matter of the first. Commonwealth v. Cooley, 10 Pick. (Mass.), 37, 39; Farr v. Brackett et al., 30 Vt., 344; Conley v. Sup'rs Calhoun Co., 2 W. Va., 416. amended.⁶⁴ So a subsequent ordinance providing for a city attorney's salary and fees in specified cases, in addition to a percentage on sums of money collected by him for the city provided for in a prior ordinance, does not repeal by implication the prior ordinance.⁶⁵ Where there are two acts on the same subject, the rule is to give effect to both if possible, but if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.⁶⁶ However, constructive repeals or repeals by implication are not favored.⁶⁷ "Repeal by implication is never permitted if it can be avoided by any reasonable construction of the statute. If both acts can be given full force without conflicting with each other, or if the latter act is merely affirmative or cumulative or auxiliary, and not inconsistent, both must stand, and

Where the later statute was clearly intended to prescribe the only rule which should govern, it will be construed as repealing the original act. Sacramento v. Bird, 15 Cal., 294; State v. Conkling, 19 Cal., 501; United States v. Tynen, 11 Wall. (U. S.), 88.

⁶⁴ Goldsmith v. Huntsville, 120
 Ala., 182, 188; 24 So. Rep., 509.

65 Austin v. Walton, 68 Tex.,507; 5 S. W. Rep., 70.

66 State v. Massey, 103 N. C.,
356; 9 S. E. Rep., 632; Greeley v.
Jacksonville, 17 Fla., 174; Waller v. Everett, 52 Mo., 57; State ex rel.
v. Walbridge, 119 Mo., 383; 24 S.
W. Rep., 457.

But where the latter ordinance is not strictly on the same subject, as where successive ordinances providing for the improvement of different streets are passed and the amount appropriated for the purpose is not sufficient to pay for all the work, the last ordinance passed will not be held to repeal the former by implication, and authorize the improvement of the street specified in the last ordi-

nance. Smyrk v. Sharp, 82 Md., 97; 33 Atl. Rep., 411.

To the extent of the conflict an existing ordinance is repealed, by implication, where a new ordinance contains a provision plainly repugnant to it. *In re* Wolf, 14 Neb., 24; 14 N. W., 660; Burlington v. Estlow, 43 N. J. L., 13; Greeley v. Jacksonville, 17 Fla., 174.

And this will follow although the two ordinances appear under different headings in the ordinance book. Cook & Rathborne Co. v. Sanitary Dist., 177 Ill., 599; 52 N. E. Rep., 870.

Where two statutes are repugnant, the latter repeals the former to the extent of the inconsistency. Dutton v. Aurora, 114 Ill., 138; 28 N. E. Rep., 461.

Where two grants of power by the legislature are repugnant, the last expressed will must control. Korah v. Ottawa, 32 Ill., 121; Culver v. Third National Bank of Chicago, 64 Ill., 528.

⁶⁷ Arkansas—Babcock v. Helena, 34 Ark., 499, 503.

the former is not repealed."⁶⁸ Thus a general statute will not impliedly repeal a prior local or special statute, unless there is such a positive repugnance between the two that they cannot stand together or be consistently reconciled.⁶⁹ Since the law does not favor a repeal by implication, it has accordingly been held that where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the former.⁷⁰ The earlier act remains in force, unless the two are manifestly inconsistent with and repugnant to each other.⁷¹ An act is not repealed by implication where the legislature had no intention to repeal it.⁷²

Connecticut—Norwich v. Story, 25 Conn., 44, 47.

Georgia—Haywood v. Savannah, 12 Ga., 404, 409.

Illinois—Thompson v. Highland Park, 187 Ill., 265; 58 N. E. Rep., 328; People v. Harrison, 185 Ill., 307; 56 N. E. Rep., 1120.

Michigan—Gordon v. People, 44 Mich., 485; 7 N. W. Rep., 69; People v. Bussell, 59 Mich., 104, 109; 26 N. W. Rep., 306.

Missouri—Pacific Ry. Co. v. Cass County, 53 Mo., 17; State v. Jaeger, 63 Mo., 403; Glasgow v. Lindell's Heirs, 50 Mo., 60; State exrel. v. Severance, 55 Mo., 378; St. Louis v. Independent Ins. Co., 47 Mo., 146; McVey v. McVey, 51 Mo., 406; St. Louis v. Life Assn., 53 Mo., 466; State v. Draper, 47 Mo., 29; State v. Fitzporter, 17 Mo. App., 271.

New Jersey—Landis v. Landis, 39 N. J. L., 274.

Pennsylvania—Erie v. Griswold, 184 Pa. St., 435; 39 Atl. Rep., 231. Rhode Island — Providence v. Union R. R. Co., 12 R. I., 473.

Washington-State v. Taylor, 21 Wash., 672; 59 Pac. Rep., 489.

68 People v. Hanrahan, 75 Mich., 611, 622; 42 N. W. Rep., 1124.

60 St. Louis v. Alexander, 23 Mo., 483; Deters v. Renick, 37 Mo., 597; State ex rel. Vastine v. Probate

Court. 38 Mo., 529: State ex rel. v. Macon County, 41 Mo., 453; St. Louis v. Independent Ins. Co., 47 Mo., 146; Kansas City v. Smart, 128 Mo., 272; 30 S. W. Rep., 773; Manker v. Faulhaber, 94 Mo., 430; 6 S. W. Rep., 372; Waller v. Everett, 52 Mo., 57; State ex rel. v. Edwards, 136 Mo., 360; 38 S. W. Rep., 73; State ex rel. v. Heidorn, 74 Mo., 410; State ex rel. v. Dolan, 93 Mo., 467, 473; 6 S. W. Rep., 366; State ex rel. v. Walbridge, 119 Mo., 383; 24 S. W. Rep., 457; State ex rel. v. Slover, 134 Mo., 10; 31 S. W. Rep., 1054; 34 S. W. Rep., 1102; State ex rel. v. Stratton, 136 Mo., 423; 38 S. W. Rep., 83.

If a conflict exists the general law will prevail, as a law regarding streets. Chicago Dock Co. v. Garrity, 115 Ill., 155; 3 N. E. Rep. 448. Street improvements. Thomason v. Ashworth, 73 Cal., 73; 14 Pac. Rep., 615, where it is held that the repeal cannot act retrospectively or disturb private rights vested thereunder.

7º People v. Mount, 87 Ill. App.,
 194, affirmed in 186 Ill., 560; 58
 N. E. Rep., 360; Bruce v. Schuyler,
 9 Ill., 221; Blain v. Bailey, 25 Ind.,
 165

⁷¹ Bowen v. Lease, 5 Hill (N. Y.), 221.

72 Tyson v. Postlethwaite, 13 Ill., 728.

§ 204. Same subject—General and special ordinances. plied repeal of a general ordinance by a subsequent conflicting special ordinance follows, where the charter does not forbid.73 Where a city by its special charter is limited in borrowing money to a sum not exceeding \$5,000 in any one year, for which it may issue its bonds, but a subsequent general law gives all incorporated cities power to construct water works, without limit as to the cost, and to borrow money for such purpose on its bonds, the general law will operate to repeal the provision in the charter only in respect to indebtedness and borrowing of money for constructing and maintaining a system of water works, leaving the limitations in the charter in force as to the contracting of indebtedness for other purposes.74 But where the charter prescribes that no special or general ordinance. which is in conflict or inconsistent with general ordinances of prior date, shall be valid or effectual until such prior ordinance, or the conflicting parts thereof, are repealed by express terms in the repealing ordinance, such provision must be observed.⁷⁵ Hence, a general ordinance, imposing a license of one hundred dollars, and not in express terms repealing a general prior ordinance, imposing a license of fifty dollars, is,

When a subsequent ordinance does not repeal a prior one by implication. New York v. Wood, 15 Daly (N. Y.), 341; 6 N. Y. Suppl., 657; Martineau v. Rochester Ry. Co., 81 Hun. (N. Y.), 263; 30 N. Y. Suppl., 778; Eidemiller v. Tacoma, 14 Wash., 376; 44 Pac. Rep., 877.

Two ordinances which are not in conflict with or repugnant to each other, the later does not repeal the former. People v. Harrison, 185 Ill., 307; 56 N. E. Rep., 1120; Barker v. Smith, 10 S. C., 226.

What do not constitute implied repeals of ordinances. Joliet v. Petty, 96 Ill. App., 450; Greensboro v. Mullins, 13 Ala., 341.

73 Brown v. Atlantic Ry. and Power Co., 113 Ga., 462; 39 S. E. Rep., 71; Budd v. Camden Horse R. Co., 63 N. J. Eq., 804; 48 Atl. Rep., 1028.

74 Dutton v. Aurora, 114 Ill., 138; 28 N. E. Rep., 461.

A later statute which is general does not repeal a former one that is particular. Haywood v. Savannah, 12 Ga., 404.

A general statute without negative words, cannot repeal a previous statute which is particular, even though the provisions of one be different from the other, unless the two are irreconcilably inconsistent. Brown v. Commissioners, 21 Pa. St., 37, 43; Providence v. Union Ry. Co., 12 R. I., 473; Conley v. Sup'rs Calhoun Co., 2 W. Va., 416.

75 St. Louis Charter, art. III, sec. 28; The Municipal Code of Louis, p. 224; Lemoine v. Louis, 72 Mo., 404, 406.

under such provision, invalid.⁷⁶ Such provision has no application where both ordinances are special. Hence, a special ordinance may, by implication, be repealed by the effect of a subsequent special ordinance in conflict with it.⁷⁷ Notwith-standing explicit charter language to the effect that all general ordinances shall be repealed by express terms, it has been held that the provision of a special ordinance, granting a franchise to construct and operate a street railroad, as to rate of speed of cars, supersedes a general ordinance on the same subject.⁷⁸

§ 205. Effect of repeal—Revival. It is a general rule of law that the repeal of a repealing act restores the law as it was before the passage of the latter act, without formal words for that purpose, unless otherwise provided either in the repealing act or by some general statute.⁷⁹ This rule has been modified

⁷⁶ St. Louis v. Sanguinet, 49 Mo., 581.

77 Schumacher v. St. Louis, 3 Mo. App., 297; St. Louis v. Weitzel, 130 Mo., 600, 616, 617; 31 S. W. Rep., 1045, rules that a particular ordinance relating to garbage was not in conflict with prior ordinances on the same subject, not repealed by express terms.

⁷⁸ Ruschenberg v. Southern Electric R. R. Co., 161 Mo., 70; 61 S. W. Rep., 626.

⁷⁹ Dakota — People v. Wintermute, 1 Dak., 63.

Georgia—Harrison v. Walker, 1 Ga., 32.

Indiana—Doe v. Naylor, Black. (Ind.), 32.

Massachusetts — Commonwealth v. Mott, 21 Pick. (Mass.), 492; Commonwealth v. Getchell, 16 Pick. (Mass.), 452.

New Jersey—James v. Dubois, 16 N. J. L., 285.

New York—People v. Davis, 61 Barb. (N. Y.), 456; Gale v. Mead, 4 Hill (N. Y.), 109.

North Carolina — Brinkley v. Swicegood, 65 N. C., 626; State v. Kent, 65 N. C., 311.

United States—United States v. Philbrick, 120 U. S., 52.

Where an act or rule of the common law is repealed, and the repealing enactment is afterwards expressly or impliedly repealed by another, which manifests no intention that the first shall continue repealed, the rule at common law was that the repeal of the second act revived the first, and, moreover, repealed it ab initio, and not merely from the time of the passage of the revived act. This rule still prevails where unchanged by statute.

The doctrine that the repeal of a repealing statute revives the original act does not apply to special acts like a charter of incorporation. Burke v. State, 5 Lea (Tenn.), 349; Smith v. Hoyt, 14 Wis., 252; State ex rel. v. Village of Reads, 76 Minn., 69; 78 N. W. Rep., 883.

Where a municipal ordinance is repealed and subsequently the repealing ordinance is repealed the original ordinance continues in force. New York v. Broadway and 7th Ave., 97 N. Y., 275; In re Opening of Albany St., 6 Abb. Pr. (N. Y.), 273.

And this is so where the repeal was only by implication. People

by statutes in many states which provide that, in the absence of an express declaration to the contrary, the repeal of a repealing law shall not revive the original act.80

The rule has been declared by the Supreme Court of California that a special provision of the legislature, applicable to a certain city only, excepts the city from the effects of the general law upon the same subject, to the same extent as though it were a part of the general law, and when the provision creating the exception is repealed, the operation of the general law is extended to that extent.81 Thus when the suspension of a general law within a municipality results from a city ordinance passed in pursuance of a special charter, the repeal of the ordinance will leave the general law in force

v. Davis, 61 Barb. (N. Y.), 456, 468; Van Denburgh v. Greenbush, 66 N. Y., 1, 4; Churchill v. Marsh, 2 Abb. Pr. (N. Y.), 219, 225; Wheeler v. Roberts, 7 Cow. (N. Y.), 536; Hastings v. Aiken, 1 Gray (Mass.), 163; Com. v. Churchill, 2 Met. (Mass.), 118, 122, per Shaw, C. J., explaining Com. v. Cooley, 10 Pick. (Mass.), 37, and Com. v. Marshall, 11 Pick. (Mass.),

The revival only takes place from the latter date and gives the ordinance no retroactive force. Rutherford v. Swink, 96 Tenn. 564; 35 S. W. Rep., 554.

An amended ordinance which is invalid cannot have the effect to repeal ordinances which conflict only with the void provision of the amended ordinance. Portland v. Schmidt, 13 Oregon, 17; 6 Pac. Rep., 221; Harbeck v. New York, 10 Bosw. (N. Y.), 366.

80 R. S. of Missouri, 1899, sec. 4177; United States v. Philbrick. 120 U. S., 52; Sullivan v. People, 15 Ill., 233; Teter v. Clayton, 71 Ind., 237; Cassell v. Lexington, H. & P. Turnpike Rd. Co., 10 Ky. Law Rep., 486; 9 S. W. Rep., 502; Witkouski v. Witkouski, 16 La. Ann., 232; Smith v. Hoyt, 14 Wis., 252; Goodno v. Oshkosh, 31 Wis., 127. The repeal of a statute does not operate a revival of the common law. State v. Slaughter, 70 Mo., 484.

The ordinances of the City of St. Louis provide that the repeal of the repealing ordinance does not ordinance. revive the original Mun. Code of St. Louis, secs. 1323 and 1333.

Secs. 19 and 20, p. 502, of Wagner's Statutes of Mo. designed for the suppression, not regulation, of prostitution, was repealed as to St. Louis by the charter of the City of St. Louis of 1870, and the repeal of this charter provision, in 1874, did not revive these sections. State v. Lewis, 5 Mo. App., 465.

"If the legislature enacts a law in the terms of a former one, and at the same time repeals the former, this amounts to a reaffirmance of the former law, which it does not, in legal contemplation. repeal." Bishop on Statutory Crimes, sec. 181; State v. Massey, 103 N. C., 356; 9 S. E. Rep., 632; State v. Sutton, 100 N. C., 474; 6 S. E. Rep., 687.

81 Santa Barbara v. Eldred, 95 Cal., 378; 30 Pac. Rep. 562.

within the city.82 But this rule has been denied in Missouri. where it is held that, while a charter amendment authorizing the corporation to "regulate or suppress" bawdy houses operated as a repeal within the city of a general law which prohibited the keeping of such houses, a subsequent charter amendment which repealed the former amendment did not thereby revive the general statute in the city.83 An offense committed while the statute creating it is in force is not affected by the repeal of such statute, but may be tried and punished in all respects as if the statute had remained in full force.84 Thus the court continues to have jurisdiction over one charged on information with a misdemeanor, notwithstanding that the act authorizing such proceeding is repealed pending the trial.85 Although the amending act by its terms repeals all parts of former acts inconsistent with its provisions, it will not have the effect of repealing the section of a prior act where the latter section is unconstitutional.86 Where the repealing clause of an unconstitutional act is made applicable only to laws inconsistent with its operative provisions, then the former law is not repealed.87

The repeal of a statute which is in the nature of a contract or a grant of power will not divest interest acquired, or annul acts done under it.⁸⁸

§ 206. Same—Penal ordinances. It is generally held that the repeal of an ordinance pending a prosecution under it operates to release the defendant, unless it is otherwise provided in

82 Heinssen v. State, 14 Col., 228; 23 Pac. Rep., 995, declining to follow State v. De Bar, 58 Mo., 395. This case approves Judge Dillon's conclusion that the decision of the De Bar case is erroneous. 1 Dillon, Munic. Corp. (4th Ed.), sec. 88, n. 2.

State v. De Bar, 58 Mo., 395.
State v. Proctor, 90 Mo., 334;
S. W. Rep., 472; State v. Boogher, 71 Mo., 631; State ex rel.
v. Willis, 66 Mo., 131.

85 State v. Ross, 49 Mo., 416. But see next succeeding section, 206.

Sc Copeland v. St. Joseph, 126
 Mo., 417; 29 S. W. Rep., 281; State
 ex rel. v. County Court, 11 Wis.,

50; Tims v. State, 26 Ala., 165; Childs v. Shower, 18 Iowa, 261, 272.

87 Devoy v. New York, 36 N. Y., 449; Stephens v. Ballou, 27 Kan., 594.

88 James v. DuBois, 16 N. J. L., 285.

"It cannot be drawn in question as a general proposition, that the repeal of a statute, by virtue of which a by-law has been enacted, involves also the repeal of the by-law itself, which is but a branch or an emanation from it. Whatever reason may be supposed to exist for the repeal of the statute, must also exist against the further

the repealing ordinance.⁸⁹ In other words, the repeal of an ordinance under which a penalty has been incurred has the same effect given it as by the common law, and operates as a pardon of the offense, superseding the jurisdiction of the court in any suit pending to enforce such penalty.⁹⁰ Statutes providing that a pending prosecution is not abated by the repeal of the statute on which it is founded have been held to have no application to municipal ordinances unless expressly made so.⁹¹ But a contrary rule has been announced in Kansas⁹² and Kentucky.⁹³ The repeal of the repealing ordinance does not operate to restore the right to prosecute for past violations; neither does the enacting of an ordinance to the effect that the first shall not affect prosecutions for prior violations.⁹⁴

§ 207. Same—Improvement ordinances. The repeal of an ordinance for opening and improving a proposed street destroys all authority for proceeding with the improvement. But the repeal of an ordinance for a special assessment for constructing and laying water supply pipes, pending an appeal

duration of the by-law, which it was the special and sole object of the statute to bring into being and to sustain by legislative authority." Per Gilchrist, J., in Lisbon v. Clark, 18 N. H., 234, 239.

89 Sonora v. Curtin, 137 Cal., 583; 70 Pac. Rep., 674; Ball v. Tolman, 135 Cal., 375; 67 Pac. Rep., 339; State Hospital v. Flaherty, 134 Cal., 315; 66 Pac. Rep., 322; Anderson v. Byrnes, 122 Cal., 272; 54 Pac. Rep., 821; Spears v. Modoc County, 101 Cal., 303; 35 Pac. Rep., 869; Kansas City v. White, 69 Mo., 26: Kansas City v. Clark, 68 Mo., 588; Earnhart v. Lebanon, 5 Ohio Cir. Ct., 578; United States v. Tynen, 11 Wall (U.S.), 88; Naylor v. Galesburg, 56 Ill., 285, 287; Illinois & M. Canal Co. v. Chicago, 14 III., 334; Contra. State v. Procter, 90 Mo., 334; 2 S. W. Rep., 472; State v. Boogher, 71 Mo., 631; State v. Willis, 66 Mo., 131; State v. Ross, 49 Mo., 416.

90 Rutherford v. Swink, 96 Tenn.,

564; 35 S. W. Rep., 554; Sutherland, Stat. Const., secs. 162, 163; Endlich, Interp. Stat., sec. 478 and note.

91 Barton v. Gadsden, 79 Ala.,
 495; Rutherford v. Swink, 96
 Tenn., 564; 35 S. W. Rep., 554.

⁹² Denning v. Yount, 62 Kan.,217, affirming 9 Kan. App., 708; 61Pac. Rep., 803.

93 The Kentucky statute, providing that no new law shall be construed to repeal a former law as to any offense committed or penalty incurred thereunder, except that any provision mitigating a penalty may be applied to a judgment pronounced after the new law takes effect, applies to ordinances as well as to general laws. Baker v. Lexington, 21 Ky. Law Rep., 809; 53 S. W. Rep., 16.

94 Day v. Clinton, 6 Ill. App., 476.

95 Kaime v. Harty, 4 Mo. App., 357. from a judgment confirming the assessment, does not justify the court in vacating the judgment after several terms of court have passed.⁹⁶

§ 208. Effect of repeal and re-enactment. Where a statute repealed is re-enacted in the same words by an act which takes effect at the same time as the repealing act, it is continued in uninterrupted operation.97 The rule of construction applicable to acts which revise and consolidate another act or acts is, that when the revised and consolidated act re-enacts in the same words the provisions of the act or acts so revised and consolidated, such revision and consolidation shall be taken to be a continuation of the former acts, although such former acts may be expressly repealed by such revised and consolidated act.98 The repeal of a general corporation law, where the manifest purpose of the repealing act is to substitute a new law extending the provisions of the old, cannot be construed. in the absence of express provisions, as intended to repeal the charters of corporations formed under it.99 A repealing statute, without a saving clause, which substantially re-enacts the law repealed, will not affect pending suits.1

§ 209. Effect of revision of ordinances as to repeal. When a former provision is included in a revised law, it is only thereby intended to continue its existence, not to make it operate as

96 McChesney v. Chicago, 161 Ill.,
110; 43 N. E. Rep., 702; People v.
McWethy, 165 Ill., 222; 46 N. E.
Rep., 187.

As to repeal by implication in particular case. Smyrk v. Sharp, 82 Md., 97; 33 Atl. Rep., 411. See sec. 202, supra.

97 Connecticut—State v. Baldwin, 45 Conn., 134, 139.

Nebraska—State v. Wish, 15 Neb., 448; 19 N. W. Rep., 686.

New Jersey—Middleton v. N. J. West Line Ry. Co., 26 N. J. Eq., 269.

North Carolina—Kesler v. Smith, 66 N. C., 154.

Wisconsin—State v. Gumber, 37 Wis., 298; Fullerton v. Spring, 3 Wis., 667; Laude v. Chicago & N. W. Ry. Co., 33 Wis., 640; Hurley v. Texas, 20 Wis., 634; Glentz v. State, 38 Wis., 549.

98 Scheftels v. Tabert, 46 Wis.,439, 446; 1 N. W. Rep., 156.

The re-enactment of a former section of a statute in a later section, is not necessarily a repeal of the former section. Martindale v. Martindale, 10 Ind., 566; Cordell v. State, 22 Ind., 1.

99 United Hebrew Assn. v. Benshimol, 130 Mass., 325.

The same has been held to be true of the repeal and re-enactment of laws, which authorize towns to exercise a municipal power. Lisbon v. Clark, 18 N. H., 234.

¹ Alexander v. Big Rapids, 70 Mich., 224; 38 N. W. Rep., 227; Moore v. Kenockee, 75 Mich., 332; 42 N. W. Rep., 944; Merkle v. Benan original act to take effect from the date of the revised law. The revision has not the effect of breaking the continuity of those provisions which were in force before it was made.2

A statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, will operate as a repeal of the former statute, although it contain no express words to that effect.³ Where a statute is revised and parts of it are omitted in the revision, those provisions are not to be revived by construction.4 Where a revised ordinance repealed "all ordinances and parts of ordinances of a general nature not herein contained," and provided for summary trial of violators

nington, 68 Mich., 133; 35 N. W. Rep., 846.

² St. Louis v. Foster, 52 Mo., 513; St. Louis v. Alexander, 23 Mo., 483, 509; Dart v. Bagley, 110 Mo., 42: 19 S. W. Rep., 311: Att'y Gen. v. Heidorn, 74 Mo., 410; State ex rel. v. Ranson, 73 Mo., 78, 93; Kamerick v. Castleman, 21 Mo. App., 587; Providence v. Union R. Co., 12 R. I., 473; State v. Pollard, 6 R. I., 290.

The general ordinances of a city were revised and consolidated for publication in book form, and were thus adopted and re-enacted. An ordinance under which a prosecution had been begun was re-enacted in substantially the same language, without any words of repeal, or any clause saving pending prosetions. It was held that the effect of the re-enactment was to continue uninterruptedly in force the provisions of the original ordinance, and that the pending prosecution was not abated. Junction City v. Webb, 44 Kan., 71; 23 Pac., 1073.

A statute requiring that ordinances of cities of the second class should be revised by the general council within one year from the time the charter took effect, a revision made after that time was held valid. Lowry v. City of Lex-

ington, 24 Ky. Law Rep., 516; 68 S. W. Rep., 1109.

3 Giddings v. Cox, 31 Vt., 607; Murdock v. Memphis, 20 Wall. (U. S.), 590, 617.

Where it is apparent that the legislature intended to revise a statute, the former statutes upon the subject, so far as in conflict with the last are no longer in force, though not expressly repealed. Wakefield v. Phelps, 37 N. H., 295, 304.

Where a town adopted a subsequent ordinance revising the whole subject of selling or dealing in spirituous liquors, it must be taken as a substitute for all prior ordinances on the same subject, although the last contained no words of repeal. Booth v. Carthage, 67 Ill., 102.

4 Pingree v. Snell, 42 Me., 53; State v. Wilson, 43 N. H., 415; Ellis v. Paige, 1 Pick. (Mass.), 43,

When an amendatory act of the legislature reads that a certain section of a previous act shall thereafter read as follows, any provision of the previous act which is not found in the amendatory act is repealed. Blakemore v. Dolan, 50 Ind., 194; State v. Andrews, 20 Tex., 230.

of ordinances, it was held that it repealed a prior ordinance authorizing jury trials.⁵

- § 210. Repeal of ordinance by ordinance only. An ordinance can be repealed only by ordinance, and not by resolution or order or motion of the legislative or governing body, not passed and published with the same formality of an ordinance.⁶
- § 211. When ordinances superseded by charter amendments. In general, alterations in the charter do not affect existing ordinances, or by-laws, resolutions or other corporate rights and liabilities. All such ordinances and resolutions remain in force unless they conflict and are inconsistent with the charter provisions as revised or amended. A new charter, or amendment of the old, has the effect of repealing inconsistent

⁵ There was positive conflict. Delaney v. Kansas City Police Court, 167 Mo., 667; 67 S. W. Rep., 589.

6 Backhaus v. People, 87 Ill. App., 173; Galt v. Chicago, 174 III., 605; 51 N. E. Rep., 653; Joliet v. Petty, 96 Ill. App., Hibbard v. Chicago, 173 Ill., 91; 50 N. E. Rep., 256; State v. Swindell, 146 Ind., 527; 45 N. E. Rep., 700; 58 Am. St. Rep., 375; Ryce v. Osage, 88 Iowa, 558; 55 N. W. Rep., 532; Cascaden v. Waterloo, 106 Iowa, 673; 77 N. W. Rep., 333.

"No ordinance shall be repealed except by ordinance." Charter San Francisco, Art. II., Ch. 1, Sec. 18; St. & Amend. to Codes of Cal., p. 246.

An ordinance cannot be repealed by mere verbal motion to that effect without reference to the title, number or date of passage of the ordinance to be repealed. Swindell v. State, 143 Ind., 153; 35 L. R. A., 50; 42 N. E. Rep., 528.

An ordinance cannot be suspended by resolution. People ex rel. v. Mount, 186 Ill., 560, 578, 579; 58 N. E. Rep., 360; Terre Haute v. Lake, 43 Ind., 481; Chicago & N.

P. Ry. Co. v. Chicago, 174 Ill., 439; 51 N. E., 596.

A resolution provided that a particular ordinance theretofore duly enacted "be reconsidered" is not a repeal of such ordinance. Ashton v. Rochester, 60 Hun. (N. Y.), 372; 14 N. Y. Suppl., 855.

A resolution rescinding a former resolution conditionally only is inoperative. Buffalo v. Chadeayne, 134 N. Y., 163; 31 N. E. Rep., 443.

7 Alabama—Baader v. Cullman,

115 Ala., 539; 22 So. Rep., 19.

Florida—Pensacola v. Sullivan,

23 Fla., 1; 6 So. Rep., 922.

Indiana—Chamberlain v. Evans-

ville, 77 Ind., 542.

Maryland—United Railway & E. Co. v. Hayes, 92 Md., 490; 48 Atl. Rep., 364.

Michigan—Ruell v. Alpena, 108 Mich., 290; 66 N. W. Rep., 49.

Missouri—Monett v. Beaty, 79 Mo. App., 315.

Pennsylvania—Erie Academy v. Erie, 31 Pa. St., 515.

Texas—Garey v. Galveston, 42 Tex., 627.

Washington—Spokane v. Williams, 6 Wash., 376; 33 Pac. Rep., 973.

An amendment of the charter by

charter and ordinance provision.8 The rule applicable to state statutes where the constitution is changed, applies with like force to municipal ordinances and resolutions where the city charter is altered. Where a statute which does not in express terms annul a right or power given to a corporation by a former act, but only confers the same rights and powers upon it under a new name, and with additional powers, the latter act does not repeal the former.9 A change in the organic law under which a city is organized does not repeal existing ordinances while the power to pass the same continues to exist.10 But if in the revised charter a provision of a prior charter,

the legislature may relieve the city of an obligation created by statute from the city to the state. Com. v. Louisville, 5 B. Mon. (Ky.), 293.

A statute expressly repealed under which an ordinance is passed, and substituting therefor a statute containing similar provisions does not affect the ordinance if not repugnant to the new statutory provisions. Allen v. Davenport, 107 Iowa, 90, 95; 77 N. W. Rep., 532.

And so where an ordinance providing for the issuing of license to sell liquors and for the punishment of all persons who should sell without license, where the charter was amended so as to prohibit cities of the second class from issuing license for the sale of liquors. the remaining part of the ordinance was held to be in force. Franklin v. Westfall, 27 Kan., 614.

Where a state statute provided that judges of an election should receive no pay and repealed all existing ordinances inconsistent with its provisions it was held that an ordinance then in force providing for the pay of judges and clerks of elections was repealed only so far as it related to the judges, and clerks were entitled to pay at the rate fixed by the ordinance. Quienette v. St. Louis, 76 Mo., 402.

8 Colorado-Carpenter v. People. 8 Colo., 116; 5 Pac. Rep., 828.

Indiana-Wood v. Mears, 12 Ind., 515; 74 Am. Dec., 222.

Kentucky-Wethington v. Owensboro, 21 Ky. Lew Rep., 960; 53 S. W. Rep., 644.

Louisiana-New Orleans v. Southern Bank, 15 La. Ann., 89.

Nebraska-In re Hall, 10 Neb., 537; 7 N. W. Rep., 287.

NewHampshire - Lisbon Clark, 18 N. H., 234.

Pennsylvania-Schroeder v. Lancaster City, 15 Pa. Co. Ct. R., 467. Rhode Island-State v. Pollard, 6 R. I., 290.

Regulations relating to the auditing and paying claims. State ex rel. v. Smith, 89 Mo., 408.

An ordinance prohibiting the sale of unsound meat, and providing a penalty for its violation becomes inoperative on the taking effect of a charter provision authorizing the council to prevent the selling of such meat, and to punish those who "knowingly" sell it, so far, at least, as the ordinance is broader than the charter. People v. Brill, 120 Mich., 42; 78 N. W. Rep., 1013.

9 Waring v. Mobile, 24 Ala., 701. 10 In re Hall, 10 Neb., 537; 7 N. W. Rep., 287.

which authorized an ordinance to permit a party wall to be built partly on the land of an adjoining owner without his consent, was omitted, an ordinance enacted by virtue of such power and existing at the time of the revision is repealed by the adoption of the revised charter.¹¹

- § 212. Rule relating to repeals of charter and ordinance provisions by general laws. Where a contrary intention is not manifest, the general rules relating to repeals by general laws of charter and ordinance provisions and legislative acts applicable to municipal corporations, which, in effect, become constituent parts of their charters, may be thus summarized:
- 1. A later statute which is general does not repeal a former one that is particular.¹² Thus laws existing for the benefit of particular municipalities, ordinarily are not repealed by general laws relating to the same subject-matter.¹³
- 2. Where there is a difference in the whole purview of two statutes, apparently relating to the same subject-matter, the former remains of force.¹⁴
- 3. Where it is evident that a subsequent act seeks to revise the entire subject-matter, embracing all that was intended to be preserved in the old, and omitting what was not so intended, or where the last act covers the entire subject-matter embraced in the first and also contains additional provisions, the last act supersedes the former and repeals it by implication.¹⁵
- § 213. Same subject—Question of intent. 4. Whether a prior law is repealed by a subsequent enactment is entirely a

11 Schmidt v. Lewis, 63 N. J. Eq.,565; 52 Atl., 707.

¹² Per Lumpkin, J., in Haywood v. Savannah, 12 Ga., 404, 409.

¹³ Harrisburgh v. Sheck, 104 Pa.
St., 53; Ottawa v. La Salle County,
12 Ill., 339; State v. Branin, 23 N.
J. L., 484; Wood v. Election Court,
58 Cal., 561.

People v. Hanrahan, 75 Mich.,
 611, 622; 42 N. W. Rep., 1124; Bowen v. Lease, 5 Hill (N. Y.), 221.

¹⁵ Per Mr. Justice Miller, in Murdock v. Memphis, 20 Wall. (U. S.), 590, 616.

United States—U. S. v. Claffin, 97 U. S., 546; Daviess v. Fairbairn,

3 How. (U. S.), 636; U. S. v. Tynen, 11 Wall. (U. S.), 88.

California—Pierpont v. Crouch, 10 Cal., 315.

Massachusetts—Bartlett v. Kurg, 12 Mass., 545.

Mississippi—State Board of Education v. Aberdeen, 56 Miss., 518.

Nebraska—Brome v. Cuming County, 31 Neb., 362; 47 N. W. Rep., 1050; 34 Am. & Eng. Corp. Cas., 481.

New Hampshire—Leighton v. Walker, 9 N. H., 59.

New York—People v. Van Nort, 64 Barb. (N. Y.), 205; Dexter & L. Plank Ry. Co. v. Allen, 16 Barb. (N. Y.), 15.

question of legislative intention.¹⁶ "Whenever the intent to repeal a special act by a general statute is apparent, the legislative intent will be effectuated."¹⁷ Thus a general statute relating to taxing railroads was held to repeal by implication prior special charter power of municipalities respecting the same subject. In this case it was said: "It is really a question of intention, and where the legislative intent is manifest or apparent it must prevail;" and the intention was regarded as manifest from the scope and purpose of the whole act, although negative words or words of repeal were not used.¹⁸ A like ruling was afterwards made by the same court when it was held that a general law relating to the assessments and taxation of railroads, and providing a method for the entire state for extending and collecting taxes on railroad property, superseded a charter provision covering the same subject-matter.¹⁹

As a rule, general legislation supersedes inconsistent special legislation relating to the same subject although the latter is not expressly repealed.²⁰ Thus a legislative act which in terms applies to all cities of the state will be construed as repealing inconsistent charter provisions.²¹ A law providing for a uniform system of registration of voters and election of municipal officers will supersede charter provisions covering the same subject.²²

¹⁶ Union Pac. Ry. Co. v. Cheyenne, 113 U. S., 516; Fish v. Branin, 23 N. J. L., 484.

¹⁷ Fitzgerald v. New Brunswick, 47 N. J. L., 479, 481.

18 Per Wagner, J., in State ex rel. v. Severance, 55 Mo., 378, 386. The court observed: "There is no question concerning the now generally admitted rule that a general affirmative statute will not repeal a former one, which is special or particular in its nature, unless negative words are used, or the acts be so entirely inconsistent that they cannot stand together. In such case there is nothing but an implication of repeal, and repeals in that manner are not favored."

19 State ex rel. v. St. Louis &

San Francisco Ry. Co., 117 Mo., 1, 12; 22 S. W. Rep., 910.

State v. Morristown, 33 N. J.
L., 57; Thomason v. Ashworth, 73
Cal., 73; 14 Pac. Rep., 615; Chicago
Dock & C. Co. v. Garrity, 115 Ill.,
155; 3 N. E. Rep., 448.

21 State (Bowyer) v. Camden, 50
N. J. L., 87; 11 Atl. Rep., 137;
State v. Spaude, 37 Minn., 322;
34 N. W. Rep., 164.

²² St. Louis v. Hoblitzelle, 85 Mo., 64, reversing 15 Mo. App., 441; State *ex rel.* v. Owsley, 122 Mo., 68; 26 S. W. Rep., 659; Staude v. Board of Election Commissioners, 61 Cal., 313.

In California it has been held that a general law providing for police courts in cities and towns will take the place of charter reguWithin its constitutional powers the legislature may modify or repeal municipal ordinances. Such repeals need not be in express terms. If the intention to repeal clearly appears, the ordinances must give way to the legislative act so far as they are in conflict with it.^{22½} Hence a legislative act creating the office of excise commissioner and giving him control of city dramshops and licenses therefor, repeals conflicting ordinances on the same subject.²³

§ 214. When charter provisions supersede general laws. The rule has obtained in some jurisdictions that a municipal charter cannot be amended, even by general, or "genuine general legislation," in matters of purely municipal and local concern, unless such legislation is necessary to carry out an express or implied constitutional provision. "Laws, though general they may be, which relate alone to the government of cities, must yield to the provisions of the adopted charter," as a law providing for "assessing damages and benefits for grading and re-grading naturally falls within the dominion of municipal government." Accordingly, the Supreme Court of Missouri unanimously held that a constitutional charter provision on this subject suspended and took the place of the general law of the state relating to the same matter, in force when the charter was adopted.²⁴ So a legislative act, empowering cities

lations on the same subject. People ex rel. v. Henshaw, 76 Cal., 436; 18 Pac. Rep., 413; Ex parte Ah You, 82 Cal., 339, 342; 22 Pac. Rep., 929.

22½ People v. Furman, 85 Mich.,
110, 48 N. W. Rep., 169; Mulcahy
v. Newark, 57 N. J. L., 513; 31
Atl. Rep., 226; Com. v. Gillam, 8
Serg. & R. (Pa.), 50.

23 State ex rel. v. Bell, 119 Mo.,
70, 75; 24 S. W. Rep., 765; State ex rel. v. Higgins, 125 Mo., 364;
28 S. W. Rep., 638.

Subsequent constitutional amendments will repeal conflicting charter provisions. Donahue v. Graham, 61 Cal., 276; East St. Louis v. Amy, 120 U. S., 600; Hagerstown v. Dechert, 32 Md., 369; Public School Trustees v. Taylor, 30 N. J. Eq., 618.

Conflict must emist, otherwise special municipal charter stands. People ex rel. v. Jobs, 7 Colo., 475; 4 Pac. Rep., 798.

Prospective provisions in revising act. Reading v. Heppleman, 61 Pa. St., 233.

²⁴ State *ex rel.* v. Field, 99 Mo., 352; 12 S. W. Rep., 802. This case was approved in these words: "We think it was properly ruled that the special charter superseded the general statutes where the two conflicted as to a *mere municipal regulation*, and we hold that the condemnation proceedings to acquire land for streets, parks, waterworks, sewers and the like clearly fall within municipal regulation." Kansas City v. Marsh Oil Co., 140 Mo., 458, 472; 41 S. W. Rep., 943.

See Kansas City v. Smart, 128

organized, or which might thereafter be organized under the provisions of the constitution, allowing cities to frame or adopt their own charters, to establish and maintain a system of parks or boulevards, was declared unconstitutional, as an attempt to amend a municipal charter; the court holding that the act related "solely to matters of internal municipal government."25 So a charter section providing that any appointed municipal officer may be removed by the mayor or council for cause is not repealed by a legislative act providing for removal of any state, county or city officers, guilty of wilful and corrupt neglect of official duty, and for a trial by jury, if demanded.26

By constitution in Minnesota, general laws relating to affairs

of cities, applying equally to all cities of a class, "shall be paramount while in force to the provisions relating to the same matter included in the local charter," authorized by the constitution. "But no local charter provision or ordinance Mo., 272; 30 S. W. Rep., 773; Kansas City v. Ward, 134 Mo., 172; 35 S. W. Rep., 600; Tacoma Gas & E. L. Co. v. Tacoma, 14 Wash., 288; 44 Pac. Rep., 655.

But in Ewing v. Hoblitzelle, 85 Mo., 64, at page 77, the court, auguendo, says a charter provision as to a board of police commissionwould not have prevailed against a state law in force at the time the St. Louis Charter was adopted. This dictum thus broadly stated appears to antagonize the principle of the unanimous decision in the Field case, which, briefly stated, is that a charter provision may prevail against a state law on the same subject. But this distinction between the two cases The St. Louis is controlling: charter not only expressly provides "That no system of police shall be established or maintained other than the present metropolitan system as long as the same is established by law" (Art. III., Sec. 26, par. 2), but the matter of preserving the public peace and order is usually regarded as a proper function of the state, whereas, in the Field case, the subject involved was purely local and municipal.

25 Kansas City v. Scarritt, 127 Mo., 642; 29 S. W. Rep., 845; 30 S. W. Rep., 111.

In California it has been held that constitutional charter provisions in conflict with general laws passed after the adoption of the charter will be superseded. Davies v. Los Angeles, 86 Cal., 37; 24 Pac. Rep., 711. Thus a general law relating to street improvements applicable to all the cities of the state, will supersede provisions of freeholder's charters on the same subject. Thomason v. Ashworth, 73 Cal., 73; 14 Pac. Rep. 615. Compare St. Louis v. Dorr, 145 Mo., 466; 41 S. W. Rep., 1094; 46 S. W. Rep., 976; Murnane v. St. Louis, 123 Mo., 479; 27 S. W. Rep., 711.

Charter provisions relating to streets inconsistent with provisions of a new or amended constitution are, of course, repealed. Donahue v. Graham, 61 Cal., 276.

26 State ex rel. v. Walbridge, 119 Mo., 383; 24 S. W. Rep., 457; Manker v. Faulhaber, 94 Mo., 430; 6 S. W. Rep., 372.

passed thereunder shall supersede any general law of the state defining or punishing crimes or misdemeanors." A statute authorizing cities of a certain class to license particular things, such as the sale of intoxicating liquors, does not repeal the provisions of the general law on the subject. But if the city, acting under the power given by the general law, licenses the thing, one acting under a license cannot be punished under the general law. A general law applicable to the entire state will not modify or repeal, in whole or in part, a special act, unless by express words or by necessary implication. Where the constitution of the state, as in California, contains a provision so as to except municipal affairs from being subject to and controlled by the operation of general laws, cities to which the provision applies are not affected by general laws relating to municipal affairs.

§ 215. When ordinances supersede general laws. Sometimes ordinances authorized by charter will have the effect of special laws of the legislature and will supersede the general laws within the corporate limits relating to that particular subject.³² Ordinances passed by a city council under a charter giving the city power to pass ordinances inconsistent with and repugnant to the general law, by necessary implication, repeal the general law upon the subject within the territorial limits of the city.³³ The Supreme Court of Louisiana invoked the same doctrine in holding that the provision of a municipal charter which con-

²⁷ Laws of Minn., 1897, pp. 507-509.

28 State v. Young, 17 Kan., 414. Where the constitution confers power upon the corporate authorities to impose fines or penalties for the unauthorized sale of intoxicating liquors, they are not limited or restricted to the same penalties imposed by the general law. Baldwin v. Murphy, 82 III., 485. But see Sec. 178, supra.

²⁹ Berry v. People, 36 Ill., 423; Gardner v. People, 20 Ill., 430. But see Ch. XV.

30 State (Gorum) v. Mills, 24 N. J. L. 177.

31 Popper v. Broderick, 123 Cal.,
 456; 56 Pac. Rep., 53; Morton v.

Broderick, 118 Cal., 474; 50 Pac. Rep., 644. See Ch. XV. Of Municipal Control of Offenses Against State.

³² Rogers v. People, 3 Colo., 450;
12 Pac. Rep., 843; In re Goddard,
16 Pick. (Mass.), 504; State v.
Dwyer, 21 Minn., 512; State v.
Clarke, 54 Mo., 17; State v. Clarke,
25 N. J. L., 54; State v. Morristown, 33 N. J. L., 57; Mark v.
State, 97 N. Y., 572; In re Snell, 58
Vt., 207; 1 Atl. Rep., 566.

33 St. Johnsbury v. Thompson, 59 Vt., 300; 59 Am. Rep., 731; 9 Atl. Rep., 571; Bennett v. People, 30 Ill., 389; Des Moines Gas Co. v. Des Moines, 44 Iowa, 505; 24 Am. Rep., 756,

ferred power to pass and enforce ordinances to suppress and punish the sale of adulterated drinks was not superseded by a general statute providing for the prosecution of the same offense throughout the state.34 "In the absence of anything showing a different intent on the part of the legislature, general legislation upon a particular subject must give way to later inconsistent special legislation upon the same subject." But where the charter does not confer upon the city authorities exclusive jurisdiction over the subject, ordinances passed by the city do not supersede the general law.36 Where a subsequent general law and prior special law, or ordinance provisions, do not conflict, they both stand and will be construed accordingly.³⁷ But if the two acts are irreconcilably inconsistent, or it appears that the legislature intended that the later act should supersede the earlier act, the former is repealed by implication.38 Where an amendatory act covers the subject of the qualifications of an officer, as mayor, in like manner as the original charter, but omits a proviso relating to certain disqualifications, it will be held that the proviso stands as part of the revised charter, as it did not conflict-with the corre-

34 State v. Labatut, 39 La. Ann., 513; 2 So. Rep., 550.

35 St. Johnsbury v. Thompson, 59 Vt., 300; 9 Atl. Rep., 571; 59 Am. Rep., 731.

36 Berry v. People, 36 Ill., 423; Seibold v. People, 86 Ill., 33. See Ch. XV. Of Municipal Control of Offenses Against State.

A by-law which a borough was authorized to make by its charter, which prohibited the taking of oysters from the water within said borough, during a certain period of the year, is abrogated by a general law of the state passed subsequent to the granting of the charter, prohibiting the doing of the same acts. Southport v. Ogden, 23 Conn., 128.

The passage of an ordinance by the city of Lexington, authorizing a fine of 100 dollars for a breach of the peace, did not repeal the general law, which authorizes a fine at the discretion of a jury by the authority of the city court. Marsh v. Commonwealth, 12 B. Mon. (Ky.), 25.

37 Simpson v. Savage, 1 Mo., 359; Baldwin v. Green, 10 Mo., 410; State v. Simonds, 3 Mo., 414; State v. Payne, 4 Mo., 377; State v. Cowan, 29 Mo., 330.

As to the right of both city and state to license or tax the same subject or object: Ferries-Harrison v. State, 9 Mo., 530. Auctioneers-Haywood v. Savannah, 12 Ga., 404.

38 Manker v. Faulhaber, 94 Mo., 430; 6 S. W. Rep., 372; State ex rel. Walbridge, 119 Mo., 383; 24 S. W. Rep., 457; State ex rel. v. Slover, 134 Mo., 607; 36 S. W. Rep., 50; State ex rel. v. Stratton, 136 Mo., 423; 38 S. W. Rep., 83; Waller v. Everett, 52 Mo., 57; State ex rel. v. Edwards, 136 Mo., 360; 38 S. W. Rep., 73; State ex rel. v. Heisponding provision contained therein.³⁹ Of course, the power granted by the charter to pass an ordinance which will supersede a state statute may be subsequently revoked by the legislature.⁴⁰

As we have seen, authorized ordinances have the same force and effect within the corporate limits that acts of the legislature have on the people throughout the state.⁴¹ It therefore follows that whether an ordinance is in apparent or real conflict with a general law, or whether it will supersede such law, must be determined by the same principles applicable to charter provisions.⁴²

dorn, 74 Mo., 411; State ex rel. v. Dolan, 93 Mo., 467, 473; 6 S. W. Rep., 366.

39 The court said that the point that the proviso was repealed might perhaps have been more successfully urged had it not been expressly provided in the amendatory act, "that all such parts of the act to which this is a supplement as are contrary to, or inconsistent with the provisions of this act, be and the same are hereby repealed." State v. Merry, 3 Mo., 278, 280. The contrary rule is intimated in Goodenow v. Buttrick, 7 Mass., 140, 143.

40 People v. Hanrahan, 75 Mich., 611; 42 N. W. Rep., 1124; Rogers v. Jones, 1 Wend. (N. Y.), 237; St. Louis v. Cafferata, 24 Mo., 94; St. Louis v. Bentz, 11 Mo., 61; Mobile v. Allaire, 14 Ala., 400; Elk Point v. Vaughn, 1 Dak., 113; 46 N. W. Rep., 577.

41 St. Johnsbury v. Thompson, 59 Vt., 300; 9 Atl. Rep., 571; 59 Am. Rep., 731; Hopkins v. Mayor, 4 M. & W., 621; State ex rel. v. Walbridge, 119 Mo., 383, 394; 24 S. W. Rep., 457; Union Depot Ry. Co. v. Southern R. R. Co., 105 Mo., 562, 575; 16 S. W. Rep., 920; Jackson v. Grand Av. Ry. Co., 118 Mo., 199, 218; 24 S. W. Rep., 192; New Orleans Water Works v. New Orleans

leans, 164 U. S., 471, 481; Buttrick v. Lowell, 1 Allen (Mass.), 172; Brick Pres. Church v. New York, 5 Cowen (N. Y.), 538, 541; Sec. 12, supra.

⁴² State v. Binder, 38 Mo., 451, held that a city ordinance, passed pursuant to authority conferred upon the city, operated as a repeal of å general state law.

State v. Clarke, 54 Mo., 17, holds that the power given St. Louis under the Charter of 1870, Art. III., Sec. 1, "to regulate bawdy houses," operated as a repeal of the general statute prohibiting them, in respect to the City of St. Louis. (See Ex parte Garza, 28 Tex. App., 381; 13 S. W. Rep., 779; 19 Am. St. Rep., 845.) State v. De Bar, 58 Mo., 395, affirms this case and grounds judgment on the principle that where a special provision applicable to a particular object or locality is inconsistent with the general law, the former must prevail. And this rule applies to a comparison of duly authorized ordinances with state statutes, since both are from a common source of authority.

Where the matter is committed by state statute to the exclusive jurisdiction of the municipality—as to license, tax, restrain, prohibit the selling of intoxicating liquor,

§ 216. Effect on ordinances by surrender of special charter -Change in class or grade. Unless otherwise provided by statute, when a city surrenders its special charter and elects to be governed by the general incorporation laws applicable, or advances to a higher class, or is reduced to a lower municipal grade, all its rights, liabilities, property, suits, etc., remain unaffected by the change. All rights and property vested in the former organization become vested in the new.43 While the adoption of the general incorporation law by a city organized under special charter repeals all inconsistent provisions of such charter, consistent provisions continue in force.44 ordinances and resolutions in force remain so, until altered or repealed, unless inconsistent with the law applicable to the new organization.45

etc.—such express grant of power will be construed to supersede prior state laws conferring jurisdiction on the state over the subject. Huffsmith v. People, 8 Colo., 175; 6 Par Rep., 157.

The rule is illustrated in numerous decisions. Smith v. Madison, 7 Ind., 86; Burlington v. Lawrence, 42 Iowa, 681; In re Goddard, 16 Pick. (Mass.), 504; St. Louis v. Alexander, 23 Mo., 483; St. Louis v. Cafferata, 24 Mo., 94; St. Louis v. Bentz, 11 Mo., 61; Baldwin v. Green, 10 Mo., 410; Harrison v. State, 9 Mo., 530; State v. Simonds, 3 Mo., 414; State v. Payne, 4 Mo., 377; State v. Cowan, 29 Mo., 330; Westport v. Kansas City, 103 Mo., 141; 15 S. W. Rep., 68; State v. Morristown, 33 N. J. L., 57; State v. Clarke, 25 N. J. L., 54; Mark v. State, 97 N. Y., 572.

48 California-General Laws of California (Deering), 1897, p. 607, provide that proceedings theretofore commenced shall, after such reorganization, be conducted in accordance with the provisions of such general laws.

Iowa-Iowa Code, of 1897, Secs. 631, 637.

Illinois-1 Starr & Curtis Anno. Ill. Stat. (2nd Ed.), pp. 678, 679; Illinois v. Illinois Central R. Co., 33 Fed. Rep., 730; Carney v. Marseilles, 136 Ill., 401; 26 N. E. Rep., 491.

Ohio-1 Bate's Anno. Ohio Stat., Secs. 1539, 1633 to 1647; Corry v. Gaynor, 22 Ohio St., 584; Hubbard v. Norton, 28 Ohio St., 116; Goodale v. Fennell, 27 Ohio St., 426; Raymond v. Cleveland, 42 Ohio St.,

UnitedStates — Evanston Gunn, 99 U.S., 660.

44 Crook v. People, 106 Ill., 237; Chicago D. and C. Co. v. Garrity, 115 Ill., 155; 3 N. E. Rep., 448; Water Com'rs of Springfield v. People, 137 Ill., 660; 27 N. E. Rep., 698; Hayward v. People, 145 Ill., 55; 33 N. E. Rep., 885.

Change does not affect city charter relating to school system. Smith v. People, 154 Ill., 58; 39 N. E. Rep., 319.

45 Moore v. Cincinnati, 26 Ohio St., 582; Cotter v. Doty, 5 Ohio, 393; Zanesville v. Muskingum Co., 5 Ohio St., 590; Hubbard v. Norton, 28 Ohio, St., 116; Neff v. Bates, 25 Ohio St., 169.

So on change of class or grade, all ordinances continue in force unless inconsistent with the powers relating to the class or grade which the city enters, until amended or repealed.⁴⁶ Thus a statute converting a borough into a city does not, of itself, and in the absence of express provisions to that effect, annul existing ordinances.⁴⁷

§ 217. Same—Dissolution and reorganization. An absolute repeal of a municipal charter is effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated in law as the successor of the old one, entitled to its property rights, and subject to its liabilties.⁴⁸ Since the new succeeds to all rights and assumes all obligations of the old corporate organization, it has the effect of continuing in existence all ordinances and franchises which constitute contracts and under which rights have become vested.⁴⁹

All ordinances, resolutions and by-laws in force in any city or town when it shall organize under general incorporation laws shall continue in force and effect until repealed or amended, notwithstanding such change of organization, and the making of such change shall not be construed to effect a change in the legal identity, as a corporation, of such city or town. 1 Starr & Curtis Ill. Stat. (2nd Ed.), p. 679. The provision is intended to continue in force ordinances adopted under special charters, which could lawfully be enacted under the general law. Cairo v. Bross, 101 Ill., 475, 479; 9 Ill. App., 406; Law v. People, 87 Ill., 385.

⁴⁶ Code of Washington, 1896, Sec. 1132.

Neff v. Bates, 25 Ohio St., 169; Hubbard v. Norton, 28 Ohio St., 116.

Passing from one class to another, ordinances remain the same.

Ritchie v. South Topeka, 38 Kan., 368; 16 Pac. Rep., 332.

⁴⁷ Trustees Erie Academy v. Erie, 31 Pa. St., 515.

A provision in such statute, that the existing ordinances shall remain in force, provided they shall be recorded within four months thereafter, is merely directory; and a non-compliance therewith does not affect the validity of such ordinances. Trustees Erie Academy v. Erie, 31 Pa. St., 515.

⁴⁸ Shapleigh v. San Angelo, 167 U. S., 646.

Where a town is reincorporated with the same name and substantially the same powers as before but with some excision of population and territory, the effect is not to extinguish the debts of the original corporation, but to leave them subsisting as valid obligations against the new one. Ross v. Wimberly, 60 Miss., 345, overruling Port Gibson v. Moore, 13 Smed. & M. (Miss.), 157.

49 Episcopal C. Soc. v. Episcopal

Although a place may have no legal existence as a body politic and corporate, because not incorporated according to law, and which in proper proceeding is adjudged to be dissolved as a municipal corporation, but is subsequently legally incorporated as a city, embracing the same territory as the illegal corporation, street improvement bonds issued while it existed as a de facto corporation are binding on the new corporation; and the fact of legal disincorporation does not have the effect of avoiding subsisting contracts of the de facto municipal government.⁵⁰

§ 218. Same — By consolidation or change of corporate limits. Where a municipal corporation is legislated out of existence and its territory annexed to other corporations, the latter, unless the legislature otherwise provides, become entitled to all its property and immunities, and are severally liable for a proportional share of all its then subsisting legal

Ch., 1 Pick. (Mass.), 372; Atty. Gen. v. Leicester, 9 Beav., 546.

The effect of a new charter in reincorporation merely continues the old corporation and does not have the effect of extinguishing the debts of the city incurred under the former charter. Smith v. Morse, 2 Cal., 524, 554; Hopkins v. Swansea, 4 M. & W., 621.

"It has never been disputed that new charters revive, and give activity, to the old corporation; where the question has arisen, in which there was any remarkable metamorphosis, it has always been determined that they remain the same as to debts and rights." Per Lord Mansfield, quoted in Smith v. Morse, 2 Cal., 524, 554.

Question discussed as to effect of reorganizing a public corporation. Savannah v. Steamboat Co., R. M. Charlt. (Ga.), 342.

50 Shapleigh v. San Angelo, 167
 U. S., 646; Ranken v. McCallum,
 25 Tex. Civ. App., 83; 60 S. W. Rep., 975.

So town orders duly issued after the attempted incorporation and

organization of a town from certain detached territory of two other towns are chargeable against such towns, where the ordinance creating the new town is judicially vacated in a direct proceeding subsequent to the issuing of such orders. Gilkey v. Town of How, 105 Wis., 41, 81 N. W. Rep., 120, relying on Shapleigh v. San Angelo, 167 U. S., 646.

But where the legal municipal corporations succeed to all the franchises, rights, property, public improvements, people and territory of such de facto governments, it is competent for the legislature to require the de jure governments to assume the obligations and pay the debts of their illegal unauthorized predecessors. Mayor, etc., of Guthrie v. Territory ex rel Losey, 1 Okla., 188; 31 Pac. Rep., 190; 21 L. R. A., 841; Guthrie Nat. Bank v. Guthrie, 173 U. S., 528; Coast Co. v. Spring Lake Borough, 56 N. J. Eq., 615; 36 Atl. Rep., 21; Blackburn v. Oklahoma City, 1 Okla., 292; 31 Pac. Rep., 782; 33 Pac. Rep., 708.

debts, and vested with the power to raise revenue wherewith to pay them by levying taxes on the property transferred and the persons residing therein.⁵¹ All franchise ordinances and ordinances resulting in contracts which have created a liability or obligation upon the part of the city and private persons or corporations, are not affected by the consolidation, but are continued in force, and the liability of the annexed town is assumed by the consolidated town, upon the principle that, having received the benefits of the assets, this is a sufficient consideration for being charged with the debts and liabilities of the territory annexed.⁵² Where a consolidation of two or more towns is effected, each having its peculiar ordinance provisions. it is sometimes provided in the act of consolidation that the ordinances then in force shall remain in force within the limits of the territory for which they were enacted, until repealed by the aldermen of the consolidated city.⁵³ As stated elsewhere,54 a municipal ordinance, regulation or contract designed for the city at large operates throughout its boundaries whatever their change.55

⁵¹ Mt. Pleasant v. Beckwith, 100 U. S., 514; Wade v. Richmond, 18 Gratt. (Va.), 583; Higginbotham v. Commonwealth, 25 Gratt. (Va.), 627, 633.

Where the whole territory of a town is annexed to another, the annexed town is destroyed, and its assets and liabilities become assets and liabilities of the town to which it is annexed, unless otherwise provided in the statute, or ordinance making the annexation. Schriber v. Langdale, 66 Wis., 616; 29 N. W. Rep., 547, 554; Guthrie v. Territory, 1 Okla., 188; 31 Pac. Rep., 190; 21 L. R. A., 841.

52 Schriber v. Langdale, 66 Wis.,616; 29 N. W. Rep., 547, 554.

53 Roche v. Jersey City, 40 N. J. L., 257.

An ordinance passed by the board of aldermen of the consolidated city was held to apply to the whole city and that it acted as a repeal of all ordinances in the respective cities forming the consolidation.

idated city upon that subject. Roche v. Jersey City, 40 N. J. L., 257.

Where a village corporation is created whose limits among other territory comprises parts of two towns, and the power to improve the streets of the new corporation is vested in a board of village trustees, it has the effect of repealing or superseding the power of the old towns to make improvements. Bull v. Southfield, 14 Blatch. (U. S.), 216; 4 Fed. Case, No. 2120.

Special provisions as to force of ordinance where two cities consolidate. Camp v. Minneapolis, 33 Minn., 461; 23 N. W. Rep., 845.

Prior ordinances remain in force, when. People v. Harrison, 191 Ill., 257; 61 N. E. Rep., 99, affirming 92 Ill. App., 643.

54 Sec. 26, supra.

55 St. Louis Gas Light Co. v. St.
 Louis, 46 Mo., 121; Toledo v.
 Edens, 59 Iowa, 352; 13 N. W.
 Rep., 313.

CHAPTER VIII

OF CONSTITUTIONALITY OF ORDINANCES.

- In general.
- 2. Ordinances impairing the obligation of contracts.
- 3. Ordinances interfering with or attempting to regulate foreign or inter-state commerce.

1. IN GENERAL.

- tutional-Enumeration.
- 220. Ordinances in derogation of common rights.
- 221. Same-Use of private property.
- 222. Same-Use of public property-Streets.
- 223. Taking or damaging private property.
- 224. Oppressive regulations.
- 225. Relating to individual liberty.

- § 219. Ordinances must be consti- § 226. Discriminating on account of class, race or religious sect. etc.
 - 227. Same-The San Francisco Queue ordinance.
 - 228. Regulating personal association, employment, etc.
 - 229. Personal liberty-Drunkenness.
 - 230. Mode of trial.
 - 231. Officer has no vested right in office - Office may be changed or abolished.

ORDINANCES IMPAIRING THE OBLIGATION OF CONTRACTS.

- § 232. Ordinances cannot impair the obligation of contracts.
 - 233. Ordinance as "Law."
 - 234. Ordinances as contracts.
 - 235. The "Obligation" of the contract.
 - 236. Question is for decision of States United Supreme Court.
 - 237. Taxation by municipal corporation of its own bonds, etc.
 - 238. Ordinances granting franchises as contracts.
 - 239. Same—Imposing additional burdens.
 - 240. Same-Exclusive privileges.

- § 241. Franchise contracts authorized by state.
 - 242. Reservation of right to alter. amend or repeal franchise contracts.
 - 243. Contracts of contractors for public work.
 - 244. Same-Rights vested in the contractor.
 - 245. Same subject -- Illustrative cases.
 - 246. Interest on special tax bills as part of obligation.
 - 247. When new remedy controls.
 - 248. When old law to be followed.

2. ORDINANCES INTERFERING WITH OR ATTEMPTING TO REGULATE FOREIGN OR INTERSTATE COMMERCE.

§ 249. Ordinances cannot interfere § 250. Meaning term with or regulate inter-state merce." or foreign commerce.

- § 251. No analogy between the power of taxation and the regulation of commerce.
 - 252. License tax on those engaged in exporting and importing.
 - 253. License tax for privilege of selling goods, etc.
 - 254. Same Discrimination not the test.
 - 255. Same-Where goods sold are in the state.
 - 256. Same—Same—Peddlers.
 - 257. Personal contracts-Occupation tax.
 - 258. License tax on brokers. agents, etc., engaged in inter-state commerce.
 - 259. Discriminating license tax void.
 - 260. License tax under police power.
 - 261. Same-Telephone and telegraph poles in streets.

- § 262. Taxation of property employed in inter-state or foreign commerce.
 - 263. License tax on foreign corporations.
 - 264. Cannot regulate or tax operations or objects of interstate or foreign commerce.
 - 265. Same-Property in transit.
 - 266. License for privilege of navigation.
 - 267. License and taxation of ferries, etc.
- 268. Wharfage charges.
- 269. Wharfage distinguished from tonnage.
- 270. Local police regulations.
- 271. Same Scope of police power.
- 272. Same—Quarantine laws.
- 273. Same subject.
- 274. Harbor and local police regulations.

Ordinances must be constitutional — Enumeration.1 The restrictions imposed by the constitution of the United States and that of the state which limit the power of the state, in like manner limit the authority of the municipal corporation. Therefore the local corporation cannot legally pass:

First, an ex post facto ordinance, or one retrospective in its operation: or.2

¹ An ordinance which conflicts with the constitution is void. Savannah v. Hussey, 21 Ga., 80; 68 Am. Dec., 452; McGrath v. Chicago, 24 Ill. App., 19; New Orleans v. Mechanics and Traders' Ins. Co., 25 La. Ann., 389.

The general proposition is well established that no law will be declared unconstitutional unless clearly so and every reasonable intendment will be made to sustain it. Wells v. Mo. Pac. R. R., 110 Mo., 286; 19 S. W. Rep., 530; State ex rel. v. Simmons Hdw. Co., 109 Mo., 118; 18 S. W. Rep., 1125; State ex rel. v. County Court, 102

Mo., 531; 15 S. W. Rep., 79; State ex rel. v. Mo. Pac. R. R., 92 Mo., 137; 6 S. W. Rep., 862; State v. Hope, 100 Mo., 347; 13 S. W. Rep., 940; State v. Pond, 93 Mo., 606, 618; 6 S. W. Rep., 469; Kelly v. Me ks, 87 Mo., 396; State v. Addington, 77 Mo., 110; People v. Rosenberg, 138 N. Y., 410; 34 N. E. Rep., 285; People v. Angle, 109 N. Y., 564; 17 N. E. Rep., 413; People v. West, 106 N. Y., 293; 12 N. E. Rep., 610: Bertholf O'Reily, 74 N. Y., 509; Erie & N. E. R. R. v. Casey, 26 Pa. St., 287. ² U. S. Const., art. I, sec. 10.

RETROSPECTIVE ORDINANCES. "No

Second, an ordinance impairing the obligation of contracts; or,³

Third, an ordinance laying imposts or duties on imports or exports; or,4

Fourth, an ordinance laying a "duty of tonnage;" or,5

Fifth, an ordinance regulating interstate or foreign commerce; or,6

laws can operate retrospectively unless they are explanatory of the statute, or declaratory of the common law. With these exceptions, statutes and ordinances will always be construed as applying their principles to cases in future, or subsequent to their enactment." Rule applied to an ordinance relating to assessment. Howard v. Savannah, Thos. U. P. Charlton (S. C.), 173.

Retroactive effect may be given to an ordinance unless constitutional rights are infringed. Thus an ordinance passed after a municipal election, may create a tribunal and prescribe the mode of procedure for determining election contests growing out of it. State v. Johnson, 17 Ark., 407.

Ordinance not retrospective. Willow Springs v. Withaupt, 61 Mo. App., 275.

As to binding effect on street railway company not in existence when the ordinance was enacted, see Thompson v. Citizens' St. Ry., 152 Ind., 461; 53 N. E. Rep., 462.

Retrospective ordinance is viewed with disfavor. Carson v. Bloomington, 6 Ill. App., 481; Hansen v. Meyer, 81 Ill., 321; *In re* Fuller, 79 Ill., 99.

³ Const. of U. S., art. I, sec. 10. *United States*—Walla Walla v. Walla Walla Water Co., 172 U. S., 1.

Georgia—Haywood v. Savannah, 12 Ga., 404.

Illinois-Illinois Conference Fe-

male College v. Cooper, 25 Ill., 148.

Indiana—Indianapolis v. Consumers' Gas Trust Co., 140 Ind., 107; 49 Am. St. Rep., 183; 39 N. E. Rep., 433.

Iowa—Davenport, etc., Co. v Davenport, 13 Iowa, 229.

Missouri—State ex rel. v. Laclede Gaslight Co., 102 Mo., 472; 14 S. W. Rep., 974; 15 S. W. Rep., 383; 22 Am. St. Rep., 789; Neill v. Gates, 152 Mo., 585; 54 S. W. Rep., 460.

New York—Coates v. New York, 7 Cow. (N. Y.), 585.

Pennsylvania — Western Saving Society v. Philadelphia, 31 Pa. St., 175.

Virginia — Davenport v. Richmond, 81 Va., 636; 59 Am. Rep.,

Section 232, et seq., post.

4 "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." U. S. Const., art. I, sec. 10, par. 2; Brown v. Maryland, 12 Wheat. (U. S.), 419; McCulloch v. Maryland, 4 Wheat. (U. S.), 316. ⁵ Const. of U. S., art. I, sec. 10, par. 3. Section 269, post.

6 "The Congress shall have power to regulate commerce with for-

Sixth, an ordinance abridging the privileges or immunities of citizens of the United States, or denying to any person within the municipality "the equal protection of the laws," as discriminating against non-residents in occupation and license taxes, etc.; or,7

Seventh, an ordinance depriving any person of his liberty. or authorizing the taking of private property, without due process of law; or,8

Eighth, an ordinance in derogation of other constitutional eign nations and among the several states." U. S. Const., art. I. sec. 8, clause 3. Section 249, et seq., post.

7 "The citizens of each state shall be entitled to the privileges and immunities of citizens in the several states." U. S. Const., art. II, sec. 2.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any citizen of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., 14th Amendment; Ah Kow v. Nunan, 5 Sawyer (U. S.), 552.

"EQUAL PROTECTION OF THE LAW." In re Sam Kee, 31 Fed. Rep., 680; State v. Topeka, 36 Kan., 76; 12 Pac. Rep., 310; 59 Am. Rep., 529; State v. Dering, 84 Wis., 585; 36 Am. St. Rep., 948; 54 N. W. Rep., 1104.

Ordinance requiring bicycles to carry light after dark is constitutional. Des Moines v. Keller, 116 Iowa, 648.

Section 259, post.

Ordinance forbidding keeping private markets within specified distance from public market, held constitutional. "The case is too plain for discussion," per Mr. Justice Gray, in Natal v. Louisiana,

139 U. S., 621, 624, affirming State v. Natal, 39 La. Ann., 439; 1 So. Rep., 923.

Ordinance requiring that stages used for the transportation of passengers should be licensed, and providing that persons violating it might be fined \$100, or imprisoned ninety days, does not deny to the drivers of such stages the equal protection of the laws, or subject them to cruel and unusual punishment. Belmar v. Barkalow, 67 N. J. L., 504; 52 Atl. Rep., 157.

8 U. S. Const., 14th Amendment; Coates v. New York, 7 Cow. (N. Y.), 585.

Removal of dead animals. River Rendering Co. v. Behr, 77 Mo., 91. License of non-resident vehicles. St. Charles v. Nolle, 51 Mo., 122; 11 Am. Rep., 440.

Improvement ordinances - failure to provide for notice and hearing. Spencer v. Merchant, 125 U. S., 345; Norwood v. Baker, 172 U. S., 269, affirming 74 Fed. Rep., 997: Baltimore v. Ulman, 79 Md., 469; 30 Atl. Rep., 43; Ulman v. Baltimore, 72 Md., 587; 20 Atl. Rep., 141; 21 Atl. Rep., 709.

Ordinance requiring all printing to bear union label violates the 14th Amendment, as it deprives those not using the label from pursuing their avocation as far as printing is concerned. Marshall v. Nashville (Tenn., 1903), 71 S. W. Rep., 815. See ch. XVI, Of

and recognized common rights, relating to the liberty or property of the individual; or,9

Ninth, an ordinance in conflict with a provision of the constitution of the state. Most of the state constitutions contain various specific restrictive provisions of the powers of municipal corporations. Thus they are forbidden by ordinance or otherwise from loaning their credit, granting money in aid of, or to, individuals or corporations, or becoming stockholders in corporations or associations; conferring exclusive franchises upon individuals or corporations to lay down railroad tracks in streets, supply light, water or other necessities or conveniences to the inhabitants; authorizing irrevocable grants of special privileges or immunities; granting extra compensation, fee or allowance to a municipal officer, agent, servant or contractor after service has been rendered or the contract has been entered into and performed in whole or in part; authorizing the payment of any claim created against the city under contract made without express warrant of law; legalizing the unauthorized or invalid acts of municipal officers, agents, servants or contractors; changing the compensation of a municipal

Public Improvement Ordinances, sec. 553, post.

"Due process of law" and "equal protection of the laws."

United States — Blake v. McClung, 172 U. S., 239; Gulf, C. & S. F. Ry. v. Ellis, 165 U. S., 150, 154; Duncan v. Missouri, 152 U. S., 377, 382; O'Neil v. Vermont, 144 U. S., 323, 361; Spies v. Illinois, 123 U. S., 131; Santa Clara County v. So. Pac. R. R. Co., 118 U. S., 394; Yick Wo v. Hopkins, 118 U. S., 356; Neal v. Delaware, 103 U. S., 370; Strauder v. West Virginia, 100 U. S., 303; Davidson v. New Orleans, 96 U. S., 97; Slaughter House Cases, 16 Wall. (U. S.), 36.

California—Ex parte Lacey, 108 Cal., 326; 41 Pac. Rep., 411; 49 Am. St. Rep., 93.

Georgia—Cosgrove v. Augusta, 103 Ga., 835; 31 S. E. Rep., 445; 68 Am. St. Rep., 149. Illinois—Chicago v. Netcher, 183 Ill., 104; 55 N. E. Rep., 707.

Louisiana—Waters-Pierce Oil Co. v. New Iberia, 47 La. Ann., 863; 17 So. Rep., 343.

Mississippi—Donovan v. Vicksburg, 29 Miss., 247; 64 Am. Dec., 143.

Ohio—Branahan v. Hotel Co., 39 Ohio St., 333; 48 Am. Rep., 457.

Forfeiture of animals running at large, sec. 172, supra.

9 Section 220, et seq., post.

Right of trial by jury. See ch. X, Of Action to Enforce Ordinances. Sec. 330, et seq., post.

Ordinance forbidding sale of specified newspaper, held unconstitutional. *Ex parte* Neill, 32 Tex. Crim. App., 275; 40 Am. St. Rep., 776.

Changing rule of evidence in criminal charge. In re Wong Hane,

officer during his term of office; extending the term of office, etc.¹⁰

§ 220. Ordinances in derogation of common rights. Many cases have declared the ordinance void because found to be in derogation of common rights. Generally speaking, such rights are understood to be rights which are common to all. sustaining an ordinance which imposed a penalty upon retail grocers for keeping spirituous liquors on their premises for the purpose of retailing the same, without a license, in an early case, the Supreme Court of South Carolina observed: "That which is not prohibited may be lawfully done, but that which is prohibited by law, no one has a right to do. If there was no law interfering, the butcher might kill his beeves and hogs in the street. If the butcher could do it any man might, and it might therefore be said to be a common right; but when the law prohibited it, it was no longer a common right. Before the ordinance * * * it was the common right of every citizen to keep spirituous liquors in his retail shop or anywhere else at his pleasure; but when it was found by experience that this was an easy method of violating the law prohibiting shopkeepers from selling spirits to slaves and cab loafers about town, and an ordinance was passed to prohibit such shopkeepers from keeping it in their shops and in secret back rooms adjoining, it was no longer a common right, but a legal restraint imposed on a few for the benefit of the many."11

The sovereign power in a community may, and ought to, prescribe the manner of exercising rights over property, since it is for the better protection and enjoyment of that absolute dominion which the individual claims. The power rests upon the implied right and duty of the supreme power to protect all by proper restrictions, to the end that, on the whole, the benefit of all is promoted. Every public regulation in a city may,

108 Cal., 680; 41 Pac. Rep., 693; 49 Am. St. Rep., 138.

10 Loaning money on credit by providing payment of interest on warrants for public work. Moran v. Thompson, 20 Wash., 525; 56 Pac. Rep., 29.

Forbidding removal of police officers except for cause is constitutional. Roth v. State ex rel., 158 Ind., 242; 63 N. E. Rep., 460.

Changing salary during term. Wadsworth v. Maysville, 24 Ky. Law Rep., 312; 68 S. W. Rep., 391; Grenada v. Wood (Miss., 1903), 33 So. Rep., 173.

¹¹ Per Evans, J., in Charleston v. Ahrens, 4 Strob. (S. C.), 241, 257.

and does, to a certain extent, limit and restrict the absolute right that existed previously, but this cannot be considered an injury. On the other hand, the individual is presumed to be benefited. If it should be determined that the corporate authorities have not the right to regulate the use of private property in the city, so as to prevent its proving pernicious to the health and comfort of the citizens generally, or injurious to certain classes of property and business within the city, it would strike at the very foundation of all police regulations. Every right, from an absolute ownership in property down to a mere easement, is purchased and holden, subject to the restriction that it shall be exercised so as not to injure, inconvenience or discommode others.¹²

§ 221. Same—Use of private property. An ordinance, forbidding washing and ironing in public laundries and wash houses, within defined limits, from 10 at night to 6 in the morning, was held to be a pure police regulation within the competency of a municipality possessed of the ordinary powers.¹³ But an ordinance passed by a corporation, possessing general powers incident to such corporations and without special charter authority, which required stores (except drug stores, for the sale of drugs and medicines) to be closed at 7:30 in the evening, except on Saturdays, was declared void in North Carolina, because oppressive and against common rights, as it deprived such storekeepers of their natural right, free use and

12 Baker v. Boton, 12 Pick. (Mass.), 184, 193; Vanderbilt v. Adams, 7 Cow. (N. Y.), 349; Stuyvesant v. New York, 7 Cow. (N. Y.), 1. c. 604, 605; Green v. Savannah, 6 Ga., 1; Shelton v. Mobile, 30 Ala., 540; 68 Am. Dec., 143; Rogers v. Jones, 1 Wend. (N. Y.), 237; 19 Am. Dec., 493; Warren v. Greer, 117 Pa. St., 207; 11 Atl. Rep., 415.

"Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants, are comprehensively styled police laws, and it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances." The principle was applied to an ordinance relating to use of water, which in effect compelled the water taker to bear the expense of putting in the meter. Hill v. Thompson, 16 Jones & Spencer (48 N. Y. Super. Ct. Rep.), 481, 489.

Ordinance cannot prohibit soliciting patrons. Thomas v. Hot Springs, 34 Ark., 553; 36 Am. Rep., 24.

¹³ Barbier v. Connolly, 113 U. S., 27, per Mr. Justice Field, affirmed in Soon Hing v. Crowley, 113 U. S., 703.

enjoyment of property, used in such way as not to interfere with the rights of others.¹⁴ So in the same state, an ordinance passed by a corporation possessing only general powers, forbidding one who sells liquor from occupying his own premises between 10 P. M. and 4 A. M., was condemned for the same reason.15 So under the general power "to regulate the wharves on the shore of the Ohio River adjoining said city." the city cannot by ordinance define the line of high-water mark and declare the erection of buildings below such line a nuisance and impose a fine on persons erecting such buildings on their own land. In North Carolina an ordinance providing that no person should erect or alter any building without first obtaining permission of the board of aldermen was held void as being unreasonable.17 But it may be stated that ordinances of this nature are generally sustained as being proper subjects within municipal police regulations. This subject is fully treated in the chapter on Police Powers.18

§ 222. Same—Use of public property—Streets. It was early held in Connecticut that a by-law, which restricted the privilege of fishing in a navigable river within the corporate limits to the inhabitants of the town, was void because in derogation of the common rights of the non-residents. Ordinances which permit the obstruction of public streets, in whole or in part, rendering them impassable, or in a measure useless to the public, are generally condemned. The city is the trustee of all public ways whether the fee is in the city or in the abutting

14 State v. Ray, 131 N. C., 814;42 S. E. Rep., 960. See sec. 480, post.

15 "If the general power to pass by-laws, intended for local government merely, carries with it, by implication, the authority to restrict the use of private property by prescribing the hours when a person shall be permitted to occupy his own house, then cities and towns need nothing more than the enactment of a law creating them, with the incidental grant embodied in sec. 3799 of The Code, to give them equal authority with the legislature itself, to restrict and regulate the right of personal

liberty and private property within the limits of the municipality. No such latitudinarian construction was intended by the legislature to be given by the statute and its attempted exercise was therefore invalid." State v. Thomas, 118 N. C., 1221, 1225, 1226; 24 S. E. Rep., 535. See sec. 480. post.

¹⁶ Evansville v. Martin, 41 Ind., 145.

¹⁷ State v. Tenant, 110 N. C., 609; 14 S. E. Rep., 387; 28 Am. St. Rep., 715.

¹⁸ Chapter XIV, secs. 470, 471, post.

19 Hayden v. Noyes, 5 Conn.,

property owners. The fact that the fee of the street is in the city does not authorize the municipal authorities to divert it from its legitimate purpose as a street. Hence, an ordinance authorizing a bridge approach in a public street which obstructs it is void.²⁰ So an ordinance authorizing the construction of a stairway, occupying a portion of a public alley, to the detriment of the traveling public, is void.²¹ Ordinances relating to the use of streets and public ways are treated in the chapters on Police and Franchise Ordinances.²¹/₂

§ 223. Taking or damaging private property. Notwithstanding the corporation has express power to protect the health, to declare and abate nuisances, etc., ordinances which, in effect, declare that all dead animals found in the city, not killed for human food, nuisances immediately after death, and making it unlawful for any person other than the city contractor to remove and dispose of them, have been held unreasonable, because the owner was denied the right of removal and also the right to realize any value the animal might have.²²

An ordinance designating limits outside of which no woman of lewd character shall dwell, containing a proviso that nothing therein shall be so construed as to authorize such women to occupy a house in any portion of the city, and containing no restriction respecting the legal right to restrain a private nuisance, was held by the Supreme Court of the United States a valid exercise of police power which does not invade the rights of property owners in or adjacent to the prescribed limits in violation of the federal constitution, notwithstanding the pecuniary value of their property may be depreciated as a result.²³

§ 224. **Oppressive regulations.** Under general power to regulate the sale of liquor by druggists, a provision in an ordinance exacting reports quarterly of the kind and quantity sold, when and to whom sold, and on whose prescription or assurance, under penalty, was held unreasonable.²⁴ So an or-

391; Willard v. Killingworth, 8 Conn., 247.

20 Stack v. East St. Louis, 85 Ill.,377; 28 Am. Rep., 619.

21 Pettis v. Johnson, 56 Ind., 139.

211/2 Chapters XIV and XVII.

22 State v. Morris, 47 La. Ann.,1660; 18 So. Rep., 710; River Ren-

dering Co. v. Behr, 77 Mo., 91. See sec. 452, post.

²³ L'Hote v. New Orleans, 177 U.
 S., 587; 20 Sup. Ct. Rep., 788. See sec. 475, post.

24 "The private citizen, invested with no public office or employment, should not be subjected to

dinance regulating merchants, engaged in buying and repacking loose cotton, which required them to give bond and to keep in a book specially provided for the purpose a daily record of the sellers of loose cotton and the quantity of each purchase, which book was required to be kept at all times open to the inspection of the police, was held unreasonable and void, in the absence of special legislation.²⁵ But an ordinance of Chicago requiring detailed daily reports to the police of all personal property received on deposit by pawnbrokers was held not oppressive or tyrannical, but a reasonable police regulation.²⁶

The question as to interfering with what are known as common rights has been variously answered by the decisions. Thus in North Carolina an ordinance imposing a tax on all persons engaged in the particular business, whether residents or not, was held valid against the contention that it was an interference with common rights.²⁷ But in Missouri a tax on wagons of non-residents, engaged in hauling into and out of the city, was held void.²⁸ This subject is more fully illustrated in other parts of this work.²⁹

§ 225. Relating to individual liberty. An ordinance authorizing certain officers to arrest and detain until the extinguishment of a fire, any person refusing to obey their direction, is unconstitutional for the reason that it deprives those arrested of their liberty without due process of law or a trial by jury. An ordinance authorizing police officers to make arrests without a warrant for breach of ordinances, not committed in their presence, is void. But if the ordinance is violated in the officer's presence and view he may arrest without warrant whether the ordinance so authorized or not. 32

such inquisition. * * * This section is an invasion of the sanctity of private business, and ought not to be tolerated." Clinton v. Phillips, 58 Ill., 102, 104.

Regulating the sale of intoxicating liquor, sec. 477, post.

²⁵ Long v. Shelby Co. Taxing District, 7 Lea (Tenn.), 134.

26 Launder v. Chicago, 111 Ill.,
 291. See sec. 492, post.

27 Edenton v. Capeheart, 71 N.
 C., 156.

²⁸ St. Charles v. Nolle, 51 Mo., 122; 11 Am. Rep., 440.

²⁰ Chapter VI, Reasonableness of Ordinances. Chapter XIII, License Tax. Chapter XIV, Police Regulations.

30 Judson v. Reardon, 16 Minn., 431.

31 Pesterfield v. Vickers, 3 Coldw. (Tenn.), 205.

32 Scircle v. Neeves, 47 Ind., 289; Nealis v. Hayward, 48 Ind., 19. See 306, post.

The Supreme Court of Texas held an ordinance void as being unreasonable in that it interfered with common rights, which forbade the renting of private property to lewd women or to any person for their use. This was held to be a proscriptive denial of shelter to that class, and therefore null and void and in contravention of common rights.³³ So an ordinance requiring a license for the doing of scavenger work in the city, and providing that all persons proposing to do such work must submit bids, and that the board of health shall decide who are competent bidders, and fixing the times at which closets shall be cleaned, is void as in derogation of common right, where no necessity is shown therefor, and the effect would be to prohibit property owners themselves from removing the refuse from their own premises. Respecting the effect of the ordinance the court said: "This is clearly an interference with a natural right, and while this may be allowable on the ground of public necessity, some such necessity must appear, and the ordinance must be reasonable in its provisions."34 Ordinances making it penal to carry concealed weapons have been judicially sanctioned as proper police regulations. Clearly the citizen has no natural right to do the thing forbidden.35 An ordinance of Boston providing that no person should, except by permission of the committee of the city council, deliver a sermon, lecture, address or discourse on the commons or other public grounds, was held constitutional.36 And in Michigan an ordinance forbidding the delivery of public address within half a mile of the city hall, without a license from the mayor, was sustained as reasonable.37 In the absence of express power, an ordinance declaring that any person bearing the reputation of a prostitute shall be fined, if residing or found within the corporate limits, is void.38 But an ordinance which forbids any

33 Milliken v. Weatherford, 54Tex., 388; 38 Am. Rep., 629.

34 State v. Hill, 126 N. C., 1139; 50 L. R. A., 473; 36 S. E. Rep., 326.

35 Van Buren v. Wells, 53 Ark., 368; 14 S. W. Rep., 38; *In re* Cheney, 90 Cal., 617; 27 Pac. Rep., 436; Opelousas v. Giron, 46 La. Ann., 1364; 16 So. Rep., 190; St. Louis v. Vert, 84 Mo., 204. See sec. 488, *post*.

36 Commonwealth v. Davis, 140

Mass., 485; 4 N. E. Rep., 577; Davis v. Massachusetts, 167 U. S., 43; Commonwealth v. Davis, 162 Mass., 510; 26 L. R. A., 712; 39 N. E. Rep., 113; Commonwealth v. Brooks, 109 Mass., 355; Commonwealth v. Abrahams, 156 Mass., 57; 30 N. E. Rep., 79; Wilson v. Eureka, 173 U. S., 32.

87 Love v. Recorder's Court, 128
Mich., 545; 87 N. W. Rep., 785;
55 L. R. A., 618.

38 Buell v. State, 45 Ark., 336;

prostitute from being on the streets of a city between the hours of 7 P. M. and 4 A. M. without any reasonable necessity therefor was sustained as a valid exercise of the police power, under a statute giving authority to "restrain and punish prostitutes." ³⁹

§ 226. Discriminating on account of class, race or religious sect, etc. Hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment of the Constitution of the United States. amendment declares that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the law. "This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments, and to the subordinate legislative bodies of counties and cities."40 nicipal ordinances applying alike to all persons engaged in a given pursuit, without distinction as to nationality, creed, etc., are not in violation of the federal constitution, nor of any treaty or law of the United States.41 But an ordinance to regulate the carrying on of public laundries which confers upon the municipal officers arbitrary power to give or withhold consent as to persons or places, who and where they shall carry on the business, is void and violates the provisions of the federal constitution, especially if it makes arbitrary and unjust discrimination founded on difference of race.42 An ordinance which required the arrest of any free negro found on the street after 10 o'clock and lodge him in the calaboose, there to remain

Paralee v. Camden, 49 Ark., 165; 4 Am. St. Rep., 35; 4 S. W. Rep., 654. Compare Shafer v. Mumma, 17 Md., 331; 79 Am. Dec., 656, where a like ordinance was sustained, passed under express power.

39 Dunn v. Com., 20 Ky. Law
 Rep., 1649; 43 L. R. A., 701; 49 S.
 W. Rep., 813. Compare sec. 475, post.

40 Per Mr. Justice Field in Ah Kow v. Nunan, 5 Sawyer (U. S.), 552, 562,

41 Ordinances regulating laundries wherein the question of discrimination against Chinese is fully treated. Barbier v. Connolly, 113 U. S., 27; Soon Hing v. Crowley, 113 U. S., 703; In re Yick Wo, 68 Cal., 294, 305; 9 Pac. Rep., 139; Ex parte Mount, 66 Cal., 448, 475; 6 Pac. Rep., 78; Ex parte Moynier, 65 Cal., 33; 2 Pac. Rep., 728; Ex parte Wolters, 65 Cal., 269; 3 Pac. Rep., 894.

⁴² Yick Wo v. Hopkins, 118 U. S., 356.

until the next morning, and imposing a fine of ten dollars on such offender, was declared "high-handed and oppressive, and enacted by the corporation without any authority. It is an attempt to impair the liberty of a free person unnecessarily, to restrain him from the exercise of his lawful pursuits, and to make an innocent act a crime, and to exact a penalty therefor both by fine and imprisonment, without trial before any tribunal."43 So ordinances conferring upon one class, as a religious sect, a privilege which is denied to another, are unconstitutional and void.44 So an ordinance requiring saloons to close when "any denomination of Christian people" were holding divine services anywhere in the town, which was silent as to any and all other religious worshipers, was declared discriminating and void.45 However, it has been held in Massachusetts that a city may, by ordinance, adopt reasonable rules and regulations respecting the use of streets and public places. as by itinerant musicians, although they may belong to a certain religious organization, and such persons will not be protected after the violation of such ordinance because of the fact that the act was done as a matter of religious worship.46

§ 227. Same—The San Francisco queue ordinance. An ordinance of San Francisco, although general in its terms, which was directed against the Chinese only, and imposed upon them a degrading and cruel punishment, was held to be in conflict with that clause of the fourteenth amendment of the constitution which declares that, no state "shall deny to any person within its jurisdiction the equal protection of the law." The ordinance provided that each jail prisoner should have the hair of his head "cut or clipped to an uniform length of one inch

43 Per Turley, J., in Memphis v. Winfield, 8 Humph. (Tenn.), 707, 709.

A case decided in 1844 in South Carolina sustained an ordinance of Charleston which required "free negroes and free persons of color" to take out a license for "carrying on any trade or art, or being a mechanic," etc. The discriminating feature of the ordinance was neither discussed nor suggested. State ex rel. Wilkinson v. Charleston, 2 Speers (S. C.), 623.

44 Shreveport v. Levy, 26 La. Ann., 671.

45 Gilham v. Wells, 64 Ga., 192. But ordinances forbidding the sale of liquor on Sunday, passed under ample power, are uniformly sustained. Such regulations do not affect personal or religious freedom. Minden v. Silverstein, 36 La. Ann., 912. See opinion of Manning, J., pp. 916, 917.

40 Commonwealth v. Plaisted,
 148 Mass., 375; 19 N. E. Rep., 224.

from the scalp thereof." The regulation was intended only for the Chinese of San Francisco. It was known as the "queue" ordinance, being so designated from its purpose to reach the queues of the Chinese, and was not enforced against any other persons. In delivering the opinion of the court. Mr. Justice Field said: "The reason advanced for its adoption, and now urged for its continuance, is, that only the dread of the loss of his queue will induce a Chinaman to pay his fine. That is to say, in order to enforce the payment of a fine imposed upon him, it is necessary that torture should be superadded to imprisonment. 'Then, it is said, the Chinaman will not accept the alternative, which the law allows, of working out his fine by his imprisonment, and the state and county will be saved the expense of keeping him during imprisonment. Probably the bastinado, or the knout, or the thumbscrew, or the rack, would accomplish the same end; and no doubt the Chinaman would prefer either of these modes of torture to that which entails upon him disgrace among his countrymen and carries with it the constant dread of misfortune and suffering after death. It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible."47

§ 228. Regulating personal association, employment, etc. An ordinance making it an offense for any person to knowingly associate with those who have the reputation of being thieves, burglars, pickpockets, pigeon droppers, bawds, gamblers, etc., has been held unconstitutional, as being an invasion of the rights of personal liberty, because the law takes no notice of, and has no concern with, mere guilty intention, unconnected with any overt act or outward manifestation. So an ordinance making it a misdemeanor for any person to associate, escort, converse or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of a city, except her husband, father, brother or other male relative, has been held to be an unconstitutional inter-

47 Ah Kow v. Nunan, 5 Sawyer (U. S.), 552, 559, 560. See notes of Judge Cooley, at pp. 558, 559, 564-566, of the opinion. Also note to case by Judge Cooley, in 18 Am. Law Reg., 684.

36 S. W. Rep., 628; 33 L. R. A., 606; St. Louis v. Roche, 128 Mo., 541; 31 S. W. Rep., 915; St. Louis v. Fitz, 53 Mo., 582. Compare St. Louis v. Lee, 8 Mo. App., 599; St. Louis v. Sealy, 8 Mo. App., 599; St. Louis v. Close, 8 Mo. App., 599.

⁴⁸ Ex parte Smith, 135 Mo., 223;

ference with personal freedom, since any person should be allowed to converse with her long enough to transact any necessary and legitimate business. It is also held that there is no reason for exempting any other male relative than the husband, father, or brother, or for failing to give her mother or sister the same privilege allowed to the father or brother.⁴⁹ So an ordinance forbidding any women from going into any building where liquor is sold, or to stand within fifty feet of such building, has been held void as an unnecessary interference with individual liberty.⁵⁰ So an ordinance which interferes with lawful employment and discriminates between the sexes, as one forbidding employment of females in dance cellars, barrooms, or in any place where malt, vinous or spirituous liquors are sold, is unconstitutional.⁵¹

§ 229. Personal liberty—Drunkenness. Ordinances which prohibit drunkenness on the streets and in other public places of the city, or which are directed against public drunkenness, are constitutional for the reason that no one has the constitutional right to appear in a state of intoxication in the streets and public places, and thereby degrade the public morals, to the annoyance and inconvenience of citizens in the discharge of their daily duties, and to destroy the peace, comfort and good order and well being of society.⁵²

§ 230. Mode of trial. Article 5 of the amendments of the United States constitution, which provides that, "no person

49 Hechinger v. Maysville, 22 Ky. Law Rep., 486; 49 L. R. A., 114; 57 S. W. Rep., 619; Cady v. Barnesville, 4 Weekly Cin. Law Bul. (Ohio), 101, holds that ordinance making it unlawful "for any male person to walk or ride in company with any lewd female or common prostitute, or to stand and converse with her upon any street," etc., unconstitutional and void.

50 Gastenau v. Com., 108 Ky.,473; 56 S. W. Rep., 705; 49 L. R.A., 111.

⁵¹ In re Mary Maguire, **57 Cal.**, 604.

⁵² Gallatin v. Tarwater, 143 Mo.,
 40; 44 S. W. Rep., 750; Green City
 v. Holsinger, 76 Mo. App., 567.

Compare St. Joseph v. Harris, 59 Mo. App., 122, where it is said: "The common council in undertaking to regulate the subject of drunkenness under its power by its ordinance in that direction went to the uttermost limit. It would seem that in this state drunkenness is not per se the subject of legislative prohibition. Drunkenness cannot be made the subject of municipal regulation, except where its existence in the individual is at a place or under circumstances or conditions when it annoys or disturbs others. And so it would appear that any sweeping regulation interdicting, under penalty, drunkenness generally, or shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a grand jury," is alone applicable to the exercise of the power of the federal government, and is not a restriction upon the legislative authority of the states.⁵³ Hence it does not forbid municipal corporations from punishing such offense as they may be authorized to do by their charters and the laws of the state.⁵⁴

§ 231. Officer has no vested right in office—Office may be changed or abolished. In England, offices are considered incorporal hereditaments, grantable by the crown and a subject of vested or private interest. But in this country they are not held by grant or contract, nor under our system of government has any person a private property or vested right in them. Therefore, in the absence of limitations in the organic law, all offices—federal, state and municipal—are subject to such modifications and changes as the proper authorities may deem advisable, irrespective of the consent of the officer. No law reducing the salary of an officer, imposing additional duties without increasing the compensation, or abolishing the office, will be held unconstitutional as "impairing the obligation of contracts" or as depriving any person of property "without due process of law." All offices are created for the public

in cases other than those specified in the exception just stated, would be an invasion of the 'inalienable rights of the citizen.' (St. Louis v. Fitz, 53 Mo., 582.") Here drunkenness was forbidden "on any street, avenue, alley or public place within the city or any private house to the annoyance of any citizen or person." St. Joseph v. Harris, 59 Mo. App., 122, in substance overruled by Gallatin v. Tarwater, 143 Mo., 40; 44 S. W. Rep., 750. See sec. 478, post.

53 Barron v. Baltimore, 7 Pet. (32 U. S.), 243, per Marshall, C. J., relating to the taking of private property without just compensation. But the 14th Amendment, in this respect, is a limitation on the power of the states.

54 State v. Wells, 46 Iowa, 662.

55 Barrett v. New Orleans, 32 La.

Ann., 101; State ex rel. v. Walsh, 69 Mo., 408; State ex rel. v. Davis, 44 Mo., 129; State ex rel. v. Valle, 41 Mo., 29; State v. Hermann, 11 Mo. App., 43; Wilcox v. Rodman, 46 Mo., 322; Westberg v. Kansas City, 64 Mo., 493; Augusta v. Sweeney, 44 Ga., 463.

No impairment of obligation of contract. "An appointment to a public office is not a contract within that clause of the constitution which forbids the state legislature to pass any law impairing the obligation of contracts. The design of that clause was in the language of Chief Justice Marshall, to restrain the legislature from violating the right of property, from impairing the obligation of contracts respecting property, under which some individual could claim a right to something beneficial to himself.

good, and unless restraint exists in the organic law are completely subject to the power creating them.⁵⁶ Thus an office not fixed by the constitution, but established by statute, may be abolished by statute.⁵⁷ But without express authority a municipal office created by the legislature cannot be abolished by ordinance.⁵⁸ Where a municipal corporation under its charter or legislative act applicable has power to create by ordinance an office, it also has power to abolish it.⁵⁹ But where the office is created by ordinance it can only be abolished by

And because an appointment to office is not such contract, it is not within the prohibition of the constitution." Hoboken v. Gear, 27 N. J. L., 265, 278,

The right to compensation grows out of the rendition of the services and not out of any contract between the government and the officer that the services shall be rendered by him. Connor v. Mayor, etc., of N. Y., 1 Selden (5 N. Y.), 285, 296.

A PUBLIC OFFICE IS NOT PROPERTY within the meaning of the constitutional provision that "no person shall be deprived of life, liberty or property without due process of law and the judgment of peers." It is a mere public agency, revocable according to the will and appointment of the people, as expressed in the constitution and the laws enacted in conformity therewith. An officer may be removed without jury trial. Moore Strickling, 46 W. Va., 515; 50 L. R. A., 279; 33 S. E. Rep., 274; Atty. Gen. v. Jochim, 99 Mich., 358; 58 N. W. Rep., 611; People v. Kipley, 167 Ill., 638; 49 N. E. Rep., 229.

"The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust, to be exercised for the benefit of

the public. Such salary as may be attached to it is not given because of any duty on the part of the public to do so; but to enable the incumbent the better to perform the duties of his office by the more exclusive devotion of time thereto." State v. Hawkins, 44 Ohio St., 98, 109; 5 N. E. Rep., 228.

It may be noted that some cases -although very few-oppose the above doctrine. They have adopted the theory that an office is property, under the mistaken view that the common law doctrine that an office is a hereditament applies to the offices of this country, which undoubtedly fallacious against the decided and whelming weight of authority. The following cases support this King v. Hunter, 65 N. C., 603; Brown v. Turner, 70 N. C., 93; Vann v. Pipkin, 77 N. C., 408; Plimpton v. Somerset, 33 Vt., 283; Board v. Pritchard, 36 N. J. L., 101; Page v. Hardin, 8 B. Mon. (Ky.), 648, 672; Commonwealth v. Silfer, 25 Pa. St., 23.

⁵⁶ Farwell v. Rockland, 62 Me., 296, 299.

⁵⁷ Standeford v. Wingate, 2 Duvall's Ky. Rep., 440.

58 Marquis v. Santa Ana, 108
 Cal., 661; 37 Pac. Rep., 650; Vason
 v. Augusta, 38 Ga., 542.

59 Frankfort v. Brawner, 100Ky., 166; 37 S. W. Rep., 950; 38

ordinance and not by resolution.⁶⁰ A legal provision that no officer shall be removed, except for cause, does not prevent the abolishment of an office in the absence of restrictions in this respect.⁶¹ Likewise the fact that the officer is appointed or elected for a definite term is no limitation of the power to abolish.⁶²

An unconditional repeal of a municipal charter, or the substitution of another with inconsistent provisions, without a saving clause respecting offices and officers as they existed under the former charter, will operate to abolish all offices thereunder. The term of a charter officer may be shortened by amendment to the charter. It is also established that an office may be abolished by an authorized repeal of the law,

S. W. Rep., 497; Robinson v. Baltimore, 93 Md., 208; 49 Atl. Rep., 4; Goodwin v. State, 142 Ind., 117; 41 N. E. Rep., 359; State v. Jennings, 57 Ohio St., 415; 49 N. E. Rep., 404; 63 Am. St. Rep., 723; Waldraven v. Memphis, 4 Coldw. (44 Tenn.), 431; Donaghy v. Macy, 167 Mass., 178; 45 N. E. Rep., 87; Smith v. New York, 37 N. Y., 518. See Wilcox v. Rodman, 46 Mo., 322.

60 San Antonio v. Micklejohn, 89
 Tex., 79; 33 S. W. Rep., 735.

Boards and departments may be abolished. Sheridan v. Colvin, 78 Ill., 237.

Sergeant of police abolished by ordinance, irrespective of action of police commissioner, under particular charter. Oldham v. Birmingham, 102 Ala., 357; 14 So. Rep., 793.

Where laws authorize heads of departments to employ such laborers as may be necessary for the efficient working of their department or as may be necessary for the inspection of certain work, the head of the department may abolish such positions after they have been filled by appointment. People v. Scannell, 62 N. Y. Suppl., 930.

61 Oldham v. Birmingham, 102

Ala., 357; 14 So. Rep., 793; People v. Brooklyn, 149 N. Y., 215; 43 N. E. Rep., 554, reversing 36 N. Y. Suppl., 172; Meissner v. Boyle, 20 Utah, 316; 58 Pac. Rep., 1110; People v. York, 60 N. Y. Suppl., 208. 62 Boylan v. Newark, 58 N. J. L., 133; 32 Atl. Rep., 78; Frankfort v. Brawner, 100 Ky., 166; 37 S. W. Rep., 950; 38 S. W. Rep., 497; Butcher v. Camden, 29 N. J. Eq., 478, distinguishing Bradshaw v. Camden, 39 N. J. L., 416; Primm v. Carondelet, 23 Mo., 22. See Attorney General v. Jochim, 99 Mich., 358; 58 N. W. Rep., 611; State v. Hawkins, 44 Ohio St., 98, 109; 5 N. E. Rep., 228; State v. Douglas, 26 Wis., 428; Prince v. Skillin, 71 Me., 361; State v. Bell, 116 Ind., 1; 18 N. E. Rep., 263; State ex rel. v. Bogard, 128 Ind., 480; 27 N. E. Rep., 1113; Augusta v. Sweeney, 44 Ga., 463.

63 Crook v. People, 106 Ill., 237. Creating another office and conferring the same duties as pertain to the old operates to abolish the old office. Commonwealth v. Moir, 199 Pa. St., 534; 49 Atl. Rep., 351; 53 L. R. A., 837; Commonwealth v. Reese, 16 Ky. Law Rep., 493; 29 S. W. Rep., 352.

64 See People v. Davie, 114 Cal.,

whether it be a charter, statutory or ordinance provision creating it.65

In accordance with the principle that all offices are subject to change, the proper authorities may legally impose additional duties upon an officer without creating a new office or entitling the incumbent to higher compensation.⁶⁶

2. ORDINANCES IMPAIRING THE OBLIGATION OF CONTRACTS.

§ 232. Ordinances cannot impair the obligation of contracts. "No state shall pass any law impairing the obligation of contracts." "There is no more important provision in the federal constitution than the one which prohibits states from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded or frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them as made, are foundations of all well ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the constitution was framed." 68

A municipal corporation is bound by all contracts which it may legally enter into in like manner as a private corporation or an individual.⁶⁹ The rule as to immunity of government from liability on contracts has no application to municipal corporations. They are held liable even when acting as representatives of the government. The rule of liability has been

363; 46 Pac. Rep., 150; Frankfort v. Brawner, 100 Ky., 166; 37 S. W. Rep., 950; 38 S. W. Rep., 497.

65 State ex inf. v. Rackliffe, 164 Mo., 453; 64 S. W. Rep., 772; Chandler v. Lawrence, 128 Mass., 213; State ex rel. v. Jennings, 57 Ohio St., 415; 49 N. E. Rep., 404; 63 Am. St. Rep., 723.

A board of improvements may be abolished by repealing the ordinance creating it. Toledo v. Lake Shore & Michigan Southern Ry. Co., 2 Ohio Cir. Ct. Dec., 450.

66 See Redwood City v. Grimmenstein, 68 Cal., 512; 9 Pac. Rep., 560.

67 U. S. Const., art. I, sec. 10.

68 Per Mr. Justice Strong in Murray v. Charleston, 96 U. S., 432, 448, 449.

69 Murray v. Kansas City, 47 Mo. App., 105; Steffin v. St. Louis, 135 Mo., 44; Chambers v. St. Joseph, 33 Mo. App., 536; Springfield Railroad Co. v. Springfield, 85 Mo., 674, 676; Weston v. Syracuse, 158 N. Y., 274; 53 N. E. Rep., 12; 43 L. R. A., 678; 3 Cook on Corp. (4th Ed.), sec. 913, p. 2231; Potter on Corp., sec. 376.

One may be employed to per-450. applied to govern the contracts and control the acts of states clothed with all the powers and prerogatives of sovereignty.⁷⁰

An ordinance extending fire limits and forbidding the erection of wooden buildings within a designated district will not be held as impairing the obligation of a contract made prior to the passage of such ordinance for the erection of a wooden structure within the prohibited district.⁷¹

§ 233. Ordinance as "law." The obligation of a contract can only be impaired by a "law" passed after the making of the contract. The word "law," as used in the federal constitution, may be a provision of the state constitution, a legislative act, a provision of a charter of a public or municipal corporation, or a municipal by-law or ordinance, having the force and effect of a law of the state. Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of the clause cited. It was therefore held that a statute of the so-called Confederate States, if enforced by one of the states as its law.

form services under contract with the city without becoming a municipal officer and when such is the case the city cannot vary the terms of the contract nor repudiate it. Hall v. Wisconsin, 103 U. S., 5.

City cannot repudiate by resolution or ordinance a deed which it was authorized to execute. Dausch v. Crane, 109 Mo., 323, 330; 19 S. W. Rep., 61.

70 Dartmouth College Trustees v. Woodward, 4 Wheat. (U. S.), 518; Western Saving Fund Society v. Philadelphia, 31 Pa. St., 175.

71 Knoxville v. Bird, 12 Lea (Tenn.), 121, 123; 47 Am. Rep., 326.

72 "The state may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which in our opinion is valid; it may adjudge a contract to be valid which in our opinion is void; or its interpreta-

tion of the contract may, in our opinion, be radically wrong; but in neither of these cases would the judgment be reviewable by this court under the clause of the constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statute defining and regulating its jurisdiction, unless that judgment in terms or by its necessary operation gives effect to some provision of the state constitution. or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question." Lehigh Water Co. v. Easton, 121 U. S., 388, 392. 73 Goodale v. Fennell, 27 Ohio

73 Goodale v. Fennell, 27 Onio St., 426; 22 Am. Rep., 321.

Ordinance imposing a tax is a law. Murray v. Charleston, 96 U. S. 432, 440.

Resolution of council may be such law. Iron M. R. Co. v. Memphis, 96 Fed. Rep., 113.

was within the prohibition of the constitution.⁷⁴ "So a by-law or ordinance of a municipal corporation may be such an exercise of the legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law within the meaning of the article of the constitution.''75 Thus the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself or delegated by it to a municipal corporation, is strictly a legislative power.76 Accordingly, where a city, having power conferred by legislative grant, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, the Supreme Court of the United States held such ordinances to be laws impairing the obligation of contracts. "for the reason that the city charter gave limited legislative power to the city council, and when the ordinances were passed, under the supposed authority of the legislative act, their provisions become the law of the state."77 But where an ordinance merely grants permission to a company to lay water pipes, this merely constitutes a license and involves no exercise of legislative power, though the grant is put in the form of an ordinance. Such ordinance does not constitute a by-law of the city, and still less a law of the state. The license in the form of an ordinance was granted by virtue of legislative power. which power defined the class of persons to whom, and the objects for which the permission might be granted. "All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonably interfering with the convenient use by the public of lands and highways of the city. The rule was established by the legislature, but administrative, and might equally well

⁷⁴ Per Mr. Justice Field in Williams v. Bruffy, 96 U. S., 176, 183.

⁷⁵ Per Mr. Justice Gray in New Orleans Waterworks v. Louisiana Sugar Refining Co., 125 U. S., 18, 31.

⁷⁶ United States v. New Orleans,

⁹⁸ U. S., 381, 392; Meriwether v. Garrett, 102 U. S., 472.

⁷⁷ Per Mr. Justice Gray, New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S., 18, 31, citing Murray v. Charleston, 96 U. S., 432, 440, and Home

have been vested by law in the mayor alone, or in any officer of the city.⁷⁸ * * * If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the state, and not at all on any provision of the constitution or laws of the United States.''⁷⁹

"A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts." ¹⁸⁰

§ 234. Ordinances as contracts. The term "contracts," as used in both the federal and state constitutions, comprehends all forms of legal obligations, however executed, whether between individuals, copartnerships and corporations, or between the state or a municipal corporation or governmental body or legal entity, possessing power to contract, and individuals, copartners or corporations. "The term "contract" is used in the constitution in its ordinary sense, as signifying the agreement of two or more minds for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence."

Ins. Co. v. Augusta, 93 U. S., 116.
 Railroad Co. v. Ellerman, 105
 U. S., 166, 172; Day v. Green, 4
 Cush. (Mass.), 433, 438.

⁷⁹ Per Mr. Justice Gray in New Orleans Waterworks v. Louisiana Sugar Refining Co., 125 U. S., 18, 32.

⁸⁰ Per Mr. Justice Harlan in Hamilton Gas Light Co. v. Hamilton, 146 U. S., 258, 266.

When ordinance authorizing a contract does not give the contract the force of law, see State ex rel. v. New Orleans & C. R. Co., 37 La. Ann., 589.

Ordinance held to be a "law" as term used in policy of insurance. Jones v. Firemen's Fund Ins. Co., 2 Daly (N. Y.), 307.

81 Woodruff v. Trapnall, 10 How. (U. S.), 190; U. S. v. Jefferson Co., 5 Dill. (U. S. Cir. Ct.), 310; Meriwether v. Garrett, 102 U. S., 472.

"The legislature cannot enact a law impairing the obligation of a contract by a municipal corporation." William's Appeal, 72 Pa. St., 214, 217.

As to how far a license of a municipal occupation tax is a contract within the protection of the state and federal constitutions, see sec. 170, supra.

The corporation is not liable for the non-enforcement of an ordinance on the theory that it is a contract. Kiley v. Kansas City, 87 Mo., 103; 56 Am. Rep., 443.

Ordinances as contracts. Warsop v. Hastings, 22 Minn., 437; Bassett v. El Paso, 88 Tex., 168; 30 S. W. Rep., 893.

82 Louisiana v. New Orleans, 109

§ 235. The "obligation" of the contract. Obligations are of two kinds, "perfect" and "imperfect" or "civil" and "natural." The imperfect or natural is only binding in morals; it cannot be enforced by legal action. The perfect or civil may be enforced in law. Constitutions protect from impairment the latter only,83 which consists in the remedy or the means to compel its performance and to make compensation in event of failure.84 "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The idea of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' ''85 "The obligation of a contract," says Mr. Justice Field, "in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, qui cito dat bis dat (he who gives quickly gives twice) has its counterpart in a maxim equally sound, qui serius solvit, minus solvit (he who pays too late pays less). Any authorization of the postpone-

U. S., 285, 288, speaking of statutory right to recover of a municipal corporation damages for destruction of property by a mob, which, in effect, was taken away by the adoption of a new state constitution, after judgment had been obtained, which limited the city's power of taxation.

s3 Louisiana v. New Orleans, 102 U. S., 203; Dartmouth College v. Woodward, 4 Wheat. (U. S.), 518, 529; Blair v. Williamson, 4 Litt. (14 Ky.), 34; Wood v. Wood, 14 Rich. (S. C.), 148, 154; Webster v. Rose, 6 Heisk. (53 Tenn.), 93; 19 Am. Rep., 583. s4 Louisiana v. Police Jury, etc., 111 U. S., 716; Seibert v. Lewis, 122 U. S., 284; Walker v. Whitehead, 16 Wall (83 U. S.), 314; United States v. Conway, Hemp., 313; 25 Fed. Cas. No. 14849; Johnson v. Higgins, 3 Metc. (60 Ky.), 566; Sabatier v. Creditors, 6 Mart. N. S. (La.), 585; Jacobs v. Smallwood, 63 N. C., 112; Cochran v. Darcy, 5 S. C., 125; Fitzgerald v. Grand Trunk R. R., 63 Vt., 169; 22 Atl. Rep., 76; 13 L. R. A., 70.

85 Per Mr. Justice Swayne in Edwards v. Kearzey, 96 U. S., 595, 598, citing 1 Bac. Abr., tit. Actions in General, letter B. ment of payment or of means by which such postponement may be effected, is in conflict with the constitutional prohibition." 86

§ 236. Question is for decision of United States Supreme Court. While the general rule is, that the United States Supreme Court will adopt the opinion as conclusive of the highest state court on matters relating to the construction of the state constitution and state laws, wherein no question under the laws or constitution of the United States is involved, 87 the specific rule applicable to the point under consideration is: The Supreme Court will, in a proper case, decide for itself independent of the decisions of the state courts, whether there is a contract and whether its obligations are impaired.88

The general statement of the doctrine has been formulated by Mr. Justice Bradley: "In ordinary cases the decision of the highest court of a state with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire, and judge for itself, with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto."89 Subsequently the court the rule, thus: "The question of the existaffirmed non-existence of a contract in cases like the present (state law subjecting property of railroad cortaxation) which this to is one determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to

⁸⁶ Per Mr. Justice Field in Louisiana v. New Orleans, 102 U. S., at pp. 206, 207.

⁸⁷ Erie R. R. Co. v. Pennsylvania, 21 Wall. (U. S.), 492, 497.

⁸⁸ Shelby County v. Union and Planters' Bank, 161 U. S., 149, 151, per Mr. Justice Peckham.

⁸⁹ McGahey v. Virginia, 135 U.S., 662, 667.

Similar emphatic language has been used by the United States Supreme Court in subsequent cases: "In determining whether, in any given case, a contract exists, protected from impairment

determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation.'90

Taxation by municipal corporation of its own bonds, The right of a municipal corporation to tax its own bonds and other obligations held by non-residents, by withholding the amount of the tax from the interest due thereon, has been denied, because in violation of the constitutional provision under consideration. No municipality of a state can by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised to Thus where a city has issued certificates of stock, its creditors. whereby it promised to pay to the owners thereof certain sums of money which had been borrowed, with six per cent interest, payable quarterly, it cannot subsequently impose a tax of two per cent on the value of all property within its limits and treat its stock as a part of such property, and direct that the tax upon it shall be retained by the treasurer of the city from the interest due thereon. The city sought to justify the tax upon the ground that it was not higher than the tax on all other property of its citizens, and that all property within the city was subject to taxation; but the court answered that, by the legislation of the city, its obligation to its creditors was impaired, and, however great its power of taxation, it must be

by the constitution of the United States, this court forms an independent judgment." Citizens' Sav. Bk. v. Owensboro, 173 U. S., 636, 647, 648.

90 Mobile & Ohio Railroad Co. v. Tennessee, 153 U. S., 486, 492, 493, per Mr. Justice Jackson.

"Before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired." New Orleans v. New Orleans Waterworks Co., 142 U. S., 79, 88.

"Indeed the whole foundation of our jurisdiction in this class of cases must rest upon a *contract* which can not be legally impaired." Gulf & Ship Island R. R. Co. v. Hewes, 183 U. S., 66, 75.

The rule is discussed in the following cases: Board of Liquidation v. Louisiana, 179 U. S., 622, 636; Stone v. Bank of Commerce, 174 U. S., 412; Citizens' Savings Bank v. Owensboro, 173 U.S., 636, 647, et seq.; Shelby County v. Union, etc., Bank, 161 U. S., 149, 151; Bank of Commerce v. Tennessee, 161 U.S., 134, 144; L. & N. R. R. Co. v. Palmes, 109 U. S., 244; Erie R. R. Co. v. Pennsylvania, 21 Wall. (U. S.), 492, 497; New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S., 18, 31, 38; Hamilton Gas Light & Coke Co. v. Hamilton City, exercised (being a political agency of the state) in subordination to the inhibition of the federal constitution against legislation impairing the obligation of contracts. Until the interest was paid, no act of state or political subdivision, exercising legislative power by its authority, could work an exoneration from what was promised to the creditor.⁹¹

The rule has been most frequently applied in taxation of state securities by state statutes. However, the principle is applied with like force when taxation by the municipality of its own bonds or other obligations is attempted by ordinance. The rule of the United States Supreme Court "is settled that any tax levied upon them (bonds) cannot be withheld from the interest payable thereon. Such was the decision of this court in Murray v. Charleston." This doctrine was applied to a judgment for coupons of consolidated bonds issued by the City of New Orleans. Under the municipal charter the bonds were in terms exempted from taxation, and it was held that a judgment rendered thereon in favor of non-resident holders was equally exempt. The opinion also declares that in the absence of any contract in the bonds, conferring the right to impose the tax, such tax could not be levied upon bonds or other obligations of a city which belong to non-residents, without impairing the force of the obligation itself.93

§ 238. Ordinances granting franchises as contracts. Respecting railroad charters and franchises, Mr. Justice Miller states that, in far the largest number of cases brought to the United States Supreme Court under that clause of the constitution, "the question has been as to the existence and nature of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had

146 U. S., 258, 265; Willmington & Weldon R. R. v. Alsbrook, 146 U. S., 279, 293; Huntington v. Attrill, 146 U. S., 657, 684.

91 Murray v. Charleston, 96 U. S., 432, 448, per Mr. Justice Strong, approving R. R. Co. v. Pennsylvania (State Tax on Foreign-held Bonds), 15 Wall. (82 U. S.), 300. (Mr. Justice Miller and Mr. Justice Hunt dissented.) Jenkins v. Charleston, 96 U. S., 449.

Taxing mortgages of lands to

the mortgagees in the county where land lies, does not, as applied to non-resident held mortgages contravene the 14th Amendment of the United States Constitution. Savings and Loan Society v. Multnomah County, 169 U. S., 421, 426, per Mr. Justice Gray, reviewing many cases.

92 Hartman v. Greenhow, 102 U.
S., 672, 683, per Mr. Justice Field.
93 De Vignier v. New Orleans, 16

on this point has been in regard to what may be called legislative contracts-contracts found in statute laws of the state if they existed at all. It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause referred to of the federal constitution." He further observed that, "this has always been a very nice point" (in determining the question); "and when the supposed contract exists only in the form of a general statute, doubts still recur after all our The rules applicable decisions on that class of questions."94 to legislative franchises which constitute contracts are alike applicable to ordinances granting franchises which are "laws," and which, upon acceptance by the grantee, constitute contracts. No subsequent ordinance which constitutes a law can impair their obligations.95 Thus where a city enters into a valid contract by ordinance which allots to a private corporation particular subway spaces in its streets for laying its telephone and telegraph wires, it cannot invalidate or impair that contract by a subsequent ordinance by repudiating it and allotting the same space to another company. 96 The Supreme Court

Fed. Rep., 11, 12; Folsom Bros. v. New Orleans, 16 Fed. Rep., 11.

94 "Statutes fixing the taxes to be levied on corporations, partake, in a striking manner, of this dual character, and require for their construction a critical examination of their terms, and of the circumstances under which they are created.

"The writer of this opinion has always believed, and now believes, that one legislature of a state has no power to bargain away the rights of any succeeding legislature to levy taxes in as full a manner as the constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been

made." New Jersey v. Yard, 95 U. S., 104, 113.

It was held in an opinion delivered by Chief Justice Marshal that the constitutional provision extends to legislative grants which constitute a contract to which the state is a party, and while it was admitted that one legislature is competent to repeal any act which a former legislature had legally passed yet where an act is done under a law it is not competent for a subsequent legislature to undo it. Fletcher v. Peck, 6 Cranch (U. S.), 87, 135.

95 People v. Chicago, etc., Ry.
Co., 118 Ill., 113; 7 N. E. Rep., 116;
Kansas City v. Corrigan, 86 Mo.,
67; Michigan Tel. Co. v. St. Joseph, 121 Mich., 502; 80 N. W. Rep.,
383.

96 State ex rel. Subway Co. v.

of the United States has held that the grant of right to supply water or gas to a city and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service of the grantee, is the grant of a franchise vested in the state in consideration of the performance of a public service, and after performance by the grantee is a contract protected by the constitution of the United States against legislation to impair it.⁹⁷ This question frequently arises in grants of franchises to lay down tracks and operate cars in streets and public ways. Whether this privilege is granted directly by the legislature, or through a municipal corporation, the acceptance thereof and the construction of tracks thereunder constitute a contract which cannot be impaired by any act of the state or city.⁹⁸

St. Louis, 145 Mo., 551; 46 S. W. Rep., 981.

The city in granting to a company the right to lay its wires and construct its underground conduits acts in its proprietary capacity. and in pursuance of the powers conferred upon it by charter. contract to put electric wires underground was held to be for the private advantage of the city as a legal personality, distinct from considerations connected with the government of the state at large, and that with reference to such contract the city must be regarded as a private corporation. Safety Insulated W. & C. Co. v. Baltimore, 25 U. S. App., 166; 13 C. C. A., 375; 66 Fed. Rep., 140. Power to contract for waterworks is private. Illinois Trust & Sav. Bank v. Arkansas City, 40 U. S. App., 257; 22 C. C. A., 171; 76 Fed. Rep.,

97 Walla Walla v. Walla Walla Water Co., 172 U. S., 1; 19 U. S. Sup. Ct, Rep., 77.

An ordinance granting right to erect and operate electric light works is impaired if city operates works and supplies private consumers. Injunction granted.

Southwest Mo. Light Co. v. Joplin, 101 Fed. Rep., 23.

Where city has power to supply water or contract with a company for a supply, a contract with such company is impaired if city supplies water itself or contracts with another company for a supply. Injunction will lie. White v. Meadville, 177 Pa. St., 643; 34 L. R. A., 567; 35 Atl. Rep., 695; Metzger v. Beaver Falls, 178 Pa. St., 1; 35 Atl. Rep., 1134; Welsh v. Beaver Falls, 186 Pa. St., 578; 40 Atl. Rep., 784.

Where the grant is not exclusive injunction will not lie to restrain the city from constructing its own plant for supplying water and light for municipal purposes, where it does not appear that the operation of such plants will necessarily interfere with the contract rights of the company. Little Falls Electric & W. Co. v. Little Falls, 102 Fed. Rep., 663.

98 Belleville v. Citizens' Horse
Ry., 152 Ill., 171; 3 N. E. Rep.,
584; Port of Mobile v. L. & N. R.
R. Co., 84 Ala., 115; 4 So. Rep.,
106; 5 Am. St. Rep., 342; East
Louisiana R. R. v. New Orleans, 46
La. Ann., 526; 15 So. Rep., 157:

§ 239. Same - Imposing additional burdens. It may be stated, as a general proposition, that when a city makes a contract for a municipal improvement, e. g., conferring the right to introduce, distribute and sell water within the city, it cannot, in derogation of its contract, by ordinance or otherwise, impose additional burdens upon the grantee or vary the conditions contained in the contract.99 So when, by ordinance, a municipal corporation has authorized a telephone company to erect poles and string its wires, upon certain conditions, which are complied with, the municipality cannot, by a subsequent ordinance, require the company to pay so much for each pole erected by it within a certain district in return for being allowed to keep and use such poles. So, where by ordinance. a street railroad company is granted the right to lay its tracks on the streets under conditions specified, a subsequent act imposing an additional condition, without the company's consent, in requiring the company to pave six feet on either side of its tracks, constitutes an impairment of the obligation of the franchise contract.2

§ 240. Same—Exclusive privileges. A statute authorizing a municipality to contract for the erection of a bridge across a river and giving to the company exclusive privileges, that is, that no other bridge should be built across the river within a specified time or within a certain distance from the one erected, is a contract the obligations of which are fully protected against impairment by subsequent state enactments.³ An exclusive franchise granted to supply water to the inhabitants of a

Detroit v. Detroit City Ry., 56 Fed. Rep., 867; 54 Fed. Rep., 1; 64 Fed. Rep., 628; Omaha Horse Ry. Co. v. Cable Tramway Co., 30 Fed. Rep., 324; 3 Cook on Corp. (4th Ed.), sec. 913, p. 2231. See secs. 197, 201, 202, supra.

⁹⁹ Los Angeles v. Los Angeles City Water Co., 177 U. S., 558, affirming 88 Fed. Rep., 720; Los Angeles v. Los Angeles Water Co., 61 Cal., 65.

¹ New Orleans v. Great Southern Tel. Co., 40 La. Ann., 41; 3 So. Rep., 533; 26 Cent. Law Journal, 233, and notes, ² Coast Line R. R. Co. v. Savannah, 30 Fed. Rep., 646.

Such contract cannot be amended by subsequent decisions of the state court. Chicago v. Sheldon, 9 Wall. (U. S.), 50.

Grant to lay double track cannot be limited to single track. Burlington v. Burlington Street Ry. Co., 49 Iowa, 144; 31 Am. Rep., 145.

Reducing rates of fare. Cleveland City Ry. Co. v. Cleveland, 94 Fed. Rep., 385.

³ The Binghamton Bridge, 3 Wall. (U. S.), 51; Bridge Pro-

municipality by means of pipes and mains laid through the public streets is violated by a grant to an individual in the municipality of the right to supply his premises with water by means of a pipe or pipes so laid.⁴ In one case where the city had granted the exclusive privilege to a gas company to furnish gas and subsequently granted a similar privilege to another company, the city upon complaint of the first company was restrained from proceeding to complete such grant.⁵ It has been held that a franchise contract, consisting of an exclusive privilege to furnish gas is not violated by granting the right to another company to furnish electricity.⁶

§ 241. Franchise contracts authorized by state. The state may enter into contracts with the city in matters outside of its charter, which cannot be impaired or annulled, notwithstanding the unlimited and autocratic power of the legislature over cities. Thus where a municipal corporation, by authority of the state, contracts with a third person, whereby rights become vested in such person, they cannot be divested by the state.

prietors v. Hoboken Co., 1 Wall. (U. S.), 116.

¹ N. O. Water-work Co. v. Rivers, 115 U. S., 674; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S., 683, 694; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650; Citizens' Water Co. v. Bridgeport Hydraulic Co., 55 Conn., 1; 10 Atl. Rep. 170

5 Newport v. Newport Light Co., 84 Ky., 166, declining to follow State v. Cincinnati Gas Co., 18 Ohio St., 262, 266; and Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn., 19, saying "the rule of law recognized in those cases and the reasoning upon which they are based or in the cases following them, has not been sustained or approved in the recent decisions of the Supreme Court (U.S.) in cases involving like questions," citing New Orleans Gas Co. v. Louisiana Light Co., 115 U.S., 650, 665; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S., 683; New Orleans Water Works v. Rivers, 115 U. S., 674.

Injunction to protect exclusive privilege to lay gas pipes in streets and to furnish gas, granted. Jersey City Gas Co. v. Dwight, 29-N. J. Eq., 242.

Injunction denied. Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn., 19; Montgomery Gas Light Co. v. Montgomery, 87 Ala., 245; 6 So. Rep., 113; 4 L. R. A., 616; Des Moines Gas Co. v. Des Moines, 44 Iowa, 505.

⁶ Saginaw Gas Light Co. v. Saginaw, 28 Fed. Rep., 529.

When exclusive privilege to furnish gas does not exist. Vincennes v. Citizens' Gas Light & Coke, 132 Ind., 114; 16 L. R. A., 485; 31 N. E. Rep., 573; Memphis Gayoso Gas Co. v. Williamson, 9 Heisk. (Tenn.), 314; Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn., 19. See secs. 190 to 192, 197, 201, 202, supra.

⁷ Black on Const. Prohibition, sec. 49,

Such a contract is pro haec vice the contract of the state and cannot be impaired by it. Hence where the common council of a city in the exercise of power conferred by the legislature, made an absolute grant to a horse railway company of the right to build its road on certain streets, and the company accepted the grant and built a part of the road at great expense, it was held that the legislature could not, by a subsequent amendment of the charter, make the right of the company to build the rest of the road dependent on the consent of a majority of the property owners on the street.⁸

§ 242. Reservation of right to alter, amend or repeal franchise contracts. When privileges, franchises, etc., of the character under consideration are granted, either by the state or municipal corporation, the practice generally prevails to reserve the power to alter, amend or repeal whenever the public interest may require, and this question is solely within the discretion of the legislative authorities. Such reservation may be in the state constitution, legislative act, municipal charter or in the law or ordinance granting the franchise.9 Where the power to regulate the franchise and impose conditions is reserved no question as to the impairment of the obligation of the contract can arise if the legislative authorities choose to impose additional burdens upon the enjoyment of the franchise.¹⁰ The reserved power authorizes the making of any alteration or amendment which will not defeat or substantially impair the object of the grant or any rights vested under it. "The power of alteration and amendment is not without limitation, but must be in good faith and consistent with the specific object of the charter.'11 The reserved power to alter or amend will be construed favorably to the public. Thus, under a statute conferring power to regulate water rates which are required to be "fixed by ordinance," the power was construed as continuing and authorized charges in rates from time to time as might

Rule applied in case of tax ex-

⁸ Hovelman v. K. C. Horse Ry. Co., 79 Mo., 632.

^o Skaneateles W. W. Co. v. Skaneateles, 161 N. Y., 154; People v. O'Brien, 111 N. Y., 1; Greenwood v. Freight Co., 105 U. S., 13; Henderson v. Central, etc., Ry., 21 Fed. Rep., 358; 3 Cook on Corp. (4th Ed.), sec. 913, p. 2236.

emption. New York, etc., R. R. Co. v. Bristol, 151 U. S., 556; Louisville Water Co. v. Clark, 143 U. S., 1; Hoge v. Railroad Co., 99 U. S., 348; Shields v. Ohio, 95 U. S., 319; R. R. Co. v. Maine, 96 U. S., 499.

¹⁰ Sioux City Street Ry. Co. v. Sioux City, 138 U. S., 98.

¹¹ Per Jackson, J., in Hill v.

be deemed necessary and just, both to the company and public. 12

§ 243. Contracts of contractors for public work. Charters and ordinances generally provide for public improvements, as streets, sewers, etc., to be paid for by special taxation or assessment at the expense of the property owners. Ordinarily, the city in such case, does not assume any liability, but when the work is completed in accordance with the ordinance and contract providing therefor special tax bills are issued to, and in the name of, the contractor which become first liens on the property abutting upon the improvement, or, the property in the improvement, benefit, or special taxing, district. Sometimes after the contract is let and the work begun the laws or charter or ordinances governing such matters are changed, and hence it is then important to determine when such changes constitute an impairment of the obligation of the contract, within the meaning of the federal constitution. Therefore, it was deemed proper to consider this subject as especially applicable to municipal ordinances.

The contract takes its character and receives its obligation from the law in force at the time it is made and the rights acquired under it cannot be affected materially by a subsequent repeal or change of the law.¹³ In other words, the laws which subsist at the time and place of making a contract enter into and form a part of it, as much so as if such laws were expressly referred to and incorporated in its terms. "This rule embraces alike those which affect its validity, construction, discharge and enforcement." Thus a legislative act authorizing the levy of the requisite tax to pay municipal bonds and in force when the bonds are issued enter into and become a part of the

Glasgow R. R., 41 Fed. Rep., 610; San Joaquin & K. R. Co. v. Stanislaus County, 113 Fed. Rep., 930. See secs. 200, 201, supra.

12 Freeport Water Co. v. Freeport, 180 U. S., 587; Danville Water Co. v. Danville, 180 U. S., 619; Rogers Park Water Co. v. Fergus, 180 U. S., 624, affirming 178 Ill., 571; 53 N. E. Rep., 363.

12 Walker v. Whitehead, 16 Wall.
 (U. S.), 314; Von Hoffman v.
 Quincy, 4 Wall. (U. S.), 535, 550;

Aycock v. Martin, 37 Ga., 124; 92 Am. Dec., 56; State v. Bermudez, 12 La., 352; Daquin v. Coiron, 3 La., 387, 407; Arnaud v. Executor, 3 La., 337; Penrose v. Erie Canal Co., 56 Pa. St., 46, 49.

14 Per Mr. Justice Swayne in Edwards v. Kearzey, 96 U. S., 595, 601, citing Von Hoffman v. Quincy, 4 Wall. (U. S.), 535, and McCracken v. Hayward, 2 How. (U. S.), 608; Nat. Bk. v. Sebastian Co., 5 Dillon, 414; 17 Fed. Cas. No.

contract under which the bonds are delivered and taken.¹⁵ As stated by the United States Supreme Court, "no attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which under the form of modifying the remedy impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the constitution and to that extent void." ¹⁶

§ 244. Same—Rights vested in the contractor. What rights are vested in the contractor for public work by virtue of his contract? Clearly the remedy or means of enforcing the contract constitutes substantial rights. But what do these means include? They plainly embrace the right to have the corporate authorities proceed to levy the special tax and deliver the tax The vested right of the contractor is to have such tax bills aggregate in amount the contract price for the work, and further to have such tax bills operate as first liens on the respective lots benefited by reason of the improvement. contractor must look to the property owners and their property for payment of his tax bills, for under most municipal charters, in no event, can the city be made liable for any part of the work if all the tax bills issued therefor should prove to be worthless for any reason. The change of law must neither deny nor prejudice the contractor in any of these rights. method must not be less secure than the old, for the contractor is not compelled to take additional hazard.¹⁷ Merely changing

10,040; Columbia Co. v. King, 13 Fla., 451; Helm v. Pridgen, 1 White & W. Civ. Cas., Tex. Ct. App., sec. 644.

¹⁵ McCless v. Meekins, 117 N. C., 34, 40; 23 S. E. Rep., 99, approving Von Hoffman v. Quincy, 4 Wall. (U. S.), 535, 555.

¹⁶ Seibert v. Lewis, 122 U. S., 284, 294.

A MERE CHANGE OF REMEDY Will not impair the obligation provided a substantial or efficacious remedy remains, or is given by the law making the change by means of which a party can enforce his rights under the contract. Oshkosh Waterworks Co. v. Oshkosh (U. S., 1903), 23 Sup. Ct. Rep., 234; McCullough v. Virginia, 172 U. S., 102; Barnitz v. Beverly, 163 U. S., 118; McGahey v. Virginia, 135 U. S., 685; Vance v. Vance, 108 U. S., 514.

17 In event of change the new remedy must be as efficient and substantial as that which subsisted when the contract was made; this for the reason that the remedy is necessarily inseparable from the obligation.

United States—Antoni v. Greenhow, 107 U. S., 769; Louisiana v. Jumel, 107 U. S., 711; United the method of levying the special tax, 18 as by transferring such power from the city council to a court and jury, does not impair the means of enforcement. The contractor is held to have no vested right in the particular method existing at the time

States v. Union Pac. R. Co., 98 U. S., 569.

Alabama—Coosa River Steamboat Co. v. Barclay, 30 Ala., 120.

California—Cohen v. Wright, 22 Cal., 293; Smith v. Morse, 2 Cal., 524.

Connecticut — Appeal of Mechanics' and Farmers' Bank, 31 Conn., 63.

Georgia—Aycock v. Martin, 37 Ga., 124; 92 Am. Dec., 56; Lockett v. Usry, 28 Ga., 345.

Kentucky—Griswold v. Hepburn, 63 Ky., 20.

Louisiana—Robert v. Coco, 25 La. Ann., 199; Rowlett v. Shepherd, 4 La., 86.

Maine—Lord v. Chadbourne, 42 Me., 429; 66 Am. Dec., 290.

Massachusetts — Commonwealth v. Comrs., 6 Pick. (23 Mass.), 501. Mississippi—Musgrove v. Vicksburg & N. R. Co., 50 Miss., 677; Lessley v. Phipps, 49 Miss., 790; Commercial Bank v. Chambers, 8

New Hampshire—Rich v. Flanders, 39 N. H., 304.

S. & M. (16 Miss.), 9.

North Carolina — Williams v. Weaver, 94 N. C., 134.

Pennsylvania—Rhines v. Clark, 51 Pa. St., 96; Kenyon v. Stewart, 44 Pa. St., 179.

Tennessee—Hope v. Johnson, 2 Yerg. (10 Tenn.), 123.

Texas—Treasurer v. Wygall, 46 Tex., 447.

"It is to be understood that the encroachment thus denounced must be material. If it is not material, it will be regarded as of no account." Per Mr. Justice Swayne in Edwards v. Kearzey, 96 U. S., 595, 601.

Additional remedy given to the people by mandamus subsequent to the granting of street railway franchises, held not to impair the obligation of a franchise contract. Per Mr. Justice Harlan in N. O. & L. R. Co. v. Louisiana, 157 U. S., 219.

Changing the municipal charter as to method of serving process subsequent to the issue of municipal bonds, held to be valid as the matter of proceedings was not a part of the contract. Perkins v. Watertown, 5 Biss. (U. S.), 320; 19 Fed. Cas., No. 10,991.

18 CURATIVE ACT CHANGING THE METHOD OF SPECIAL ASSESSMENT. In a Massachusetts case, a law which conferred power upon the street commissioner of Boston to make sewer assessment in a particular manner had been held to be unconstitutional in Sears v. Street Commissioner, 173 Mass., 350, and the legislature thereafter substituted therefor a section containing the following provisions: "The board of street commissioners of said city at any time within two years after any new sewer or drain * * * is completed, shall assess upon the several estates especially benefited by such sewer or drain, a proportional part of the cost thereof, not exceeding in amount the sum of four dollars per linear foot," and goes on to provide for a re-assessment of any such assessment which shall have been found to be invalid and is unpaid or which shall have been recovered back. The act containing the original provision was approved May 22, 1897; the substithe contract is made.¹⁹ But if the method of ascertaining the special tax under the new law should result in a less sum in the aggregate than by following the old provisions, clearly the obligation of the contract would be impaired, for the contractor would be compelled to take less money than the amount stipulated in his contract.²⁰

tuted section took effect June 1, 1899; held that a sewer built under order of August 5, 1897, begun July 23, 1897, and completed April 5, 1898, is a "new sewer" within the meaning of the provision of the substituted section above quoted and that the provision is constitutional. In this case the proceeding was a petition by a tax payer for a writ of certiorari, to quash proceedings for special assessments to pay for sewer construction. Hall v. Street Commissioners Boston. of Mass., 434; 59 N. E. Rep., 68.

19 In Palmer v. Danville, 166 Ill., 42, 45, 46; 46 N. E. Rep., 629, the special tax levy, to pay for sewer and water connections was made prior to the change in the law. Upon proceedings taken after the amendment, the tax levy was held invalid as inequitable. In the proceeding to re-assess the tax, the new law was applied, and the property owners were allowed to have a jury pass upon the question of benefits. Prior to the change the power to determine the amount of such benefits was vested in the city council, and its exercise was not ordinarily subject to review. "There was no saving clause in the amendatory act and the statute thereby repealed must be considered except as to proceedings passed and closed as if it never had existed." Respecting the contention that the change disturbed the vested rights of the contractors, the court said (p. 45): "So far as the contractors were concerned the tax had not been determined previous to the substitution of the amended section. The manner in which it had been attempted to fix the benefits had been set aside by this court as illegal and the first proceeding to determine such benefits in conformity with the law was after the adoption of the amendment. The right (p. 46) of the contractors that the city should proceed to levy according to law and some principle of equality the special tax to pay for the improvement was not impaired."

20 Goodale v. Fennell, 27 Ohio
 St., 426; 22 Am. Rep., 321.
 IN A GRADING CONTRACT With a

city the contractor was to receive a certain portion of his pay as the work progressed on estimates to be made by the city engineer, the remainder due being payable on completion and acceptance of the work. Held, that it was not competent for the legislature to change the city charter so as to bind the contractor to a new estimate made without his consent, or to accept less money than he had really earned. "As no legislation can be valid which impairs the obligation of a contract, there can be no ground for claiming that the estimate made under the law of 1869 (law changing charter) is of any legal force concluding the contractor. It is authority for the new estimate but could not cut off the right to further payment, if it before existed." Per Campbell, § 245. Same subject—Illustrative cases. In an Ohio case, a street improvement contract was duly let under a law in existence at the time the contract was made which limited the amount of the special tax to 50 per cent of the value of the property assessed, and provided that all excess should be paid by the city. Before the ordinance making the assessment to pay for the work was passed and took effect, the law was changed limiting the special tax to 25 per cent of the lot value, and providing, as the prior law, that all excess should be paid by the corporation. There was no saving clause in the latter act. Under the latter act the lot in question was only liable for \$165 assessment, but under the law in force at the time the

J., in State ex rel. Whitely v. Lansing, 27 Mich., 131, 132.

LIMITING THE AMOUNT of recovery constitutes impairment. Walker v. Whitehead, 16 Wall. (U. S.), 314.

CHANGING TIME AND METHOD OF PAYMENT OF municipal indebtedness. Tribune Association v. New York, 48 Barb. (N. Y.), 240; Hadfield v. New York, 2 Abb. Prac. (N. S.) (N. Y.), 95; Eidemiller v. Tacoma, 14 Wash., 376, 383; 44 Pac. Rep., 877.

State indebtedness. Forstall v. Consolidated Association, 34 La. Ann., 770; Sharp v. Contra Costa Co., 34 Cal., 284; Hunsaker v. Borden, 5 Cal., 288; 63 Am. Dec., 130; Lamkin v. Sterling, 1 Idaho, 92; Swann v. Buck, 40 Miss., 268.

PRESENTING AND ALLOWING CLAIM; charter change respecting, held not to impair obligation. Oshkosh Waterworks Co. v. Oshkosh (U. S. Sup. Ct., 1903), 23 Sup. Ct. Rep., 234.

ACT POSTPONING THE PAYMENT OF municipal indebtedness and stopping the interest thereon, held to be an impairment of the obligation of the contract. Williams's Appeal, 72 Pa. St., 214.

Law denying execution on judg-

ments against a city, held to be unconstitutional. New Orleans v. Morris, 3 Woods (U. S.), 115; 18 Fed. Cas. No. 10,183.

MATERIAL CHANGE as to method of raising revenue necessary to meet the accruing interest on municipal bonds which impair the rights or remedies of the bondholders is unauthorized. Seibert v. Lewis, 122 U. S., 284; In re Copenhaver, 54 Fed. Rep., 660; State ex rel. v. Young, 29 Minn., 474; 9 N. W. Rep., 737.

IMPOSING ADDITIONAL BURDENS OF varying the conditions of a contract to supply water to the city by ordinance or otherwise, is forbidden. Los Angeles v. Los Angeles Water Co., 61 Cal., 65.

LAW IMPOSING CERTAIN CONDITIONS PRECEDENT to payment of municipal indebtedness which are reasonable and which did not render less effective pre-existing remedies are valid. Louisiana v. New Orleans, 102 U. S., 203; State v. New Orleans, 32 La. Ann., 493; Lincoln v. Grant, 38 Neb., 369; 56 N. W. Rep., 995; Parker v. Buckner, 67 Tex., 20; 2 S. W. Rep., 746.

But unreasonable conditions contained in state laws or ordinances respecting the presentation or reg-

contract was made the assessment of \$386.59 was valid. corporate authorities, following the provision of the repealed law, made the assessment \$386.59. The contract provided that the city should not in any event "be liable to pay for any part of said work or of the material used for the same, except such as may properly be chargeable upon city property bounding or abutting the said street." It thus appears that if the amended law governed the contractor would lose the difference between \$386.59 and \$165, or \$221.59, for he surrendered all claim on the city for any excess of cost over the assessment by his contract. The improvement ordinance, passed before the contract was made, provided that "the costs and expenses was to be ascertained and assessed according to the provisions of the acts of the legislature and other ordinances of the city on the subject of special taxes." The court sustained the assessment under the old law.21 In a Texas case the action was to recover the amount of two certificates of assessment for work done in constructing a pavement in front of defendant's property under a contract with the city, dated Oct. 3, 1888. The work had been regularly let and was completed Oct. 30, 1888. As the law required, the city engineer made out the roll, showing prop-

istry of bonds, warrants, claims, judgments, etc., against the city are void. McCracken v. Moody, 33 Ark., 81; Robinson v. Magee, 9 Cal., 21; 70 Am. Dec., 638; Rose v. Estudille, 39 Cal., 270; Priestly v. Watkins, 62 Miss., 798; Royall v. Virginia, 116 U. S., 572; Sands v. Edmunds, 116 U. S., 585; Willis v. Miller, 29 Fed. Rep., 239; McCauley v. Brooks, 16 Cal., 11, 29-31, per Field, C. J.; Brewer v. Otoe County, 1 Neb., 373, 381.

21 "In the case before us, the law in force at the time the city obligated itself to make an assessment equal to the contract price of the work, created the obligation of this contract. The act of 1870 impaired that obligation by depriving the city of the power to perform without any provision to make good to the contractors the

difference. The city was not bound to make it good out of the general fund, and could not be compelled to do so, under the authority of the cases cited from 18 Ohio St. (Creighton v. Toledo, 18 Ohio St., 447; Welker v. Toledo, 18 Ohio St., 452). Its obligation was to pay by assessment and in no other way. It could be made liable in no other way without the assent of both parties." In referring to the constitutional power of the legislature to restrict the power of municipal corporation in powers of taxation, assessments, etc., the court remarked that such power was subject to the limitation of the federal constitution that, "no state shall pass any law impairing the obligation of contracts." Concluding the court observed (p. 434): "When the legiserty fronting on the improvement, the owners, etc., the total cost of work and sum assessed against each lot owner, etc. This was not approved by the city council, as the city charter directed, but the mayor and secretary issued certificates of assessment (tax bills). Afterwards it was discovered that these certificates were defective. The city council ordered that the city engineer make out a new and corrected roll and that upon a return of the unpaid certificates they be cancelled and new certificates be issued. This was done, but before their issue the section of the charter under which the contract was let and the work done had been repealed (March 15, 1889) and a new section substituted, providing a wholly different mode of making street improvements and a different method of issuing certificates. It was claimed that the certificates were void. The court held the certificates valid. "The provisions of the last amendment of the city charter are so variant from the section as it existed at the time of the contract that certificates in accordance with the new section for work done under the old could not be issued without materially altering the terms of the contract. The legislature could not repeal the law or any of its provisions so as to impair the contract. If it had provided as effective a remedy under the new as existed under the old it might be held that the old law was repealed. But such is not the case. The certificates provided for in the new section are materially different from those provided for in the old. It is not to be presumed that the legislature intended to repeal the old section as to existing contracts." 22

Interest on special tax bills as part of obligation. Reduction in the rate of interest after the contract is let and the lature has invested the corporation with the power to improve streets, and raise money to pay the cost of such improvements by an assessment, and persons have, on the faith of this power and the stipulation of the corporation, performed the contract, and the contractor has become entitled to the consideration there is a (p. 435) contract obligation to pay, valid in all respects, that may be enforced. Such a contract is as free from legislative control as one between It is wisely limited individuals.

by the constitutional provisions." Goodale v. Fennell, 27 Ohio St., 426, 434; 22 Am. Rep., 321.

22 Flewellyn v. Proetzel, 80 Tex., 191, 197; 15 S. W. Rep., 1043.

As affecting the validity of laws providing for the payment special tax bills in annual installments, passed subsequent to the letting of the contract for work, see argument of Mr. Justice Swayne in delivering the opinion Supreme Court of the United States in Edwards v. Kearzey, 96 U.S., 595, 601, 602.

work begun is sometimes made and the question is then presented whether the provisions relative to interest constitute a part of the contract obligation. Respecting this proposition there is apparent conflict in the decisions. In one case the Supreme Court of the United States, 221/2 with a divided court, held that a city may reduce the rate of interest on judgments when interest is not provided for in the contract. Other cases have announced the same rule.²² The doctrine of these cases is that, if not stipulated in the contract, interest is to be regarded as in the nature of a penalty or liquidated damages, arising merely by virtue of the operation of law, which may be changed at the pleasure of the state. However, these cases deal solely with interest on judgments, which matter is usually regulated by general laws. In the opinions a judgment is not viewed as a contract at all.23 Therefore, the conclusion is reached that a mere penalty imposed for not paying a judgment when rendered is not a part of the obligation of the contract from which the judgment sprung.

Does the doctrine of these cases go further than to establish the rule that the provisions of the state statute respecting interest on judgments do not constitute a part of the contract for the improvement? These provisions may be excluded and also the general statutory provisions relating to interest on contracts in general, judgments, etc., and the question remains whether the repealed provisions of the charter or ordinances as to interest on special tax bills do not constitute a part of the contract, as much so as if written therein, or as much so as other provisions of the law—statute, charter or ordinance—which authorize the making of the contract, and which control

22½Morley v. Lake Shore and Michigan Southern Ry., 146 U. S., 162.
22¾ Nevada Co. v. Hicks, 50 Ark.,
416; 8 S. W. Rep., 180; Read v.
Mississippi, 69 Ark., 365; 63 S. W.
Rep., 807.

²³ "A judgment is, in no sense, a contract or agreement between parties." Wyman v. Mitchell, 1 Cowen (N. Y.), 316, 321.

"A statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the parties. Even a judg-

ment founded upon a contract is no contract." McCoun v. N. Y. Cent. R. R., 50 N. Y., 176, 180.

"A judgment is no contract nor can it be considered in the light of a contract; for judicium redditur in invitum." Per Lord Mansfield in Bidleson v. Whytel, 3 Burrow, 1545.

"The term 'contract' is used in the constitution in its ordinary sense, as signifying the agreement of two or more minds, for consideration proceeding from one to its operation, although not set out in the contract or even referred to therein.24

In one case the charter rate of interest was treated as a part of the contract up to the date of judgment on the tax bills and then on the judgment the rate of interest prescribed by general statute was applied. The court declared that the 15 per cent interest provided by the charter was more in the nature of a penalty than a contract. The charter did not provide that the judgment should bear 15 per cent interest, therefore, the law in existence when the judgment was entered controlled. But the point of the case is that the contractor was given the benefit of the charter rate of interest up to the date of judgment.²⁵

In a Pennsylvania case, a legislative act forbidding the computation of interest on prior municipal indebtedness after a specified date, was held to violate the "constitution clearly, plainly, palpably and in such manner as to leave no doubt or hesitation in our minds." ²⁶ If a new provision reducing the rate of interest can be made to apply to contract for public work on the theory that charter interest is not a part of the obligation, then for like reason, a new section forbidding any interest whatever on special tax bills can be made to apply.²⁷

§ 247. When new remedy controls. Where a remedy is legally changed, all rights of action are enforceable under the new procedure.²⁸ It is not enough that the remedy is changed and rendered less speedy and convenient. If there is still a substantial remedy left to enable the party to enforce his rights that is sufficient.²⁹ If the new remedy is not unreasonable and will enable the party to enforce his rights without new and burdensome restrictions the party is bound to pursue the new remedy.³⁰

the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence." Louisiana v. New Orleans, 109 U. S., 285, 288.

²⁴ Buchan v. Broadwell, 86 Mo., 31, seems to give an affirmative answer.

25 St. Louis v. Allen, 53 Mo., 44
 26 William's Appeal, 72 Pa. St.,
 14

²⁷ Further as to changing rates of interest, see Cox v. Marlatt, 36

N. J. L., 389; Verree v. Hughes, 11
N. J. L., 91; North River Meadow
Co. v. Shrewsbury Church, 22
N. J. L., 424, 429; Wilson v. Marsh,
13
N. J. Eq., 289.

28 Winslow v. People, 117 Ill.,
152; 7 N. E. Rep., 135, affirming
17 Ill. App., 222.

²⁹ James v. Stull, 9 Barb. (N. Y.), 482.

³⁰ Per Mr. Justice Clifford, in Edwards v. Kearzey, 96 U. S., 595, 608.

§ 248. When old law to be followed. Where the change of remedy is substantial or material the old law remains in force for the purpose of completing the execution of all contracts made by virtue of it. In other words, a law, although repealed, is still in force for the purpose of giving the remedy provided by the obligation of the contract.³¹ In an Illinois case the improvement ordinance made the assessment payable in five installments, as provided by law then in force. Subsequently the law was changed, providing for the division of an assessment into not more than ten installments, which had been held to operate as an amendment of the previous law.³². It was held that as the prior law was in force when the ordinance was passed and the proceedings instituted, they were unaffected by the change in the law.³³

A contract with a municipal corporation was made and the work performed, in reliance upon the mode of taxation enabling the corporation to perform its part, which afterwards was declared to be unconstitutional by the state Supreme Court. Subsequently the state legislature supplied the place of the void law with another which gave the power to levy a tax to pay the debt. Judgment was then obtained and application made for mandamus to enforce its collection, when the latter law was repealed. Here the repeal was disregarded, and the same rule applied as though the latter law had existed at the date of the contract. The case seems to rest upon the proposition that "where a remedy has once been accorded, the right to employ it existed, and especially where, as in this case, its employment had actually been entered upon, there was no power in the legis-

Rule applied to proceedings to ascertain damages to lands by the construction of a canal. Commonwealth v. Beatty, 1 Watts. (Pa.), 382.

Statute of limitations. Gilman v. Cutts, 23 N. H., 376.

Assessments for construction of drains, where law repealed without saving clause. Bate v. Sheets, 64 Ind., 209; McKinsey v. Bowman, 58 Ind., 88; Board of Commissioners, etc., v. Ruckman, 57 Ind., 96, 102; Roush v. Morrison, 47 Ind., 414, 416, 417.

New remedy to be followed if adequate. Von Baumback v. Bade, 9 Wis., 559; McMillan v. Sprague, 4 How. (U. S.), 647; 35 Am. Dec., 412; Bronson v. Kinzie, 1 How. (U. S.), 311.

³¹ Rule applied to levy and collection of taxes for payment of judgment against municipal corporation. Seibert v. Lewis, 122 U. S., 284.

32 English v. Danville, 150 Ill.,
 92; 36 N. E. Rep., 994.

³³ Merriam v. People *ex rel.*, 160 Ill., 555; 43 N. E. Rep., 705.

lature to take away that remedy without the substitution of some reasonable mode of relief in its place." 34

- 3. Ordinances Interfering with or Attempting to Regulate Foreign or Interstate Commerce.
- § 249. Ordinances cannot interfere with or regulate interstate or foreign commerce. Under the constitution of the United States the Congress possesses exclusive jurisdiction, "to regulate commerce with foreign nations, and among the several states." Therefore, all state laws or municipal ordinances, which, in effect, interfere with, or constitute a regulation of such commerce, clearly violate this provision of the federal constitution, and will be declared void by the courts.

While most of the cases relating to this subject involved state laws, the principles are obviously the same whether the regulation is attempted by statute or municipal ordinance.

Respecting this doctrine, the following principles, established by the United States Supreme Court, were stated by Mr. Justice Bradlev: "The constitution of the United States, having given to Congress the power to regulate commerce, not only with foreign nations but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom; that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, health and comfort of persons and the protection of property and imposes taxes upon persons residing within the state or belonging to its population, and upon vocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution

³⁴ Brooks v. Memphis (U. S. Cir. 35 Constitution U. S., art. I., sec. Ct. W. D. Tenn.), 4 Federal Cas. 8, par. 3.
No. 1,954; 3 Central Law Journ., 356.

and laws of the United States; and imposes taxes upon all property within the state, mingled with and forming part of the great mass of property therein; but that, in making such internal regulations, a state cannot impose taxes upon persons passing through the state or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not become part of the common mass of property therein; and no discrimination can be made, by such regulations, adversely to the persons or property of other states: and no regulations can be made directly affecting interstate commerce." ³⁶

A law cannot be deemed a regulation of commerce among states merely because it may incidentally or indirectly affect it.³⁷

Meaning of term "Commerce." The able and comprehensive opinion of Chief Justice Marshall, delivered in Gibbons v. Ogden,38 declares the fundamental principle for the construction of the commerce clause of the federal constitution. The doctrine of that opinion has been consistently followed by the United States Supreme Court in all subsequent cases, involving many state laws and municipal ordinances relating to the subject. In that case the great jurist declared: "In regulating commerce with foreign nations the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every state in the union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or ter-

³⁶ Robbins v. Shelby Taxing District, 120 U. S., 489, quoted with approval in Caldwell v. North Carolina, 187 U. S., 622, 625 (1903). For history and necessity of federal control of interstate and foreign commerce, see article of James Madison, 42 Federalist, p.

262 et seq.; Opinion of Chief Justice Marshall, in Brown v. Maryland, 12 Wheat. (U. S.), 419; of Mr. Justice Miller, in Cook v. Pennsylvania, 97 U. S., 566.

³⁷ Missouri, K. & T. Ry. Co. v. Haber, 169 U. S., 613.

38 9 Wheat. (U. S.), 1.

minate at a port within a state then the power of Congress may be exercised." 39

"Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens or subjects of foreign countries and between the citizens of different states." 40

No analogy between the power of taxation and the regulation of commerce. In Gibbons v. Ogden the Chief Justice declared that the power of taxation is indispensable to the existence of the states, "and is a power which, in its own nature is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division, and a power in one to take what is necessary for certain purposes. is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. '' 41

§ 252. License tax on those engaged in exporting and importing. In the language of the Supreme Court of the United

³⁹ Gibbons v. Ogden, 9 Wheat. Preston v. Finley, 72 Fed. Rep., (U. S.), 1, 195. 850, 859.

⁴⁰ Welton v. Missouri, 91 U. S., 41 9 Wheat. (U. S.), 1, 199. 275, 280, quoted with approval in

States: "No state can tax an import or export as such except under the limitations of the constitution. But before the article becomes an export or after it ceased to be an import, by being mingled with other property in the state, it is a subject of taxation by the state. A cotton broker may be required to pay a tax upon his business, or, by way of license, although he may buy and sell cotton for foreign exportation."42 Thus a tax on money and exchange brokers is valid as applied to one dealing exclusively in foreign exchange. Here it was decided that the tax was for the privilege of carrying on the business and was not imposed upon the bills of exchange as such.43 So a license tax on residents of the state engaged in packing or canning oysters for sale or transportation was declared valid. Here it was held that the tax was imposed for the prosecution of the business within the jurisdiction of the state, and the fact that the oysters were prepared for transportation did not constitute a tax on interstate commerce.44

§ 253. License tax for privilege of selling goods, etc. In accordance with the principles above outlined, state laws and municipal ordinances imposing a license tax for the privilege of carrying on trades, occupations, etc., are uniformly held invalid, where they interfere with or regulate interstate or foreign commerce. Thus a state law of Tennessee was declared void which imposed a license tax on "all drummers and all persons not having a regular licensed house of business in the taxing district," who should offer for sale or sell goods, wares or merchandise therein by sample. "This kind of taxation." remarked the court, "is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions on interstate commerce for the benefit and pro-

⁴² Nathan v. Louisiana, 8 How. (U. S.), 73, 81.

⁴³ Nathan v. Louisiana, 8 How. (U. S.), 73, 81.

When tax on foreign bills of 8

lading is tax on exports, see Fairbank v. U. S., 181 U. S., 283.

⁴⁴ State v. Applegarth, 81 Md., 293; 31 Atl. Rep., 961; 28 L. R. A., 812.

tection of its own citizens we are brought back to the condition of things which existed before the adoption of the constitution and which was one of the principal causes which led to it."

The doctrine of this case has been repeatedly affirmed by the Supreme Court of the United States in holding void state laws and municipal ordinances, seeking to impose a license tax on non-resident (of state) drummers and commercial agents, selling by sample.⁴⁶ Therefore, the law is firmly established that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.⁴⁷

§ 254. Same—Discrimination is not the test. The fact that the local law by its terms is made applicable to all of the class. as drummers or commercial travelers or those going from place to place selling goods by sample, does not save it from being invalid under the interstate commerce clause of the constitution. Numerous decisions of state courts prior to the decision of the United States Supreme Court in Robbins v. Shelby County Taxing District,48 held that if the law was free from discriminating features it was valid. Concerning this point the Federal Supreme Court observed: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers-those of Tennessee and those of other states: that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of the State The negotiations of the sale of goods which Freight case.49 are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate com-

⁴⁵ Per Mr. Justice Bradley, in Robbins v. Shelby Taxing District, 120 U. S., 489.

⁴⁶ Caldwell v. North Carolina, 187 U. S., 622; Brennan v. Titusville, 153 U. S., 289; Crutcher v. Kentucky, 141 U. S., 47; Stouten-

burgh v. Hennick, 129 U. S., 141; Asher v. Texas, 128 U. S., 129.

⁴⁷ Lyng v. Michigan, 135 U. S.,

^{48 120} U. S., 489.

^{49 15} Wall. (U. S.), 232.

merce. A New Orleans merchant cannot be taxed there for ordering goods in London or New York, because, in one case it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone."⁵⁰ The fact that such ordinance was held by the state courts to be enacted in the exercise of the police power does not relieve the Supreme Court of the United States of the duty of declaring it void where it is in fact, or in effect, an interference or burden on the lawful commerce between the citizens of the states. Any tax on the occupation is a restriction on the right to sell and is forbidden by the federal constitution.⁵¹

Same-Where goods sold are in the state. A license tax imposed for the privilege of doing business by the state or a municipality on all peddlers, hawkers, drummers and itinerant vendors, which operates uniformly upon all persons engaged in the same kind of business, whether residents or non-residents of the state, is valid, where the goods sold are at the time of the sale within the state and have become a part of the property of the state.⁵² As soon as the goods are in the state and become a part of its general mass of property they will become liable to be taxed in the same manner as other property of sim-Thus an ordinance requiring persons who ilar character.⁵³ engage on their own account in a "commercial street brokerage business." in the course of which they take orders for goods to be filled by non-resident dealers and re-sell any goods rejected after their arrival in the state is not void nor in conflict with interstate commerce.⁵⁴ But a tax on goods sold by an auctioneer, so far as it applies to goods from a foreign state, sold in the original package of the importer before they become

⁵⁰ Robbins v. Shelby County Taxing District, 120 U. S., 489, 497.

^{5j} Brennan v. Titusville, 153 U.
 S., 289; State v. Agee, 83 Ala., 110;
 So. Rep., 856.

52 Brown v. Houston, 114 U. S.,
622; 5 Sup. Ct. Rep., 1091; South
Bend v. Martin, 142 Ind., 31; 41
N. E. Rep., 315; Emert v. Missouri,
156 U. S., 296.

An ordinance imposing a license upon itinerant merchants, as applied to one who purchases for resale bankrupt stocks in whatever state he can obtain them, is not invalid as a regulation of commerce. Carrollton v. Bazzette, 159 Ill., 284; 42 N. E. Rep., 837.

53 Robbins v. Shelby Co. Taxing Dist., 120 U. S., 498; 7 Sup. Ct. Rep., 592; Brown v. Houston, 114 U. S., 622; 5 Sup. Ct. Rep., 1091; Singer Mfg. Co. v. Wright, 97 Ga., 114.

54 Walton v. Augusta, 104 Ga., 757; 30 S. E. Rep., 964; case of Leloup v. Port of Mobile, 127 U. S., 640, referred to and distinguished.

mingled with the property of the country, is an interference with interstate commerce and is invalid.⁵⁵ And where the goods manufactured by a non-resident are sold by the agent on the installment plan and are to be delivered afterwards by the agent, the agent cannot be subjected to a license tax.⁵⁶

§ 256. Same—Same—Peddlers. Many cases have been presented where peddlers and itinerant vendors of goods manufactured in a state other than that in which they were being sold have opposed the payment of a license tax, imposed by statute or ordinance upon the ground that it was an interference with interstate commerce and therefore void as to goods manufactured in another state. But the courts have held such statutes and ordinances valid where it was found that at the time the sale was made the goods were in the state,57 as where a peddler going from place to place within the state carries the goods along with him.58 Where the manufactured goods are sent into another state, in car load lots, and agents take the same in small quantities from a central warehouse and carry them about the country, selling them and delivering them direct to purchasers, such agents are not engaged in selling goods by sample.⁵⁹ Where goods are previously contracted by the importer or his agent and are shipped and received in a single package and that package is broken up and its contents distributed among the several purchasers, the goods are not entitled to the protection of interstate commerce. 60

⁵⁵ Cook v. Pennsylvania, 97 U. S., 566.

56 In re Spain, 47 Fed., 208;
 Huntington v. Mahan, 142 Ind.,
 695; 42 N. E. Rep., 463.

57 South Bend v. Martin, 142 Ind.,
 31; 41 N. E. Rep., 315; Hynes v.
 Briggs, 41 Fed., 468.

58 Emert v. Missouri, 156 U. S.,
 296, following Machine Co. v.
 Gage, 100 U. S., 676; Commonwealth v. Harmel, 166 Pa. St., 89;
 30 Atl. Rep., 1036.

Where the goods are ordered in the name of the agent and when received and delivered by him to the purchaser. Croy v. Obion County, 104 Tenn., 525; 58 S. W. Rep., 235. A statute which provided for the levy and collection of an occupation tax from every person or firm who peddles out clocks or cooking stoves was held valid, and not in conflict with the commerce act. Ex parte Butin, 28 Tex. App., 304; 13 S. W. Rep., 10.

⁵⁹ American Harrow Co. v. Shaffer, 68 Fed. Rep., 750.

60 Kimmel v. State, 104 Tenn.,
 184; 56 S. W. Rep., 854; Austin v.
 State, 101 Tenn., 563; 48 S. W.
 Rep., 305.

Cigarettes put up in small boxes, bearing internal revenue stamps, which are shipped from one state to another, the boxes constitute original packages; but when they The state may not only tax the property if it be within its jurisdiction at the time of the sale, but also the occupation of selling it, or it may authorize a municipal corporation to do so. A tax or license levied upon the property itself or on the occupation of selling it when such property is actually present within the jurisdiction exercising such authority is not in any sense an interference with interstate or foreign commerce.⁶¹

§ 257. Personal contracts—Occupation tax. The exemption of persons and property from a local license tax or control is strictly confined to such persons as are engaged, and to such property as is employed, in interstate or foreign commerce. Commerce, as stated by the United States Supreme Court, in its broad sense, includes intercourse and the means of intercourse, as applied to trade. 62 The term commerce does not include personal contracts although made between those residing in different states, as contracts of street brokers,63 and insurance contracts,64 of fire,65 marine,66 or mutual life.67 The making of contracts of this character is held to be a mere incident of the business transacted, and not commerce in and of itself. The distinction is well illustrated in the following cases, sustaining tax and license laws: a tax imposed upon agents doing business in a state for laundries, located in another state:68 a law regulating the sale and redemption of transporta-

reach their place of rest for final disposal, and remain there until sold to customers, they thereupon become a part of the mass of the property of the state, and become subject to a license tax, such as was placed on all goods of that character. *In re* May, 82 Fed., 422.

 61 For various definitions of peddlers and drummers:

Brookfield v. Kitchen, 163 Mo., 546; 63 S. W. Rep., 825; State v. Snoddy, 128 Mo., 523; 31 S. W. Rep., 36; State v. Parsons, 124 Mo., 436; 27 S. W. Rep., 1102; State v. Smithson, 106 Mo., 149; 17 S. W. Rep., 221; State v. Emert, 103 Mo., 241; 15 S. W. Rep., 81; State v. Welton, 55 Mo., 288; State ex rel. Barricelli v. Noonan, 59 Mo. App.,

524; State v. Hoffman, 50 Mo. App., 585; State v. Downing, 22 Mo. App., 504.

⁶² Paul v. Virginia, 8 Wall. (U. S.), 168, 183.

63 Walton v. Augusta, 104 Ga., 757; 30 S. E. Rep., 964.

64 License law operating directly upon agents of foreign insurance companies held valid. People v. Thurber, 13 Ill., 554.

65 Paul v. Virginia, 8 Wall. (U. S.), 168, 183.

66 Hooper v. California, 155 U. S., 648.

⁶⁷ New York Life Ins. v. Cravens, 178 U. S., 389.

68 Smith v. Jackson, 103 Tenn.,673; 54 S. W. Rep., 981; 47 L. R.A., 416.

tion tickets;⁶⁹ a license imposed upon locomotive engineers, operating or running trains of cars on any railroad in the state;⁷⁰ an ordinance imposing a license fee upon a telegraph company upon business done exclusively in the city;⁷¹ and a license for the privilege of doing a general commission business within the state. 'The fact that much of the business was done on behalf of principals residing without the state and many of the transactions were sales of goods to be shipped into the state, was held not to be an interference with interstate commerce.⁷²

An ordinance of the city of Mobile, Ala., which imposed a license tax on all telegraph companies with offices in the city, was held invalid, being an interference with interstate commerce, since its business consisted in transmitting messages to all parts of the United States.⁷⁸

§ 258. License tax on brokers, agents, etc., engaged in interstate commerce. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves, and where such a tax

69 State v. Corbett, 57 Minn.,
 345; 24 L. R. A., 498; 59 N. W.
 Rep., 317.

⁷⁰ Smith v. Alabama, 124 U. S., 465.

71 Postal Tel. Cable Co. v. Charleston, 153 U. S., 692; 14 Sup. Ct. Rep., 1094; 38 L. Ed., 871, affirming 56 Fed. Rep., 419; Western Union Tel. Co. v. Fremont, 39 Neb., 692; 58 N. W. Rep., 415; Postal Tel. & Cable Co. v. Norfolk (Va., 1903), 43 S. E. Rep., 207.

⁷² Ficklen v. Shelby Co. Taxing Dist., 145 U. S., 1.

78 Leloup v. Mobile, 127 U. S., 640, reversing Mobile v. Leloupe, 76 Ala., 401, and overruling Osborne v. Mobile, 16 Wall., 479, which held an ordinance of the city, requiring express and railroad companies doing business in the city and extending beyond the state, to pay an annual license was valid. And in effect overruling a large number of state decisions which were based on Osborne v.

Mobile. Thus in W. U. Tel. Co. v. State, 55 Tex., 314, the court following Osborne v. Mobile, held an occupation tax on an express company graduated according to the business done, regardless of whether it was within or without the state, valid.

And a license tax upon foreign telegraph companies having an agency in the city was upheld in W. U. Tel. Co. v. Richmond, 26 Gratt. (Va.), 1.

And a tax on the gross receipts of a telegraph company for the year next preceding the assessment return was held valid. W. U. Tel. Co. v. Mayer, 28 Ohio St., 521.

And a license tax imposed on the business of an express company engaged solely in commerce between the state was upheld. Memphis, etc., v. Nolan, 14 Fed., 532.

A privilege tax on steamboat agents and agents of railroad companies, having no terminus in the conflicts with the constitution of the United States it can not be any the less invalid because enforced through the form of a personal license.⁷⁴ The particular form of the transaction does not always furnish the test in determining whether it constitutes foreign or interstate commerce. Clearly the sale of property of one state to the residents of another state is interstate commerce. It can make no difference whether the sale was negotiated by the principal or an agent or a broker, who has an established place of business, or by a commercial traveler or drummer, who goes from place to place soliciting orders.⁷⁵ Thus an ordinance imposing a license tax upon every traveling merchant, hawker or peddler, who vends goods, wares or merchandise other than the manufactures or productions of the

state was upheld. Lightburne v. Taxing District, 4 Lea (Tenn.), 219.

74 Welton v. Missouri, 91 U. S., 275.

So it was held that the exaction of a license tax from the importer of goods was a tax on the goods, and therefore in conflict with the constitution. Brown v. Maryland, 12 Wheat. (U. S.), 419, 425, 444.

75 Laws and ordinances requiring a license for taking orders and making sales of goods, as drummers selling by sample for principals residing beyond the state, are void. The tax is, in effect, a tax on the goods sold and a state cannot levy a tax on goods not within her jurisdiction.

United States—Stockard v. Morgan, 185 U. S., 27; Brennan v. Titusville, 153 U. S., 289, reversing 143 Pa. St., 642; 22 Atl. Rep., 893; Stoutenburgh v. Hennick, 129 U. S., 141; Asher v. Texas, 128 U. S., 129; Robbins v. Shelby Taxing District, 120 U. S., 489; Brown v. Houston, 114 U. S., 622; Webber v. Virginia, 103 U. S., 344; Cook v. Pennsylvania, 97 U. S., 566; Welton v. Missouri, 91 U. S., 275; Ex parte Hough, 69 Fed. Rep.,

330; In re Rozelle, 57 Fed. Rep., 155; In re Kimmel, 41 Fed. Rep., 775; Ex parte Stockton, 33 Fed. Rep., 95; Woodruff v. Parham, 8 Wall. (U. S.), 123; In re Hennick, 5 Mackey (D. C.), 489.

Indiana—McLaughlin v. South Bend, 126 Ind., 471; 26 N. E. Rep., 185.

Kansas—Ft. Scott v. Pelton, 39 Kan., 764; 18 Pac. Rep., 954.

Louisiana—Pegues v. Ray, 50 La. Ann., 574; 23 So. Rep., 904; Simmons Hdw. Co. v. McGuire, 39 La. Ann., 848; 2 So. Rep., 592.

Maine—State v. Furbush, 72 Me., 493.

Nevada—Ex parte Rosenblatt, 19 Nev., 439; 14 Pac. Rep., 298.

New York—Buffalo v. Reavey, 55 N. Y. Supp., 792.

North Carolina—State v. Bracco, 103 N. C., 349; 9 S. E. Rep., 404.

Pennsylvania—Port Clinton Borough v. Shafer, 5 Pa. Dist. Ct., 583.
South Dakota—State v. Rankin,
11 S. Dak., 144; 76 N. W. Rep.,
299.

Texas—Talbutt v. State, 39 Tex. Crim. App., 64; 44 S. W. Rep., 1091. Virginia—Adkins v. Richmond, 98 Va., 91; 34 S. E. Rep., 967; 47 L. R. A., 583. states,⁷⁶ or who solicits orders for non-resident principals is void.⁷⁷

The delivery of the goods sold is plainly a part of the commercial transaction. Thus the occupation of delivering goods, as books, sold by a resident or corporation of one state to those in another cannot be licensed by the state or municipal corporation, since this is clearly an interference with an interstate commercial transaction.⁷⁸

§ 259. Discriminating license tax void. State statutes and municipal ordinances which discriminate in the license tax im-

ILLUSTRATIVE CASES.

A license on "itinerant dealers in fruit trees, vines," etc., so far as it applies to a foreign drummer or traveling agent, selling goods by sample for his principal who is a non-resident, is void. State v. Agee, 83 Ala., 110; 3 So. Rep., 856.

An ordinance requiring an agent of a corporation residing in another state to pay a license for selling a picture frame, encasing a picture sold by a corporation on previous orders, is in violation of the interstate commerce provision of the Constitution. Laurens v. Elmore, 55 S. C., 477; 33 S. E. Rep., 560.

License tax on persons, other than photographers of the state, who solicit pictures to be enlarged, is void. State v. Scott, 98 Tenn., 254; 39 S. W. Rep., 1; 36 L. R. A., 461.

So an act which requires a person who solicits orders for spirituous liquors, to procure a license, is void as applied to a person soliciting orders for the sale of goods to be shipped from points outside of the state. State v. Lichtenstein, 44 W. Va., 99; 28 S. E. Rep., 753.

So a license tax imposed by the board of supervisors of San Francisco, on an agent soliciting business in San Francisco for a railroad running from Chicago to New York, but who sold no tickets. McCall v. California, 136 U. S., 104.

An ordinance applicable to brokers who represent non-resident principals exclusively is void. Stratford v. Montgomery, 110 Ala., 619; 20 So. Rep., 127.

But a tax imposed by a state upon all money and exchange brokers, although the business was limited to foreign bills of exchange, was held not in conflict with interstate commerce. Nathan v. Louisiana, 8 How. (U. S.), 73.

76 Ex parte Thomas, 71 Cal., 204; 12 Pac. Rep., 53; Corson v. Maryland, 120 U. S., 502.

To license a person peddling tea the growth of foreign country is in conflict with Federal Constitution. State v. Pratt, 59 Vt., 590; 9 Atl. Rep., 556.

77 Ex parte Murray, 93 Ala., 78; 8 So. Rep., 868; Wrought Iron Range Co. v. Johnson, 84 Ga., 754; 11 S. E. Rep., 233; Martin v. Rosendale, 130 Ind., 109; 29 N. E. Rep., 410; People v. Bunker, 128 Mich., 160; 87 N. W. Rep., 90; Overton v. Vicksburg, 70 Miss., 558; 13 So. Rep., 226.

78 Huntington v. Mahan, 142
 Ind., 695; 42 N. E. Rep., 463; In re
 Tuerman, 48 Fed. Rep., 167; In re
 Nichols, 48 Fed. Rep., 164; In re

posed by them against persons or produce of other states are uniformly held void, not only because such laws constitute an interference with interstate commerce, but because they also are in violation of the privileges and immunities of citizens in other states, guaranteed by the federal constitution. 79 No state can, consistently with the Federal constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereof, more onerous public burdens or taxes than it imposes upon like products of its territory.80 Thus an ordinance requiring a hawker or peddler, who is not a resident of the city, and who proposes to sell goods, wares or merchandise which are not grown or manufactured in the county in which the city is situated, to procure a license, discriminates against the citizens and products of other communities, and is unconstitutional.81 So a law authorizing the withholding of a peddler's license from the citizens of other states, is an unconsti-

White, 43 Fed. Rep., 913; Bloomington v. Bourland, 137 Ill., 534; 27 N. E. Rep., 692; Baxter v. Thomas, 4 Okla., 605; 46 Pac. Rep., 479.

Goods sold on the installment plan are also exempted. *In re* Spain, 47 Fed. Rep., 208.

Contra—Ordinance passed by virtue of legislative grant imposing tax on goods, etc., not the product of the state, sold on commission by any person residing in the city, held to be a legitimate exercise of the power of the state to regulate its internal commerce, and not an "impost or duty on imports." Cumming v. Savannah, R. M. Chart. (Ga.), 26, 28.

State statute imposing license to vend merchandise of non-residents held valid. Sears v. Warren County Comrs., 36 Ind., 267.

State statute imposing license tax upon all traveling merchants, agents, etc., who sell goods in state by sample and otherwise, to be delivered at future time, held valid. In re Rudolph, 6 Sawyer (U. S.), 295.

79 Const., art. IV., sec. 2; Walling v. Michigan, 116 U. S., 446; Ward v. Maryland, 12 Wall. (U. S.), 418, reversing 31 Md., 279. Compare Crandell v. Nevada, 6 Wall. (U. S.), 35; Minneapolis Brewing Co. v. McGillivray, 104 Fed. Rep., 258.

Ordinances discriminating against non-resident's goods held void. Ex parte Thornton, 12 Fed. Rep., 538; Fecheimer Bros. & Co. v. Louisville, 84 Ky., 306; 2 S. W. Rep., 65.

so Tiernan v. Rinker, 102 U. S., 123; Guy v. Baltimore, 100 U. S., 434; Vines v. State, 67 Ala., 73; Arkansas v. McGinnis, 37 Ark., 362; Ex parte Thomas, 71 Cal., 204; 12 Pac. Rep., 53; State v. Zophy, 14 S. Dak., 119; 84 N. W. Rep., 391.

81 Graffty v. Rushville, 107 Ind., 502; 8 N. E. Rep., 609; Rodgers v. McCoy, 6 Dak., 238; 44 N. W. Rep., 990.

tutional discrimination, and therefore void.82 Thus an ordinance which prohibits non-residents from peddling or selling goods from house to house without a license and which fixes such license tax at such sum, as in effect, to make it prohibitory, and, which in terms, excepts residents of the municipality from its operation, is void.83 So an ordinance regulating the sale of farm product, making exceptions in favor of residents of the state, was held discriminating and void.84 So an ordinance which imposed a license tax upon all persons selling meat except of their own raising, is void.85 So a law which excepts peddlers residing in the county from its operation is void.86 And an ordinance imposing a tax on every agency of nonresident breweries doing business in the state, being a discrimination in favor of domestic breweries, is void.87 But an ordinance imposing a license tax upon all dealers in beer or ale by the cask, which was not manufactured in the city but brought there for sale, was held valid, there being no evidence in the case to show that the beer sold was manufactured outside of the state, and therefore not subject to the regulation of commerce.88

82 Bliss's Petition, 63 N. H., 135. A statute prohibiting the sale of any intoxicating liquors, except for medicinal or chemical purposes, as applied to a sale by the importer, and in the original or unbroken packages manufactured in and brought from another state, was held void, being repugnant to the commerce clause of the Federal Constitution. Leisy v. Hardin, 135 U. S., 100.

83 Sayre Borough v. Phillips, 148Pa. St., 482; 24 Atl. Rep., 76.

Ordinance discriminating in amount of license tax against non-residents void. Pacific Junction v. Dyer, 64 Iowa, 38; 19 N. W. Rep., 862; Carrollton v. Bazzette, 159 Ill., 284; 42 N. E. Rep., 837; State (Morgan) v. Orange, 50 N. J. L., 389; 13 Atl. Rep., 240; State v. Wiggin, 64 N. H., 508; 15 Atl. Rep., 128.

Discriminating against vendors

of patented articles. In re Sheffield, 64 Fed. Rep., 833.

Supp., 792; State v. Stevenson, 109
 N. C., 730; 14 S. E. Rep., 385.

⁸⁵ Georgia Packing Co. v. Macon, 60 Fed., 774.

A statute which discriminates in favor of purchases from wholesale dealers, resident in the state, and against purchases from non-residents is void. Albertson v. Wallace, 81 N. C., 479; Sinclair v. State, 69 N. C., 47.

Scommonwealth v. Snyder, 182
Pa. St., 630; 38 Atl. Rep., 356;
Rodgers v. Kent Circuit Judge, 115
Mich., 441; 73 N. W. Rep., 381;
Marshalltown v. Blum, 58 Iowa, 184; 12 N. W. Rep., 266.

87 Cullman v. Arndt, 125 Ala.,
581; 28 So. Rep., 70; Indianapolis
v. Bieler, 138 Ind., 30; 36 N. E.
Rep., 857.

ss Downham v. Alexandria, 10 Wall. (U. S.), 173.

§ 260. License tax under police power. Where the object is not to derive revenue but to protect the public against imposition the tax will be sustained under the general police power, but in the exercise of such power no interference with interstate or foreign commerce will be permitted. Thus an ordinance prohibiting the business of peddling within the municipal limits, without a license from the proper municipal officer, would seem to be as clearly justified by the police power as a statute prohibiting the same business throughout the commonwealth. But it is very clear that a police regulation must be directed against a business or practice that is harmful, and which may in some way injuriously affect the peace, good order, health, morality, or safety of society. On

Statutes and ordinances imposing a license upon itinerant vendors of drugs and proprietary medicines have been held not in conflict with the power of Congress to regulate commerce, but a valid exercise of the police power, intended to restrain the sale of nostrums by itinerants who profess knowledge of the art of healing in order to make sales.⁹¹

Ordinances and statutes requiring peddlers and itinerant vendors of goods to take out a license, have in many instances been held valid where the goods sold were manufactured in another state, upon the ground that the imposing of a license

89 Commonwealth v. Crowell, 156 Mass., 215; 30 N. E. Rep., 1015; Arnold v. Yanders, 56 Ohio St., 417; 47 N. E. Rep., 50; Commonwealth v. Harmel, 166 Pa. St., 89; 30 Atl. Rep., 1036; Thompson v. State, 17 Tex. App., 253.

An act to license and regulate the business of commission merchants, etc., held not to be in conflict with the power to regulate commerce, and as an act designed to prevent false and fraudulent practices was a valid exercise of the police power. State ex rel. Beek v. Wagener, 77 Minn., 483; 80 N. W. Rep., 633, 778, 1134.

90 Sayre Borough v. Phillips, 148 Pa. St., 428; 24 Atl. Rep., 76; Pabst Brewing Co. v. Terre Haute, 98 Fed. Rep., 330.

A statute of the state of Texas

which imposed an occupation tax of \$500.00 upon every person, firm, or association engaged in selling the "Sunday Sun," the "Kansas City Sunday Sun," or other publications of like character, was held valid, as a police regulation, and not invalid as a regulation of interstate commerce. Preston v. Finley, 72 Fed. Rep., 850.

91 State v. Wheelock, 95 Iowa,
 577; 64 N. W. Rep., 620; Commonwealth v. Newhall, 164 Mass., 338;
 41 N. E. Rep., 647.

A statute of West Virginia, requiring every person practicing medicine in the state to obtain a certificate from the state board of health was upheld upon the ground that it was within the power of the state to secure its citizens against the consequences of igno-

was a valid exercise of the police power of the state, to protect its citizens against fraud and imposition. However, in most cases of this kind where the constitutional question of interference with interstate commerce was raised, because the goods were manufactured in another state, it was found that the goods were carried along with the peddler and delivered at the time the sale was made, and the goods being in the state and not sold in the original package, were, therefore, subject to the taxing power of the state.92 But where the license tax imposed is, in effect, a tax on the goods of another state, and is, therefore, an interference with interstate commerce, as an ordinance imposing a license tax upon persons soliciting orders for books, the orders to be filled by a principal in another state;93 or, on each brewery depot of non-resident breweries;94 or, on any person desiring to deal in convict-made goods when imported from another state,95 it is void and cannot be upheld as a valid police regulation. An act imposing a license for the purpose of discouraging the use of intoxicating liquors and for the preservation of the health and morals of the people. cannot be justified as a police regulation, where it discriminates against the citizens and products of other states.96 By an act of congress of August 8, 1890, intoxicating liquors were made subject to the police regulations of the state into which they are transported.97

§ 261. Same—Telephone and telegraph poles in streets. A city may by ordinance impose a license tax upon poles and wires of a telegraph company erected and maintained in its streets within the city, to cover the expense of the enforcement of its police regulations and the necessary expense to which it is put by reason of the existence of such poles and wires, although the company is a corporation of another state and is

rance and incapacity, as well as of deception and fraud. Dent v. West Virginia, 129 U. S., 114.

West Virginia, 129 U. S., 114.

92 State v. Smithson, 106 Mo.,
149; 17 S. W. Rep., 221; Singer
Manufacturing Co. v. Wright, 33
Fed. Rep., 121; Wrought Iron
Range Co. v. Carver, 118 N. C.,
328; 24 S. E. Rep., 352; Rash v.
Farley, 12 Ky. Law Rep., 913; 15
S. W. Rep., 862; State v. Richards,
32 W. Va., 348; 9 S. E. Rep., 245.

93 In re Nichols, 48 Fed. Rep., 164.

94 Pabst Brewing Co. v. Terre Haute, 98 Fed. Rep., 330.

⁹⁵ Arnold v. Yanders, 56 Ohio St., 417; 47 N. E. Rep., 50.

96 Walling v. Michigan, 116 U.S., 446.

97 In re Rahrer, 140 U. S., 545; Commonwealth v. Calhane, 154 Mass., 115; 27 N. E. Rep., 881; Indianapolis v. Bieler, 138 Ind., engaged in interstate commerce. In one case the Supreme Court of the United States held that a charge imposed by ordinance for the use and occupation of the streets at so much per pole was in the nature of a rental or compensation for the space in the streets thus exclusively appropriated. "Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship."

* * That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax."

Whether the charge be called a license tax for the privilege of erecting its poles, or whether, as held in the above case, it is termed a rental for the use of the space occupied, it has been clearly decided that it is within the power of a municipality to impose such a tax, although telegraph and telephone companies are Federal agencies and engaged in interstate commerce.²

30; 36 N. E. Rep., 857; Reymann Brewing Co. v. Brister, 179 U. S., 445.

It was held in Rhodes v. Iowa, 170 U.S., 412, that under the act of Congress the state legislature did not affect the goods until the act of transportation had been completed and the goods, had arrived at the point of destination and had been delivered to the consignee. There was, however a dissenting opinion written by Mr. Justice Gray, and concurred in by Justices Harlan and Brown, which held that the laws of the state attached immediately upon the entry of the liquor into the state.

ps Atlantic & Pacific Tel. Co. v. Philadelphia, 23 Sup. Ct. Rep., 817; Philadelphia v. W. U. Tel. Co., 89 Fed. Rep., 454; Philadelphia v. W. U. Tel. Co., 40 Fed. Rep., 615; Postal Tel. Cable Co. v.

Charleston, 153 U. S., 692; Chester v. W. U. Tel. Co., 154 Pa. St., 464; 25 Atl. Rep., 1134; Philadelphia v. Postal Tel. Cable Co., 21 Ñ. Y. Supp., 556; 66 Hun. (N. Y.), 633; 67 Hun. (N. Y.), 21.

⁹⁹ State Freight Tax Case, 15 Wall. (U. S.), 232, 278.

¹ Per Mr. Justice Brewer, J., in St. Louis v. Western Union Tel. Co., 148 U. S., 92, reversing 39 Fed. Rep., 59, which held the charge to be a privilege or license tax.

² Railroad Co. v. Peniston, 18 Wall. (U. S.), 5, 30; Philadelphia v. W. U. Tel. Co., 82 Fed. Rep., 797; Allentown v. Tel. Co., 148 Pa. St., 117; 23 Atl. Rep., 1070; Philadelphia v. American U. Tel. Co., 167 Pa. St., 406; 31 Atl. Rep., 628; Philadelphia v. Postal Tel. Cable Co., 21 N. Y. Supp., 556; 67 Hun. (N. Y.), 21; 66 Hun. (N. Y.), 633. "It never could have been intend-

But the charge which the city is allowed to impose must be reasonable, that is, it must not be in excess of a reasonable compensation for the space in its streets thus exclusively appropriated, together with a sufficient sum to pay for the necessary inspection and care upon the part of the city to insure the public safety.3 An ordinance imposing a tax of one dollar per pole and two dollars and fifty cents per mile on each mile of wire, was held, under the circumstances, a reasonable charge.4 But an ordinance charging more than five times the sum required to pay the cost of supervision and inspection necessary for the protection of property and persons, was held unreasonable and void.⁵ The amount of the charge rests with the municipal council in the first instance and whether the amount imposed is reasonable is a question for judicial determination. And where the discretion of the council in fixing the amount has been manifestly abused the courts are justified in interfering.7

§ 262. Taxation of property employed in interstate or foreign commerce. It has been repeatedly decided by the Supreme Court of the United States, that when a law of a state or municipality imposes a tax, under such circumstances and with such effect as to constitute it a regulation of commerce, either

ed by the Congress of the United States in conferring upon a corporation of one state the authority to enter the territory of another state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support." W. U. Tel. Co. v. Massachusetts, 125 U. S., 530, 548.

St. Louis v. W. U. Tel. Co., 148
U. S., 92; Philadelphia v. W. U. Tel. Co., 40 Fed. Rep., 615; Philadelphia v. W. U. Tel. Co., 89 Fed. Rep., 454.

One dollar annually per pole sustained. Chester v. W. U. Tel. Co., 154 Pa. St., 464; 25 Atl. Rep., 1134.
Two dollars per pole sustained.
Postal Tel. Co. v. Baltimore, 79

Md., 502; 29 Atl. Rep., 819; 24 L. R. A., 161.

⁴ Philadelphia v. Postal Tel. Cable Co., 21 N. Y. Suppl., 556; 66 Hun. (N. Y.), 633; 67 Hun. (N. Y.), 21.

⁵ Philadelphia v. W. U. Tel. Co., 40 Fed. Rep., 615.

⁶ St. Louis v. W. U. Tel. Co., 148 U. S., 92.

Fifty cents per pole annually. Lancaster v. Edison E. I. Co., 8 Pa. Co. Ct. Rep., 178.

The reasonableness of the charge depends upon the facts in each case and is a proper question to be determined by a jury where it arises in actions at law. Philadelphia v. W. U. Tel. Co., 89 Fed. Rep., 454; Philadelphia v. Atl. & P. Tel. Co., 42 C. C. A., 325.

Allentown v. Tel. Co., 148 Pa.
 St., 117; 23 Atl. Rep., 1070; Phila-

foreign or interstate, it is void on that account.8 The fact that the legislative purpose is to raise money for the support of the state or municipal government and not to regulate transportation, will not render such law valid; for it is not the purpose of the law but its effect which is to be considered.9 The fundamental proposition involved has been thus comprehensively stated by Mr. Justice Miller: "The question of the taxing power of the states, as its exercise has affected the functions of the federal government, has been repeatedly considered by this court, and the right of the state in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied.''10 As said by Mr. Justice Matthews: "Otherwise unrestrained by the authority of the federal constitution, the taxing power of the states extends to and embraces the persons, property and pursuits of their people; although it is not always easy in particular cases to draw the line which separates the two jurisdictions." Although the transportation of the subjects of interstate or foreign commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state or municipal taxation, yet property belonging to individuals, corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be construed as falling within the inhibition of the constitution. Thus property employed in interstate or foreign commerce of express companies,12 and of telegraph companies,13 is subject to taxation

delphia v. American U. Tel. Co., 167 Pa. St., 406; 31 Atl. Rep., 628. ⁸ Telegraph Co. v. Texas, 105 U. S., 460; Brown v. Maryland, 12 Wheat. (U. S.), 419.

9 State Freight Tax Cases, 15 Wall. (U. S.), 232-276.

10 Crandall v. Nevada, 6 Wall.(U. S.), 35, 45.

11 Moran v. New Orleans, 112 U. S., 69, 74. Compare State Freight Tax Cases, 15 Wall. (U. S.), 232-276; State Tax on Railway Gross Receipts, 15 Wall. (U. S.), 284; Osborne v. Mobile, 16 Wall. (U. S.), 479.

12 Adams Express Co. v. Ohio, 165 U. S., 194; Adams Express Co. v. Ohio, 166 U. S., 185; American Union Express Co. v. St. Joseph, 66 Mo., 675.

13 Tax on property of a telegraph company held to be essentially an excise tax, and not forbidden by the commerce clause of the constitution. Western Union Tel. Co. v. Taggart, 163 U. S., 1; Postal Telegraph Co. v. Adams, 155 U. S., 688; Massachusetts v. Western Union, 141 U. S., 40; Western Union Telegraph Co. v. Massachusetts, 125 U. S., 530.

by the state, or municipal corporation under delegated authority. So where a corporation of one state brings into another state, to use and employ, a portion of its movable property, it is competent for the latter state to impose upon the property thus used and employed, its fair share of the burden of taxation imposed upon similar property used in like manner by its own citizens. The fact that such property, as railroad cars, is employed as vehicles of transportation for the interchange of interstate commerce does not render their taxation invalid.¹⁴

It has often been judicially declared by the Supreme Court of the United States that vessels engaged in foreign or interstate commerce, and duly enrolled and licensed under the Acts of Congress, may be taxed by state authority as property; provided; the tax be not a tonnage duty, is levied only at the port of registry, and is valued as other property in the state, without unfavorable discrimination on account of its employment.¹⁵

§ 263. License tax on foreign corporations. Corporations are not citizens within the meaning of the constitution of the United States declaring that, "the citizens of each state shall be entitled to all the privileges and immunities of citizens in

¹⁴ Union Refrigerator Transit Co. v. Lynch, 177 U. S., 149.

Such a tax may be properly assessed and collected when the specific and individual items of property so used, as railroad cars, were not continuously the same, but were constantly changing according to the exigencies of the business, and the tax may be fixed in proportion to the value of the average amount of the property thus habitually used and employed. American Refrigerator Transit Co. v. Hall, 174 U. S., 70.

Method of ascertaining assessed value of railroad company. Pittsburgh, etc., Ry. v. Backus, 154 U. S., 421.

Imposing a tax on those engaged in the transportation of passengers and freight between states, levied on the capital stock of the corporation, proportionately, etc., held valid. Pullman Palace Car Co. v. Pennsylvania, 141 U. S., 18.

¹⁵ Wiggins Ferry Co. v. East St. Louis, 107 U. S., 365; Transportation Co. v. Wheeling, 99 U. S., 273; Morgan v. Parham, 16 Wall. (U. S.), 471; Hays v. Pac. Mail Steamship Co., 17 How. (U. S.), 596.

A state law requiring vessels to file a statement in writing in the office of the Probate judge of the county, setting forth the name of the vessel, the name, place of residence and the interest of each owner in the vessel, under a penalty for non-compliance, held void as applied to vessels engaged in interstate or foreign commerce, and which had taken out a license and were duly enrolled under the act of congress for carrying on the coasting trade. Sinnot v. Daven-

the several states.¹⁶ Therefore, a state is not prohibited from imposing such conditions upon foreign corporations as it may choose, as a condition of their admission within its limits.¹⁷ But a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce.¹⁸

§ 264. Cannot regulate or tax operations or objects of interstate or foreign commerce. Neither a state nor its municipal corporation can regulate or tax the operations or objects of interstate or foreign commerce. The following have been held to be attempts to regulate or interference with interstate commerce: Attempt to regulate the delivery of telegraph messages in another state; 19 attempt to regulate the charge for the transportation of passengers and freight begun within the state but extending into other states; 20 imposing a license tax upon telegrams, passing over wires extending through more than one state; 1 laying a tax upon every person passing through or out of the state; 2 imposing a tax upon the gross receipts of a steamship company engaged in the transportation of persons and property by sea between different states; 2 imposing a

port, 22 How. (U. S.), 227, 243; Foster v. Davenport, 22 How. (U. S.), 244.

¹⁶ Pembina Mining Co. v. Pennsylvania, 125 U. S., 181; Paul v. Virginia, 8 Wall., 168; McCready v. Virginia, 94 U. S., 391; United States v. Cruikshank, 92 U. S., 542.

¹⁷ Pembina Mining Co. v. Pennsylvania, 125 U. S., 181; Philadelphia Fire Assn. v. New York, 119 U. S., 110.

An annual tax on a railroad company for the privilege of exercising its franchise therein to be determined by the amount of its gross transportation receipts, is not in conflict with the Federal Constitutional provision relating to interstate commerce. Maine v. Grand Trunk Ry. Co., 142 U. S., 217.

A license upon an express company doing business in Florida,

which applies solely to business of the company within the state, is not an interference with interstate commerce. Osborne v. Florida, 164 U. S., 650.

¹⁸ Norfolk Ry. Co. v. Pennsylvania, 136 U. S., 114.

The exacting of a license fee to enable a corporation to have an office in another state, is a proper subject for license and is not in violation of interstate commerce. Pembina Mining Co. v. Pennsylvania, 125 U. S., 181.

¹⁹ W. U. Telegraph Co. v. Pendleton, 122 U. S., 347.

²⁰ Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U. S., 557.

21 Leloup v. Port of Mobile, 127
 U. S., 640; Telegraph Co. v. Texas,
 105 U. S., 460.

²² Crandall v. Nevada, 6 Wall.
 (U. S.), 35.

²³ Phila. Steamship Co. v. Pennsylvania, 122 U. S., 326.

tax on every alien passenger who shall come by vessel from a foreign country to the port of New York and seeking to hold the vessel liable for such tax;²⁴ and laying a stamp duty upon bills of lading for gold or silver transported from the state.²⁵

§ 265. Same—Property in transit. Ordinances imposing a license or tax upon personal property while in transit from one state to another or to a foreign port, are void for the reason that such a tax would be, in effect, a tax upon interstate commerce, which as has been seen, cannot be burdened with a tax or license imposed by any state or municipality through which the goods must pass. Thus logs drawn from Vermont and delivered on the ice in the Connecticut River and stored temporarily awaiting transportation as soon as the ice should break in the spring-the purpose being to float the logs down the river to mills in another state—are in commercial transit, and are exempt from state taxation.26 And where property is brought into the state in the course of transportation and is detained there for a long time; yet if it remained no longer than was necessary under the circumstances, it is in transit and is not subject to be taxed; as where logs, while in the course of transportation on the river, were detained for one summer on account of low water, they were, while there, in transit and not subject to tax.27 Property in transit through the state, or which has been sent within the state simply for the purpose of sale, is not to be considered as having a situs within such state for purposes of taxation. Coal shipped from Pennsylvania and deposited on the wharf in New Jersey for the purpose of separation and assortment, then to be shipped to different places, was held to be in transit.28 The commercial transit of the goods is not terminated until the goods reach

24 People v. Compagnie Generale Transatlantique, 107 U. S., 59, citing and approving Henderson v. New York, 92 U. S., 259, and Chy Lung v. Freeman, 92 U. S., 275; Passenger Cases, 7 How. (U. S.), 283, 408.

25 Almy v. California, 24 How.
 (U. S.), 169.

Lumber Co. v. Columbia, 62
 N. H., 286.

²⁷ Coe v. Errol, 62 N. H., 303. Lumber in the port and awaiting shipment to England is not subject to taxation by the state. Blount v. Munroe, 60 Ga., 61.

A cargo of corn purchased in Iowa and removed to the railroad station and temporarily stored in cribs to await transportation to Canada, was held to be in transit and exempt from taxation, provided the purchaser intended to ship immediately. Ogilvie v. Crawford County, 7 Fed. Rep., 745.

28 State v. Engle, 34 N. J. L.,

their destination and are delivered to the consignee.²⁹ While the property is still in the state from which the transportation is to be made, and before the transportation from the state has actually begun it is subject to the taxing power of the state. Thus where the logs have been hauled and placed on the ice in a river to await the opening of the river, then to be floated down to mills in another state, it was held that while awaiting the opening of the river they could not be considered in transit.³⁰

§ 266. License for privilege of navigation. An ordinance of New Orleans, which assessed and directed to be collected from persons owning and running tow boats to and from the Gulf of Mexico and the City of New Orleans, was declared invalid by the Supreme Court of the United States as a regulation of commerce among the states. Mr. Justice Matthews, who delivered the opinion of the court, said that the license fee exacted was not a tax upon the boats as property. It was contended that the fee exacted was merely a tax on an occupation, and for that reason not a regulation of commerce. reply the court observed: "If it were a tax upon the income derived from the business it might be justified by the principle of the decision in the case of the State Tax on Railway Gross Receipts,301/2 which shows the distinction between a tax on transportation and a tax upon its fruits, realized and reduced to possession, so as to have become part of the general capital and property of the taxpayer. But here it is not a tax on the profits and income after they have been realized from the business. It is a charge explicitly made as the price of the privilege of navigating the Mississippi River between New Orleans and the Gulf, in the coastwise trade; as the condition on which the State of Louisiana consents that the boats of the plaintiff in error may be employed by him according to the terms of the license granted under the authority of Congress. The sole

425; State v. Carrigan, 39 N. J. L., 35.

29 Rhodes v. Iowa, 170 U. S., 412. In Brown v. Houston, 114 U. S., 622, coal which had been shipped from Pennsylvania to New Orleans was held to be subject to tax while remaining on barges to be sold in open market.

30 Nelson Lumber Co. v. Loraine, 22 Fed. Rep., 54.

In Kelley v. Rhodes, 7 Wyo., 237; 39 L. R. A., 594; 51 Pac. Rep., 593, it was held that a herd of sheep while being driven from Utah through Wyoming to Nebraska. which were allowed to graze and feed upon the natural grasses, were

occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the state thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from the constitution and laws of the United The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him, for using his boats in this way, he shall not be permitted to act under, and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and What the one declares may be done without the tax the other declares shall not be done except upon payment of the tax. In such an opposition the only question is, which is the superior authority; and reduced to that, it furnishes its own answer." 31 The same court held void an ordinance of " the City of Chicago which imposed a license tax for the privilege of navigating the Chicago River and its branches upon steam tugs licensed by the United States, under federal laws. The ordinance provided that, "no person or persons shall keep, use or let for hire any tug or barge or tow boat for towing vessels or craft in the Chicago River, its branches, or slips connected therewith, without first obtaining a license therefor, in the manner and way hereinafter mentioned." Then followed other sections indicating the amount of the license fee, the manner of its issuance, etc., and denouncing a penalty of a fine against any one violating the ordinance. It was a part of the agreed statement of facts that the Chicago River had been deepened and improved for navigation by the city at its expense, and the contention was that the license fee was but a reasonable charge for that service. But the court replied: "The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expense of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen or can arise to the tugs in question by the alleged

not in transit so as to exempt them from taxation in Wyoming.

31 Moran v. New Orleans, 112 U.
S., 69, 74, 75.

^{301/2 15} Wall (U. S.), 284.

deepening of the river." All of the former cases on the subject are examined and fully considered.32

The Supreme Court of Missouri held void an ordinance of the City of St. Louis which exacted a license from the owner of a boat (licensed under the laws of Congress for the coasting trade and engaged under that authority in transporting freight upon the Mississippi River from Illinois to Missouri) for the privilege "of towing boats or other water craft into and out of the harbor, or from one place to another within said harbor." The court held that the ordinance did not exact the license fee on the ground of compensation for the use of the wharf and could not be construed to simply demand the payment of such wharf charges, although it contained a qualified provision that the amount paid for the license "shall be in lieu of all wharfage during the time said license remains in force." The latter provision was construed to mean that the city would not exact wharfage from the owner of a vessel who had paid the license for the privilege of navigating that part of the river embraced within the city harbor.33

§ 267. License and taxation of ferries, etc. The authority to establish and regulate ferries is not included in the power of the federal government to regulate commerce between the states, but the right is within the control of the states, although the ferries cross a river which divides two states.³⁴ The rule is thus declared by the Supreme Court of the United States: "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a state expressly grants to an incorporated city, * * * the power to license, tax and regulate ferries, the later may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different states, and

32 Per Mr. Chief Justice Fuller, in Harman v. Chicago, 147 U. S., 396, distinguishing Huse v. Glover, 119 U. S., 543, and Sands v. Manistee Improvement Co., 123 U. S., 288.

33 St. Louis v. Consolidated Coal Co., 158 Mo., 342; 59 S. W. Rep., 103.

34 St. Louis v. Waterloo-Carondelet Turnpike Co., 14 Mo. App., 216; Conway v. Taylor, 66 U. S., 603, So the state in granting a ferry license may impose conditions. State v. Sickmann, 65 Mo. App.. 499.

As to ordinances providing for license of ferries, see Reddick v. Amelin, 1 Mo., 5.

To license ferry boats running across the Detroit River from Detroit to the shore of Canada, held not to be a regulation of commerce, and that the penalty can be imthe act by which the exaction is authorized will not be held to be a regulation of commerce." 35

Steam ships registered in their home ports are not subject to tax at another port while temporarily there and engaged in lawful trade and commerce.³⁶ But steamboats plying between different ports on a navigable river may, under a state statute, be taxed as personal property by the city in which the company owning them has its principal office, although enrolled and licensed as coasting vessels under the law of the United States.³⁷

§ 268. Wharfage charges. Although related to commerce and navigation, as aids and conveniences, wharves are local in their nature. They require special regulation at particular places. In the absence of federal legislation on the subject, the jurisdiction and control of wharves properly belongs to the state, or by delegated authority to the municipal corporation, where situated. A license or a certain rate of wharfage is frequently imposed by ordinance on vessels using wharves.³⁸ The law appears to be established that a municipal corporation cannot, solely for the benefit of the general revenue, exact a charge on vessels for entering or leaving a port, or remaining therein, nor levy a tax on vessels and water craft entering its port and using the wharves and landing.³⁹ But a municipal corporation owning improved wharves and other artificial

posed although the boat had been enrolled and licensed for the coasting and foreign trade under the United States laws. Chilvers v. People, 11 Mich., 43.

The United States has jurisdiction of the navigable rivers, but until Congress acts the state has plenary authority over bridges across such rivers in its municipal corporations, jurisdiction over the construction, repairs and use of those bridges within the city. So held respecting the jurisdiction of Chicago over the Chicago River. Escanaba v. Chicago, 107 U. S., 678.

35 Wiggins Ferry Co. v. East St. Louis, 107 U. S., 365, 374.

License of lotteries of municipal

corporation when licensed under federal law. Cohens v. Virginia, 6 Wheat. (19 U. S.), 264.

Tax for privilege of exercising franchise of operating railroad partly within and partly without the state, is valid. Maine v. Grand Trunk Ry. Co., 142 U. S., 217.

³⁶ Hays v. Pac. Mail Steamship Co., 17 How. (U. S.), 596; People v. Niles, 35 Cal., 282.

³⁷ Transportation Co. v. Wheeling, 99 U. S., 273.

38 Ouachita Packet Co. v. Aiken, 121 U. S., 444; Transportation Co. v. Parkersburg, 107 U. S., 691.

39 Packet Co. v. Keokuk, 95 U. S., 80; Packet Co. v. St. Louis, 4 Dill. (C. C.), 10; Leathers v. Aiken, 9 Fed. Rep., 679.

means which it maintains, at its own cost for the benefit of those engaged in commerce, upon public navigable waters of the United States, may charge and collect from owners of vessels using its wharves such reasonable fees as will fairly remunerate it for the use of its property.⁴⁰ An ordinance providing for wharfage dues to be paid by all boats landing at the city wharves is void so far as it applies to boats landing on the natural bank of the river and not at the city's improved wharf. A landing place to become a wharf must be improved for that purpose.⁴¹ Accordingly, an ordinance of the City of St. Paul which imposed a wharfage tax upon every boat or vessel landing or anchoring at, or in front of, the landing or wharf of the city was held void, as the tax was not a charge for the use of a wharf but for the privilege of arriving at or departing from the port.⁴²

Wharfage distinguished from tonnage. Wharfage is a compensation which the owner of a wharf demands for the use thereof. To be valid, it must not be so exorbitant as to constitute a burden on commerce. The duty of tonnage is a charge, according to the tonnage of the vessel as an instrument of commerce, for the privilege of entering, or loading at, or running in, a port or harbor, and can be laid only by the United States.43 The question as to which of these classes, if either, a charge against a vessel or its owner belongs, is one, not of intent, but of fact and law; of fact, whether the charge is imposed for the use of a wharf, or for the privilege of entering the port: of law, whether, upon the facts which are shown to exist, it is wharfage or a duty of tonnage.44 A statute giving masters and wardens of a port authority to demand and receive, in addition to other fees, the sum of \$5, whether called upon to perform any service or not, for every vessel arriving

40 Huse v. Glover, 119 U. S., 543; Cannon v. New Orleans, 20 Wall., 577; Packet Co. v. Catlettsburg, 105 U. S., 559; Vicksburg v. Tobin, 100 U. S., 430; Packet Co. v. St. Louis, 100 U. S., 423; Elerman v. Mc-Mains, 30 La. Ann., 190; St. Louis v. St. L. & N. O. Trans. Co., 84 Mo., 156.

The extent to which the right may be exercised is purely administrative, and hence the courts will not limit the amount of the charge. First Municipality of New Orleans v. Pease, 2 La. Ann., 538.

- ⁴¹ Cape Girardeau v. Campbell, 26 Mo. App., 12.
- ⁴² Northwestern Packet Co. v. St. Paul, 3 Dill. C. C. (U. S.), 454.
 - 43 Huse v. Glover, 119 U. S., 543.
- 44 Per Justice Bradley, in Transportation Co. v. Parkersburg, 107 U. S., 691, 696, which was an action instituted in a United State court, to enjoin the prosecution of a suit

in the port, is a regulation of commerce and is also a tonnage duty, and is, therefore, unconstitutional. So an ordinance levying a tonnage tax upon all vessels coming within the harbor of the city (but a small portion of whose water line was improved as a wharf) irrespective of whether they landed at an improved wharf or not, is not valid, as imposing compensation for wharfage service, but is void as a duty of tonnage and is an interference with interstate and foreign commerce. But an ordinance which authorizes the collection of a wharfage rate, to be measured by the tonnage of the vessels which use the wharves, and estimated to be sufficient to light the wharves and to keep them in repair and to construct new wharves as required, is not in conflict with the constitution or any law of the United States.

§ 270. Local police regulations. Local police regulations which do not impose restraints upon interstate or foreign commerce and which do not conflict with the power of the Congress under what is called the "Commerce Clause" of the constitution of the United States will be sustained. Thus, an ordinance of the City of Chicago forbidding the emission of dense smoke within the corporate limits and directed against steam boats and water craft, plying on the Chicago River, which is a navigable stream under the laws of Congress, although such boats were engaged in interstate commerce, was held valid. Here the ordinance only purported to regulate the use of tug boats in such manner as might not produce effects detrimental to property and business, nor become a personal annoyance to the public at large, within the city.⁴⁷

An ordinance of Philadelphia, general in its nature, limiting the speed of all vehicles used upon the streets was held to

in a state court to collect a charge against a vessel imposed by ordinance.

44½ Steamship v. Portwardens, 6 Wall. (U. S.), 31.

45 Cannon v. New Orleans, 20 Wall. (U. S.), 577. See St. Louis v. Schulenburg & Boeckler Lumber Co., 13 Mo. App., 56.

⁴⁶ Ouachita Packet Co. v. Aiken, 121 U. S., 444; Packet Co. v. Keokuk, 95 U. S., 80.

47 "Regulating the use of fuel,

or, what is the same thing, requiring the owners or managers of tug boats to so use their vessels as not to create a dense smoke, which it is conceded would be an annoyance to the public at large, is in no sense imposing any restraint upon commerce, nor does it in any manner conflict with the power of Congress under what is called the 'commerce clause' of the Constitution of the United States." Harmon v. Chicago, 110 Ill., 400, 408.

apply to vehicles carrying the United States mail. The ordinance conferred power upon the municipal authorities to stop vehicles violating its provisions. The fact that the enforcement of such ordinance might result in a temporary stoppage of United States mails was held to be no objection to its validity.48

A state law requiring electric wires to be placed under the surface of the streets is a valid police regulation, as to telegraph companies accepting the act of Congress and which thereby become as to government business, an agency of the general government and which is an instrument of interstate commerce.⁴⁹ Obviously the same principle applies to like regulations by municipal ordinances; and such matters must be so regulated where the local corporation has full control of its streets, as in Missouri and other states.⁵⁰

§ 271. Same—Scope of police power. The extent to which the state may go in the exercise of its police powers and interfere with the power of Congress regulating commerce depends upon the facts of each case. "By the settled doctrine of this court," remarked the Supreme Court of the United States, "the police power extends at least to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not in the sense of the constitution, necessarily intrench upon any authority which has been confided expressly or by implication, to the national government." In determining whether or not a police regulation interferes with interstate commerce the court will look into the operation and effect of the statute, to

48 United States v. Hart, Peters C. C. (U. S.), 390.

49 Western U. Tel. Co. v. New York, 38 Fed. Rep., 552, per Wallace, J., where it is said (p. 555), "Such statutes * * * unquestionably belong to the category of police regulations, the power to establish which has been left to the individual states."

The police power of a state does not extend to the regulation of the delivery at points without the state of telegraphic messages received within the state, but the power may be exercised with regard to its poles and wires so far as is necssary for the comfort and convenience of the community. W. U. Tel. Co. v. Pendleton, 122 U. S., 347.

50 State ex inf. v. Lindell Ry. Co., 151 Mo., 162, 183; 52 S. W. Rep., 248.

⁵¹ Patterson v. Kentucky, 97 U. S., 501, 504. This doctrine was approved in *In re* Rahrer, 140 U. S., 545. See § 430 *et seq.*, *post*.

discern its purpose, and if it is found to be a just exercise of the state power it will be sustained; but if it is intended by a roundabout means to evade the domain of Congress over commerce it will be held void.⁵² When exercised for the protection of the lives and health of the people, the police power of a state extends beyond the commercial power of Congress and may be exercised to abate nuisances:53 to prohibit the continuance of manufactures deemed injurious to the public health;54 the sale and manufacture of intoxicating drinks;55 and the maintenance of lotteries, gambling, horse racing or anything else that the legislature may deem opposed to the public welfare.⁵⁶ But the state when providing by legislation for the protection of the public health, the public morals, or public safety, is subject to the paramount authority of the constitution of the United States and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government.⁵⁷ To what extent the state may exercise its police power in prohibiting the sale of goods within the state without interference with the commercial power is illustrated by Justice Catron in the License Cases,58 where in referring to certain articles, the sale of which had been prohibited by the state, he said: "If, from its nature, it does not belong to commerce, or if its condition, from putrescence, or other cause, is such when it is about to enter the state that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a state may use means to ascertain the fact. And

Morgan v. Louisiana, 118 U.
 S., 455, 462; 6 Sup. Ct. Rep., 1114.
 Fertilizing Co. v. Hyde Park,
 U. S., 659.

⁵⁴ Powell v. Pennsylvania, 127 U. S., 678.

55 Beer Co. v. Massachusetts, 97
U. S., 25; Foster v. Kansas, 112 U.
S., 201; Kidd v. Pearson, 128 U.
S., 1.

⁵⁶ Stone v. Mississippi, 101 U. S., 814.

"It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves, and generally with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce." Crutcher v. Kentucky, 141 U. S., 47, 61.

⁵⁷ Mugler v. Kansas, 123 U. S.,623, 663.

58 5 How., 504, 599.

here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States."

A statute of Massachusetts, "to prevent deception in the manufacture and sale of imitation butter," in its application to the sale of oleomargarine artificially colored so as to cause it to look like yellow butter and brought into Massachusetts, was held not in conflict with the power of Congress to regulate commerce among the several states. The court said: "We are of the opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sales of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The constitution of the United States does not secure to any one the privilege of defrauding the public." ⁵⁹

§ 272. Same—Quarantine laws. It seems that a state in the exercise of its police power to prevent the spread of infectious or contagious diseases may empower a board of health to exclude healthy persons from a locality infested with a contagious disease, and to prevent well persons seeking to enter the infected place from entering, whether they come from within or without the state. The most recent authoritative utterance of the United States Supreme Court on this subject is: "The health and quarantine laws of the several states are not repugnant to the constitution of the United States, although they affect foreign and domestic commerce, as in many cases they necessarily must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the constitution, such state health and quarantine laws producing such effect on legitimate interstate commerce are not in conflict with the constitution. True is it that, in some of the cases relied on in the argument, it was held that a state law absolutely prohibiting the introduction, under all circumstances, of objects actually affected with disease, was valid

⁵⁹ Plumey v. Massachusetts, 155 U. S., 461, 479; Powell v. Pennsylvania, 127 U. S., 678.

because such objects were not legitimate commerce. But this implies no limitation on the power to regulate by health laws the subjects of legitimate commerce. In other words, the power exists until Congress has acted, to incidentally regulate by health and quarantine laws, even although interstate and foreign commerce is affected, and the power to absolutely prohibit additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce." 60 Prior to this decision in considering a quarantine law of the State of Texas, Mr. Chief Justice Fuller ob-"While it is true that the power vested in Congress to regulate commerce among the states is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution, and that where the action of the states in the exercise of their reserve powers comes in collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government."61

In holding that a statute which prohibited the driving or conveying of Texas, Mexican or Indian cattle into a state, during a certain period of the year, was in conflict with interstate commerce, and was not a legitimate exercise of the police power, nor a quarantine regulation, Mr. Justice Strong said: "While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with the transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not under the cover of exerting its police powers substantially prohibit or burden either foreign or interstate commerce."62

§ 273. Same subject. An ordinance of the City of St. Louis,

60 Compagnie Francaise, etc., v. Louisiana State Board of Health (June, 1902), 186 U. S., 380, 391, per Mr. Justice White. Mr. Justice Brown delivered a dissenting opinion, pp. 397-401, concurred in by Mr. Justice Harlan.

61 Louisiana v. Texas, 176 U. S.,1, 21.

62 Railroad Co. v. Husen, 95 U.

enacted under the authority of the city to make quarantine regulations for the preservation of the health of its citizens, which prescribed that boats coming from below Memphis on the Mississippi River, and carrying more than a specified number of passengers should be detained at the quarantine, for the purpose of inspection and to guard against introducing into the city diseases and pestilences, was held valid and not in repugnance to that clause of the federal constitution which reserves to Congress the exclusive right to regulate "Whatever exclusiveness may be claimed for commerce.63 the power to regulate commerce, conferred upon Congress by the constitution of the United States, it is conceded that the power exists in the different states to protect their own citizens against the introduction of diseases by the enactment of quarantine laws, although such laws will inevitably interfere to some extent with commerce."64 It is the settled construction of every regulation of commerce, that under the sanction of its general laws, no person can introduce into a community malignant diseases, or anything which contaminates its morals or endangers its safety.65 And it is conceded that a state has power to pass quarantine laws and other restraints which shall be required to protect the health of its citizens, and laws passed expressly for such purposes, have been held not to be a regulation of commerce.66 Thus the requirement that each vessel passing a quarantine station shall pay a fee fixed by the statute for examination as to her sanitary condition, is a part of all quarantine systems, and is a compensation for services rendered to the vessel, and is not a tax within the meaning of the constitution concerning tonnage tax.67

S., 465, 472, quoted with approval in dissenting opinion in Compagnie Fraincaise, etc., v. Board of Health, 186 U. S., pp. 399, 400. The subject is discussed in Bangor v. Smith, 83 Me., 422; 22 Atl. Rep., 379; State v. Steamship Constitution, 42 Cal., 578.

A statute which provides that one having in his possession "Texas cattle" shall be liable for any damage which may accrue from allowing them to run at large and thereby spread the disease known as "Texas fever," held valid in Kimmish v. Ball, 129 U. S., 217.

63 St. Louis v. McCoy, 18 Mo., 238, approved in St. Louis v. Boffinger, 19 Mo., 14.

64 Per Judge Gamble, St. Louisv. Boffinger, 19 Mo., 13.

⁶⁵ License Cases, 5 How. (U. S.), 504, 589.

66 Gibbons v. Ogden, 9 Wheat. (U. S.), 1, 205; New York v. Miln, 11 Pet. (U. S.), 102, 142.

67 Morgan's Steamship Co. v. Louisiana, 118 U. S., 455.

In Peete v. Morgan, 19 Wall. (U.

§ 274. Harbor and local police regulations. Although United States courts have exclusive jurisdiction of maritime torts. states may confer upon municipalties, where navigable waters and harbors exist, police authority over them, and a violation of any regulation the municipal authorities should adopt, if within the power conferred, would be within the jurisdiction of the state courts. "The state, or its municipalities under it. may pass all laws or ordinances for their government not in conflict with the constitution of the United States or the laws of Congress enacted within its constitutional powers. federal government, under its power to regulate commerce between the states, may, no doubt, take into its hands the construction and improvement of the harbors within the states. But this power does not prohibit the state from doing the same thing, for the purpose of its internal commerce. case of conflict, no doubt the state laws must yield to the law of Congress. But until such conflict arises the state law is valid and unimpeachable." Thus ordinances under charter power, imposing penalties for depositing, etc., certain substances in a river, or the canals, raceways, etc., leading into it are valid.68 So an act regulating the speed of steamboats when passing the wharves of a city is a valid police regulation, enacted to guard against endangering the lives and property of individuals.69

S.), 581, it was held that a state could not for the purpose of defraying the expenses of her quarantine regulations impose a tonnage tax on vessels owned in foreign ports.

68 Ogdensburgh v. Lyon, 7 Lans.
 (N. Y.), 215, 218, 219.

"It is obvious that the government of the Union, in the exercise of its express power, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state." Per Marshall, C. J., in Gibbons v. Ogden, 9 Wheat. (U. S.), 1.

69 People v. Jenkins, 1 Hill (N. Y.), 469.

CHAPTER IX.

OF CONSIDERATION OF VALIDITY OF ORDINANCES

AND HEREIN PROCEDURE TO TEST AND RULES OF CONSTRUCTION.

- § 275. Courts may determine validity of ordinances.
 - 276. Method of consideration of validity.
 - 277. How the exercise of the police power may be questioned.
 - 278. Estoppel.
 - 279. Collateral attack denied.
 - 280. Enumeration of proceedings in which validity may be questioned.
 - 281. Who may question validity.
 - 282. Citizens and taxpayers may question validity of ordinances.
 - 283. Same—When court will not interfere at instance of taxpayer or citizen.
 - 284. Same-Mandamus.
 - 285. Injunction to restrain enforcement.

- § 286. Injunction to prevent violation of ordinances.
 - 287. Certiorari.
 - 288. Quo warranto.
 - 289. Rules of construction.
 - 290. Same subject.
 - 291. Title in construction.
 - 292. Contemporaneous construction.
 - 293. Construction of penal ordinances
 - 294. Construction of words and terms.
 - 295. Construction where ordinance void in part.
 - 296. Construction of ordinance—
 —Illustrative cases.
 - 297. Same subject.
 - 298. Same Who liable Landlord or tenant.

§ 275. Courts may determine validity of ordinances. The general proposition has been affirmed repeatedly that, questions relative to the necessity and advisability of the enactment of any particular ordinance are, in the first instance, to be determined by the municipal authorities; that the presumption is in favor of its validity, and that courts incline to the judgment and discretion of the local legislative body. How-

¹ Section 186, supra.

Judicial interference, secs. 76 to 78, *supra*.

WHEN COURTS WILL NOT INTERFERE WITH IMPROVEMENT ORDINANCES. Field v. Western Springs, 181 Ill., 186; 54 N. E. Rep., 929.

Where a power touching local improvement is expressly granted to municipal authorities as a general rule, they are in the reasonable exercise of it beyond the control of the courts. Skinker v. Heman, 64 Mo. App., 441; Estes v. Owen, 90 Mo., 113; 23 S. W. Rep., 133; Farrar v. St. Louis, 80 Mo., 379; McCormack v. Patchin, 53 Mo., 33; Dennison v. Kansas City. 95 Mo., 416; 8 S. W. Rep., 429. Ordinarily courts will not inter-

ever, the rule is equally well established that the judiciary has the power to determine the validity of the ordinance in any proper case. It may interfere in order to restrain municipal corporations, their officers and agents, from doing illegal acts. The usual legal and equitable remedies may be invoked for this purpose.²

§ 276. Method of consideration of validity. In determining the validity of any ordinance the question may be considered under three principal heads, namely, first, is the subject matter of the legislation within the powers of the corporation; second, is the ordinance in proper form, and was it enacted in the manner prescribed by the organic law of the corporation, and, third, if passed by virtue of general or implied power (if such

fere on the ground that a given improvement is unnecessary, and that the ordinance providing for it is, therefore, oppressive and un-Marionville to use v. reasonable. Henson, 65 Mo. App., 397. It has been held that the passage of the ordinance is usually conclusive as to the necessity of the work. Seibert v. Tiffany, 8 Mo. App., 33; Bohle v. Stannard, 7 Mo. App., 51. But in Corrigan v. Gage, 68 Mo., 541, it was held that an ordinance for a sidewalk in an uninhabited portion of a city, and disconnected with any other street or sidewalk, was unnecessary and oppressive; and such facts might be shown in an action on the special tax-bill. See ch. XVI., Sec. 519, post.

See sec. 183, et seq. supra, as to mode of execution of power.

Discretionary power in vacating streets, not subject to judicial review. Knapp, Stout & Co. v. St. Louis, 156 Mo., 343; 56 S. W. Rep., 1102.

² Alabama—Greensboro v. Ehrenreich, 80 Ala., 579; 60 Am. Rep., 130 (second-hand clothing, importing, selling, etc.).

Illinois — Field v. Western Springs, 181 Ill., 186; 54 N. E. Rep., 929 (construction of sidewalk by special taxation); Walker v. Morgan Park, 175 Ill., 570; 51 N. E. Rep., 690; Peyton v. Morgan Park, 172 Ill., 102; 49 N. E. Rep., 1003; McChesney v. Chicago, 171 Ill., 253; 49 N. E. Rep., 548; Hawes v. Chicago, 158 Ill., 653; 42 N. E. Rep., 373.

Louisiana—Vicksburg, S. & P. R. R. Co. v. Monroe, 48 La. Ann., 1102; 20 So. Rep., 664.

Missouri—Springfield R. R. Co. v. Springfield, 85 Mo., 674; Tarkio v. Cook, 120 Mo., 1; 25 S. W. Rep., 202; St. Louis v. Weber, 44 Mo., 547; Cape Girardeau v. Riley, 72 Mo., 220; St. Louis v. Bell Telephone Co., 96 Mo., 623, 631; 10 S. W. Rep., 197.

Nebraska—Littlefield v. State, 42 Neb., 223; 60 N. W. Rep., 724; 47 Am. St. Rep., 697.

An illegal ordinance is wholly inoperative. It is not made valid by an ordinance continuing in force all existing ordinances until repealed or changed. Omaha v. Harmon, 58 Neb., 339; 78 N. W. Rep., 623.

³ See ch. II, Of Power to Enact Ordinances, sec. 38, et seq.

4 Chapters III and IV. Of Enact-

power exists), was such power reasonably exercised.⁵ The circumstances under which the motives of the members of the legislative body who voted for the ordinance may be looked into in considering its validity are stated in prior sections.⁶

- How the exercise of the police power may be ques-Specific police powers are often conferred upon municipal corporations but it is not unusual to confer such powers in general terms by way of addition to the particular enumeration appearing in various parts of the charter, or the several legislative acts applicable. (1) Although the power in question may be conferred by express terms, the objection to its exercise may be raised by showing that the state, in view of its constitution and legislative policy, could not commit to the municipal corporation the execution of such power.⁷ (2) Assuming that it is entirely competent for the state to vest the power in the local corporation, the question whether it has been so vested may be presented, and its determination will depend upon the proper construction of the laws bearing on the subject.8 (3) Opposition to the enforcement of any particular local police regulation may also be based on the proposition that it violates the letter or spirit of either the federal or state constitution in its subject matter or in the manner of the exercise of the power.9 Specific defenses to the enforcement of police ordinances are enumerated and considered elsewhere.10
- § 278. **Estoppel.** The doctrine of estoppel has often been applied when the question of the validity of an ordinance has been raised. Thus a railroad corporation which accepts the benefit of an ordinance, will be estopped from thereafter denying its validity.¹¹ So one being prosecuted for the violation of a police regulation relating to pawn brokers will not be permitted to question the reasonableness of the regulations therein contained where it appears that he has accepted the provisions

ment of Ordinances, sec. 90, et seq.; sec. 136, et seq.

⁵ Chapter VI, Of Reasonableness of Ordinances, sec. 181, et seq.

⁶ Section 161 and 162, supra.

⁷ Chapter VIII, Of Constitutionality of Ordinances. Chapter XV, Of Municipal Control of Offenses Against State.

⁸ Chapter II, Of Power to Enact Ordinances.

⁹ Chapter VI, Of Reasonableness of Ordinances. Chapter VIII, Of Constitutionality of Ordinances.

¹⁰ Chapter X, Of Actions to Enforce Police Ordinances, sec. 348, et seq., post.

¹¹ Chicago, etc., R. R. Co. v. Chi-

of the ordinance.¹² So the rule of estoppel applies with full force to the municipal corporation itself.¹³ Thus where the ordinance is published in pamphlet form by public authority with the other ordinances of the municipality a city cannot question its validity, on the ground that it was not validly adopted. Its publication estops the city from so doing.¹⁴

8 279 Collateral attack denied. The validity of the ordinance cannot be attacked collaterally. The passage of an ordinance is a legislative act, and public policy forbids that it should be impeached collaterally.¹⁵ Thus in an action by a gas company for gas furnished the corporation by virtue of an ordinance conferring upon the company the perpetual and exclusive right to furnish gas, the validity of the ordinance cannot be questioned.16 An ordinance passed which the corporation has no power to enact, as one levying a tax for a purpose not authorized by the charter, is an act of usurpation and all proceedings under it are void; yet where the corporation has power to pass the ordinance for a certain purpose, but exercises that power in an unauthorized manner the ordinance is valid and binding until set aside by legal proceedings instituted for that purpose, and its validity cannot be brought in question collaterally, as a matter of defense to an action under it.17

§ 280. Enumeration of proceedings in which validity may be questioned. The particular circumstances and the local practice will determine the nature of the proceedings to test the validity of the ordinance. The following proceedings have received judicial sanction: (1) Any judicial proceeding, civil or criminal, legal or equitable, wherein the cause of action is

cago, 176 Ill., 253; 52 N. E. Rep., 880; 68 Am. St. Rep., 188.

12 Launder v. Chicago, 111 Ill.,291; 53 Am. Rep., 625.

13 See sec. 352, post.

14 People v. Maxon, 139 III., 306,
 310; 38 III. App., 152; 28 N. E.
 Rep., 1074.

¹⁵ Consumers' Gas, etc., Co. v. Congress Spring Co., 61 Hun. (N. Y.), 133, 135; 15 N. Y. Suppl., 624.

16 Decatur Gas Light and Coke

Co. v. Decatur, 120 Ill., 67; 11 N.E. Rep., 406, affirming 24 Ill. App.,544

¹⁷ Camden v. Mulford, 26 N. J. L., 49, per Green, C. J.

In an action to recover claims arising under an ordinance a copy of such ordinance attached to and filed with the petition as an exhibit is no part of it and hence the validity of the ordinance cannot be determined on a general founded thereon or the ordinance is directly involved;¹⁸ (2) injunction;¹⁹ (3) prohibition;²⁰ (4) mandamus;²¹ (5) certiorari;²² (6) quo warranto;²³ (7) habeas corpus;²⁴ (8) proceedings for review, in actions to enforce police ordinances.²⁵

\$281. Who may question validity. As a rule those not affected, or, whose personal or property rights are in no way involved, cannot question the validity of the ordinance. On the other hand, personal and property rights being jealously guarded by the law, cannot be interfered with unreasonably or disturbed injuriously by ultra vires or void municipal legislation, and therefore, the law sanctions proper and seasonable legal proceedings to test the validity of ordinances, at the instance of those about to be so affected by their enforcement. As stated elsewhere, in all prosecutions for the viola-

demurrer to such petition. Bowling Green v. C., H. & D. R. Co., 10 Ohio Cir. Ct. Rep., 63.

18 Com. v. Robertson, 5 Cush.
(Mass.), 438; St. Charles v. Meyer,
58 Mo., 86; Moir v. Munday, Sayer,
181.

- 19 Secs. 285, 368, post.
- 20 Sec. 369, post.
- ²¹ Rex v. Harrison, 3 Burr., 1322, sec. 284, post.
 - ²² Secs. 287, 364, post.
 - 23 Sec. 288, post.
 - 24 See sec. 367, post.
 - 25 Secs. 360 to 370, post.

Plea of guilty, held not to be waiver of right to question validity of ordinance on review. Grossman v. Oakland, 30 Oregon, 478; 60 Am. St. Rep., 832; 41 Pac. Rep., 5.

²⁶ Dram shop license. People *ex rel.* v. Cregier, 138 III., 401; 28 N.
 E. Rep., 812.

Forbidding the keeping of liquor for sale—*Certiorari*. Iske v. Newton, 54 Iowa, 586; 7 N. W. Rep., 13.

Taxing insurance agents. Simrall v. Covington, 90 Ky., 444; 14 S. W. Rep., 369; 29 Am. St. Rep., 398.

Vacating street. Arnold v.

Weiker, 55 Kan., 510; 40 Pac. Rep., 901.

Vacating street. Where petition failed to show complainant was abutting owner. Knapp, Stout & Co. v. St. Louis, 156 Mo., 343; 56 S. W. Rep., 1102.

Excavations in streets. State (Rahway Gas Light Co.) v. Rahway, 58 N. J. L., 510; 34 Atl. Rep., 3.

License to lay tracks in streets. State (Montgomery) v. Trenton, 36 N. J. L., 79; State (Kean) v. Bronson, 35 N. J. L., 468.

Sale of municipal property—Action by taxpayer. Tifft v. Buffalo, 65 Barb. (N. Y.), 460.

Street franchise—Action by taxpayer. Linden Land Co. v. Milwaukee Elec. R. R. Co., 107 Wis., 493; 83 N. W. Rep., 851.

²⁷ Handy v. New Orleans, 39 La. Ann., 107; 1 So. Rep., 593; (Taxpayers—Wharf lease) Conery v. New Orleans Waterworks Co., 39 La. Ann., 770; 2 So. Rep., 555 (Taxpayers—Water contract).

Injunction will lie at suit of one injuriously affected. Baltimore v. Radecke, 49 Md., 217; 21 Alb. L. J., 117; 33 Am. Rep., 239; Page v.

tion of police ordinances the defendant may question their validity.²⁸

Municipal officers, as trustees of the public interests, may question the legality of ordinances. This is not only a legal right, but it should be viewed as a sacred public duty. They should prevent, if possible, all violations of law on the part of those associated with them in the public service, particularly those of a legislative character which vitally affect the personal and property rights of the entire local community. Such duty is especially incumbent upon the mayor or chief executive officer, who is usually enjoined in express terms by the organic law to see that all legal provisions are duly observed. Accordingly, it has been held in Pennsylvania that the chief burgess of a municipal borough may question the validity of an ordinance by proper legal proceedings, notwithstanding he vetoed it.²⁹

Baltimore, 34 Md., 558, 564; State (Gregory) v. Jersey City, 34 N. J. L., 390; State (N. J. R. R. & T. Co.) v. Jersey City, 29 N. J. L., 170; State (Danforth) v. Paterson, 34 N. J. L., 163; Camden v. Mulford, 26 N. J. L., 49; State v. Jersey City, 34 N. J. L., 31.

Court will enjoin operation of street railway at instance of private party under a pretended license for franchise which the corporation had no power to grant. Allen v. Clausen, 114 Wis., 244; 90 N. W. Rep., 181.

ABUTTING OWNER. A railroad company as an abutting lot owner may enjoin the unauthorized construction of a railroad streets by another company where special injury will result to complainant from the construction and operation of the proposed road. The fact that the complainant road is occupying streets under a void franchise does not estop it as an abutting owner from enjoining the other company from constructing and operating tracks under a void grant. Louisville & N. R. Co. v. Mobile, etc., R. R., 124 Ala., 162; 26 S. W. Rep., 895.

RIVAL TELEPHONE COMPANY cannot maintain action where it fails to show unreasonable interference with its business. Louisville Home Tel. Co. v. Cumberland Tel. Co. (U. S. C. C. A.), 111 Fed. Rep., 663.

Franchise ordinance which has been accepted and acted upon becomes a contract, and ordinarily its validity cannot be attacked by third persons. Chicago Telephone Co. v. North Western Telephone Co., 199 Ill., 324; 65 N. E. Rep., 329, affirming 100 Ill. App., 57.

28 Sec. 348, post.

29 Respecting the right of the chief burgess to question the validity of the ordinance, the court remarked, that "this is hardly debatable. The statute confers on him the veto power. * * * He has a right to assert his prerogative, and he can do this only by denying the validity of the ordinance alleged to be binding notwithstanding his veto. The appropriate remedy for him is by bill in equity to restrain action under

Citizens and taxpayers may question validity of or-The law has been declared that a suit by injunction may be instituted by any taxpayer for himself and all others similarly situated to enjoin the collection of an illegal tax or the enforcement of an illegal ordinance where the effect would be to impose upon him an unlawful tax or to increase his burden of taxation.³⁰ So where a public right is involved and the object of the suit is to enforce a public duty or keep public officials within the limits of their legal powers the people are regarded as the real party; and in such case the relator, in a suit for a writ of mandamus and by analogy, the plaintiff in a suit for injunction, need not show any legal or special interest in the result.31 The doctrine thus broadly stated is denied by some cases.³² the ordinance alleged on one side to be legal and on the other to be without legal force. This brings his prerogative and the manner of its exercise before the court and determines the duty of the council towards him." Lehigh Coal and Navigation Co. v. Inter-County Street Railway, 167 Pa. St., 126, 136: 36 Wkly. Notes of Cases (Pa.), 160; 31 Atl. Rep., 477.

30 St. Louis v. Wenneker, 145 Mo., 230; 47 S. W. Rep., 105; Arnold v. Hawkins, 95 Mo., 569; 8 S. W. Rep., 718; Dennison v. Kansas City, 95 Mo., 416; 8 S. W. Rep., 429; Valle v. Ziegler, 84 Mo., 214; Newmeyer v. Mo. & Miss. R. R. Co., 52 Mo., 81; Ranney v. Bader, 67 Mo., 476.

TAXPAYER MAY ENJOIN action under void ordinance. Sank v. Philadelphia, 4 Brews. (Pa.), 133.

Fact complainant voted for the ordinance on its final passage does not estop him from asserting its invalidity. Stadler v. Fahey, 87 Ill. App., 411, 414.

Contra-Where interest on taxpaver differs only in degree from that of other residents and whose property does not abut on the park, he cannot sue to enjoin itscondemnation for a railroad sta-

It has been held that a resident and taxtion. Manson v. South Bound R. Co., 64 S. C., 120; 41 S. E. Rep., 832.

Injunction at instance of taxpayers denied, to restrain building city hall. Parker v. Concord, 71 N. H., 468; 52 Atl. Rep., 1095.

Although act may be ultra viries injunction will not lie at instance of taxpayers where it does not appear that the execution of the act will injuriously affect such complainants. Blanton v. Merry, 116 Ga., 288; 42 S. E. Rep., 211.

Injunction by taxpayers to prevent bond issue denied. LeTourneau v. Duluth, 85 Minn., 219; 88 N. W. Rep., 529.

State statutes give remedy against illegal official and corporate acts. Osterhoudt v. Rigney, 98 N. Y., 222; Weston v. Syracuse, 158 N. Y., 274; 53 N. E. Rep., 12. 31 State ex rel. v. School Board. 131 Mo., 505; 33 S. W. Rep., 3; Ranney v. Bader, 67 Mo., 476; Overall v. Ruenzi, 67 Mo., 203; Rubey v. Shain, 54 Mo., 207; Newmeyer v. Mo. Pac. R. R., 52 Mo., 81; Knapp v. Kansas City, 48 Mo. App., 485.

32 See cases supra in this section.

payer has such an interest as to entitle him to an injunction to prevent the incurring of indebtedness in excess of that allowed by law.³³ So where a city is attempting to dispose of public property without warrant of law a non-resident of the city who has property liable to taxation may maintain an injunction to enjoin such disposition.34 So, injunction will lie at the suit of a taxpayer to enjoin the entering into,35 or the consummation,36 or the enforcement, of an illegal or unauthorized contract.³⁷ Thus where the contract is illegal in that it confers a monopoly, equity may be invoked if the carrying out of the contract would increase the burden of taxation.38 So. injunction on behalf of the property owner on the street to be improved will lie to enjoin the doing of the work under a contract not let to the lowest bidder where the charter so requires.³⁹ And it is generally held that injunction will lie on behalf of the public brought by a taxpayer to restrain the performance of any invalid contract for public work, as where the bidding was restricted so as to exclude nonunion labor and thus increased the cost of the work.40

§ 283. Same—When courts will not interfere at instance of taxpayer or citizen. It should be borne in mind that the doctrine just stated and illustrated is not based on the right of the

33 Wright v. Bishop, 88 Ill., 302; Springfield v. Edwards, 84 Ill., 626. 34 Brockman v. Creston, 79 Iowa, 587; 44 N. W. Rep., 822.

Injunction granted to prevent unauthorized appropriation of corporate funds. Stevens v. St. Mary's Training School, 144 Ill., 336; 36 Am. St. Rep., 438; 32 N. E. Rep., 962.

35 Reighard v. Flinn, 189 Pa. St., 355; 42 Atl. Rep., 23, and authorities cited in brief of appellees at page 359 of state report. Execution of contract relating to water supply, held to be a ministerial act. Valparaiso v. Gardner, 97 Ind., 1, 3; 49 Am. Rep., 416.

INJUNCTION BY TAXPAYER to enforce contract to light street.

Schiffman v. St. Paul (Minn., 1902), 92 N. W. Rep., 503.

Taxpayer may enjoin the city from entering into an illegal contract involving the expenditure of municipal funds. Austin v. McCall, 95 Tex., 565; 68 S. W. Rep., 791.

36 Yarnell v. Los Angeles, 87Cal., 603; 25 Pac. Rep., 767.

³⁷ Crampton v. Zabriskie, 101 U. S., 601; Parkersburg v. Brown, 106 U. S., 487.

38 Davenport v. Kleinschmidt, 6 Mont., 502; 13 Pac. Rep., 249.

39 Mazet v. Pittsburg, 137 Pa.,548; 20 Atl. Rep., 693; 27 WeeklyNotes Cas., 73.

40 Atlanta v. Stein, 111 Ga., 789;
 Holden v. Alton, 179 Ill., 318; 53
 N. E. Rep., 556; Adams v. Bren-

property owner or taxpayer, resident or non-resident, or citizen, to dictate and control the administration of the municipal government and to nullify by proceedings in the courts the lawful acts of the public officials, legislative or excutive, done in the administration of the municipal affairs, because it may be assumed that the proposed acts of the corporate authorities sought to be restrained do not promote the best interests of the community and are, therefore, against public policy. As to the taxpayer, the doctrine rests upon the ground of direct interference with his rights, for the reason that if the proposed unauthorized act were consummated his burden of taxation might or would probably be increased. As to the citizen, the ground of relief is found in the fact that the public have a right to be protected against unauthorized or illegal acts on the part of the municipal authorities where such contemplated acts do not involve merely discretionary matters or questions of mere expediency or policy, but where they are in fact in contravention of express or implied constitutional, statutory, charter or ordinance provisions. Thus, whether a city being only authorized to purchase such lands as might be necessary for the purpose of the corporation, could take lands outside of her limits not necessary for such purposes, "is a question that can only arise in a proceeding instituted by the state against the city for abusing her right to purchase lands." 41 In one case, the proper municipal authorities granted to a railway company the right of way over certain streets, on condition that the road should be completed within twelve months from acceptance of the grant by the company, and that in case of failure so to complete it, the council might take away the fran-Here it was held that this provision was a condition subsequent, and that the right of way, when accepted by the company, vested at once, subject to be defeated at the election of the city for breach of the condition, but that a private citizen could not take advantage of a breach.42

§ 284. Same—Mandamus. It is settled law in Missouri that where the performance of a public duty obviously affects the

In a case determined by the United States Circuit Court for the Northern District of Ohio, there existed a contract between a city and a water company, by which the latter agreed to furnish

nan, 177 Ill., 194; 52 N. E. Rep., 314. See § 553, post.

⁴¹ Chambers v. St. Louis, 29 Mo., 543, 576.

⁴² Hovelman v. K. C. H. R. R. Co., 79 Mo., 632, 639.

rights of all citizens, any of them may move for a mandamus to compel the performance of that duty, and "citizens, taxpayers and resident householders" have sufficient interest to maintain such action.43 Where a public right is involved and the object is to enforce a public duty, the people are regarded as the moving party; and in such case, the relator in mandamus need not show any special interest in the result, if the performance of the general duty obviously affects his rights as a citizen.44 While in matters in which public officers exercise a discretion, mandamus will lie to compel them to act, yet it will not dictate the terms of said discretion.45 Thus mandamus will lie to compel the board of police commissioners of the City of St. Louis to vacate an order made by it directing the chief of police of the city not to interfere with the sale of wine or beer on Sunday.46 So, mandamus is an appropriate remedy to compel the restoration of a highway to its former condition, and in this respect, to require the corporation to perform its charter duties.47 The question here is one of public right, and the better opinion is that it is sufficient for the relators in such cases to show that they are citizens, and thus interested in the performance of a public duty.48 And a private citizen is a com-

water and to maintain sufficient pressure in the mains for fire purposes. Here the property owner based his suit on the ground that if a proper pressure had been maintained his property would not have been destroyed and the fire could have been extinguished. The court held that he had no right to maintain the suit, as there was no privity of contract between the company and the plaintiff. Boston S. D. & T. Co. v. Salem Water Co., 94 Fed. Rep. 238.

43 State ex rel. Rutledge v. St. Louis School Board, 131 Mo., 505; 33 S. W. Rep., 3; State ex rel. v. Public Schools, 134 Mo., 296; 35 S. W. Rep., 617; State ex rel. Morris v. H. & St. J. Ry. Co., 86 Mo., 13; State ex rel. Wear v. Francis, 95 Mo., 44; 8 S. W. Rep., 1; State ex rel. v. Crete, 32 Neb., 568; 49 N. W. Rep., 272.

44 State *ex rel.* v. School Board, 131 Mo., 505; 33 S. W. Rep., 3.

The extraordinary writ of mandamus may be invoked either for the purpose of enforcing or protecting a private right, unconnected with the public interest, or for merely a public right, where the people at large are the real parties. When addressed to a ministerial officer it simply commands him to perform some specific act, the performance of which is required of him by law. State ex rel. v. Tracy, 94 Mo., 217, 220; 6 S. W. Rep., 709.

⁴⁵ State *ex rel.* Wear v. Francis, 95 Mo., 44; 8 S. W. Rep., 1.

46 State ex rel. Wear v. Francis,95 Mo., 44; 8 S. W. Rep., 1.

⁴⁷ State *ex rel*. Morris v. H. & St. J. Ry. Co., 86 Mo., 13.

⁴⁸ State *ex rel*. Morris v. H. & St. J. Ry. Co., 86 Mo., 13.

petent party to a mandamus proceeding to compel public officers to enforce a city ordinance.49 So. mandamus may be invoked to test the validity of an ordinance appropriating money out of the general revenue where such appropriation is contended to be a diversion of the money of the taxpayers in contravention of charter provisions.⁵⁰ So, mandamus is properly brought in the name of the state, on the relation of taxpayers residing in a school district, wherein an election of a school director is to be held, to compel the board and its members constituting the election committee to rescind certain appointments of judges and clerks, made by such committee, for the election of a member of the board.⁵¹ So, mandamus will lie at the suit of one having no special interest to compel the mayor to revoke an illegal permit.⁵² And the writ may be invoked to compel the board of engineers of St. Louis to grant an engineer's license where the same is withheld because of caprice or whim.53

§ 285. Injunction to restrain enforcement. The remedy by writ of injunction or prohibition (as termed by some statutes)⁵⁴ usually exists in all cases where an irreparable injury to real or personal property is threatened and to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be afforded at law, and, according to some statutes, by an action for damages.⁵⁵ This remedy has often been applied to restrain the enforce-

Mandamus denied as proper

remedy to test validity of ordinance. Com. v. Fitler, 136 Pa. St., 129; 20 Atl. Rep., 424.

54 The term prohibition is used in the general sense of restraint by injunction and not in the technical sense of a writ of prohibition. Casby v. Thompson, 42 Mo., 133.

⁵⁵ 2 R. S. Mo., 1899, sec. 3649.

Injunction Defined. A writ of injunction may be defined to be a judicial process, operating in personam, and requiring the person to whom it is directed to do or refrain from doing a particular thing. In its broadest sense the process is restorative as well as preventive, and may issue both

⁴⁹ State *ex rel*. Wear v. Francis, 95 Mo., 44; 8 S. W. Rep., 1.

⁵⁰ Hitchcock v. St. Louis, 49 Mo., 484.

⁵¹ State ex rel. v. Public Schools, 134 Mo., 296; 35 S. W. Rep., 617. Where officials arbitrarily refuse to audit claims, etc., mandamus will lie. People v. Board of Supervisors, etc., 45 N. Y., 196, 199; People v. Board of Supervisors, 73 N. Y., 173.

 ⁵² State ex rel. v. Noonan, 59 Mo. App., 524; see State ex rel. v. Francis, 95 Mo., 44; 8 S. W. Rep., 1.
 53 St. Louis v. Meyrose Lamp Co., 139 Mo., 560; 41 S. W. Rep., 244; 61 Am. St. Rep., 474.

ment of void ordinances where it appeared that their enforcement was threatened and which would result in irreparable injury to the property of the complainant and there was no other adequate remedy open to him. The cases in the notes fully illustrate the doctrine.⁵⁶ The general doctrine is that

in the enforcement of rights and in the prevention of wrongs. High on Injunctions, sec. 1.

Mr. Justice Story describes it as "a judicial process whereby a party is required to do a particular thing, or refrain from doing a particular thing, according to the exigency of the writ." 2 Story Eq. Jur., sec. 861; 3 Daniel's Ch. Pr., 1809, et seq.

³⁶ Georgia—Athens v. Georgia R. R. Co., 72 Ga., 800; Gould v. Atlanta, 55 Ga., 678.

Indiana—Rushville v. Rushville Natural Gas Co., 132 Ind., 575; 15 L. R. A., 321; 28 N. E. Rep., 853; Spiegel v. Gansburg, 44 Ind., 418.

Maryland—Deems v. Baltimore, 80 Md., 164; 26 L. R. A., 541; 30 Atl. Rep., 648; 45 Am. St. Rep., 339; Baltimore v. Scharf, 54 Md., 499; Baltimore v. Radecke, 49 Md., 217; 33 Am. Rep., 239.

Missouri—Dennison v. Kansas City, 95 Mo., 416; 8 S. W. Rep., 429.

New York—People v. New York, 32 Barb. (N. Y.), 35; 10 Abb. Pr. (N. Y.), 144; 19 How. Pr. (N. Y.), 155; Birdsall v. Clark, 73 N. Y., 73; 29 Am. Rep., 105; Wood v. Brooklyn, 14 Barb. (N. Y.), 425.

Pennsylvania—Appeal of Harper, 109 Pa. St., 9; 1 Atl. Rep., 791; Sank v. Philadelphia, 4 Brews. (Pa.), 133; 8 Phila. (Pa.), 117.

United States—Barthet v. New Orleans, 24 Fed. Rep., 563.

To prevent invasion of right of property. Guillotte's Heirs v. New Orleans, 12 La. Ann., 479; Morris

Canal & B. Co. v. Jersey City, 12 N. J. Eq., 252.

To protect vested right. Cape May & S. L. R. Co. v. Cape May, 35 N. J. Eq., 419; Platte & D. Canal & M. Co. v. Lee, 2 Colo. App., 184; 29 Pac. Rep., 1036.

Forbidding burial of dead in designated cemetery — Property rights. Austin v. Austin City Cem. Assn., 87 Tex., 330; 28 S. W. Rep., 528; 47 Am. St. Rep., 114.

Fire limits — Destruction of buildings. Montgomery v. Louisville & N. R. Co., 84 Ala., 127; 4 So. Rep., 626; Hine v. New Haven, 40 Conn., 478.

License fee ordinance, enforcement enjoined. Southern Express Co. v. Ensley, 116 Fed. Rep., 756.

Injunction to restrain enforcement of ordinance to levy tax on bicycles will lie, where city has no power to pass such ordinance. Chicago v. Collins, 175 Ill., 445; 67 Am. St. Rep., 224; 51 N. E. Rep., 907; 29 Chicago Legal News, 426.

An illegal ordinance imposing a license tax will be enjoined on a showing that the license is illegal and that on enforcement complainant would be compelled to defend a multitude of criminal prosecutions and would suffer irreparable injury in his business. Hutchinson v. Beckman (U. S. C. C. A.), 118 Fed. Rep., 399.

Ordinance interfering with street railroad franchise and property. Mobile v. Louisville and N. R. Co., 84 Ala., 115; 5 Am. St. Rep., 342; 4 So. Rep., 106.

courts of equity never interfere to stay proceedings of a criminal character, as such courts deal only with civil and property rights. This rule has been applied to proceedings under ordinances enforceable by fine, with consequent liability to imprisonment, where there appeared to be no invasion of property rights.⁵⁷ But equity will restrain unauthorized invasions of property rights which threaten irreparable injury, even though the threatened acts are punishable as crimes.⁵⁸ And it has been declared in Missouri that the doctrine that criminal statutes cannot be tested or their enforcement restrained in civil courts has no application to municipal ordinances, which, while penal, are not criminal statutes.⁵⁹ Thus the enforcement of a city ordinance making it a misdemeanor to buy or sell certain articles, unless in a manner therein provided, will be enjoined if such ordinance is invalid, although its invalidity has not been determined in a prosecution thereunder or in an action of a legal character.60 Where the ordinance is void the remedy by

Impairing obligation of contracts. Cleveland City Ry. Co. v. Cleveland, 94 Fed. Rep., 385.

Void ordinance—Reducing water rates. Los Angeles City Water Co. v. Los Angeles, 88 Fed. Rep., 720.

Ordinance fixing water rates at unreasonable amounts in violation of the state constitution. Spring Valley W. W. v. San Francisco, 82 Cal., 286; 16 Am. St. Rep., 116; 22 Pac. Rep., 910, 1046.

Ordinance illegal; forbidding hauling on certain streets. Cicero Lumber Co. v. Cicero, 176 Ill., 9; 51 N. E. Rep., 758; 68 Am. St. Rep., 155.

In Kentucky the validity of ordinances of cities of the first class may be tested by writ of prohibition. Bybee v. Smith, 22 Ky. L. Rep., 467, 1684; 57 S. W. Rep., 789.

57 Injunction denied to restrain the execution of an ordinance of a criminal nature, on the ground of the invalidity of the ordinance or that the complainant is exempted from its operation. Moultrie v. Patterson, 109 Ga., 370; 34 S. E.

Rep., 600; Garrison v. Atlanta, 68 Ga., 64; Phillips v. Stone Mountain, 61 Ga., 386.

Court will not enjoin if property rights are not invaded. Atlanta v. Gate City Gas Light Co., 71 Ga., 106.

Rule applied to criminal statute. Gault v. Wallis, 53 Ga., 675, 677.

⁵⁸ Hamilton-Brown Shoe Co. v. Saxey, 131 Mo., 212; 32 S. W. Rep., 1106.

Injunction to test validity of statute. Business Men's League v. Waddill, 143 Mo., 495; 45 S. W. Rep., 262; State ex rel. v. Hughes, 104 Mo., 459; 16 S. W. Rep., 489.

⁵⁹ Sylvester Coal Co. v. St. Louis,
130 Mo., 323; 32 S. W. Rep., 649;
51 Am. St. Rep., 566; Kansas City
v. Clark, 68 Mo., 588.

60 Sylvester Coal Co. v. St. Louis,
130 Mo., 323; 32 S. W. Rep., 649;
51 Am. St. Rep., 566.

Contra. Invalidity must be established in court of law. Forcheimer v. Mobile, 84 Ala., 126; 4 So. Rep., 112; Marvin Safe Co. v. New York, 38 Hun. (N. Y.), 146.

injunction has frequently been sustained in order to prevent a multiplicity of prosecutions under it.61

The rule is uniformly sustained that if an adequate remedy at law exists (according to some statutes by an action for damages), or where no irreparable injury to property rights are threatened, injunction will be denied to restrain the enforcement of the ordinance.⁶²

Equity has no jurisdiction. Burnett v. Craig, 30 Ala., 135; 68 Am. Dec., 115.

61 Chicago v. Collins, 175 Ill., 445; 67 Am. St. Rep., 224; 51 N. E. Rep., 907; South Covington & C. St. Ry. Co. v. Berry, 93 Ky., 43; 18 S. W. Rep., 1026; 40 Am. St. Rep., 161; Brown v. Catlettsburg, 11 Bush (74 Ky.), 435; Newport v. Bridge Co., 90 Ky., 193; 13 S. W. Rep., 720; Holland v. Baltimore, 11 Md., 186; Contra. West v. New York, 10 Paige (N. Y.), 539.

To Avoid a Multiplicity Suits and have the controversy settled at one hearing, followers of a particular occupation, as master plumbers, whose rights and liabilities are identical, may join in a suit in equity to restrain the enforcement of an alleged illegal ordinance requiring a license to be obtained, where it appears that the corporate authorities are threatening each of them with prosecution for non-compliance, and each prosecution would involve the same right claimed. Wilkie v. Chicago, 188 Ill., 444; 80 Am. St. Rep., 182; 58 N. E. Rep., 1004, reversing 88 Ill. App., 315.

FEDERAL COURTS HAVE JURISDIC-TION where the loss alleged exceeds \$2,000 and the sum involved for jurisdictional purposes is not alone the tax demanded (here an illegal license tax) but the value of complainant's right to conduct his business without being subject to the illegal tax. Hutchinson v. Beckman (U. S. C. C. A.), 118 Fed. Rep., 399.

62 ADEQUATE REMEDY AT LAW.
 Alabama—Forcheimer v. Mobile,
 84 Ala., 126; 4 So. Rep., 112.

Colorado—Denver v. Beede, 25 Colo., 172; 54 Pac. Rep., 624.

Connecticut — Whitney v. New Haven, 58 Conn., 450; 20 Atl. Rep., 666; Dunham v. New Britain, 55 Conn., 378; 11 Atl. Rep., 354.

Georgia—Moultrie v. Patterson, 109 Ga., 370; 34 S. E. Rep., 600; Pope v. Savannah, 74 Ga., 365.

Illinois—Poyer v. Des Plaines, 123 Ill., 111; 13 N. E. Rep., 819; 5 Am. St. Rep., 494; 20 Ill. App., 30; Yates v. Batavia, 79 Ill., 500; Skakel v. Roche, 27 Ill. App., 423; Klinesmith v. Harrison, 18 Ill. App., 467.

North Carolina—Scott v. Smith, 121 N. C., 94; 28 S. E. Rep., 64; Warden of St. Peter's E. Ch. v. Washington, 109 N. C., 21; 13 S. E. Rep., 700; Cohen v. Goldsboro, 77 N. C., 2.

Texas—Wade v. Nunnelly, 19 Tex. Civ. App., 256; 46 S. W. Rep., 668.

United States—Torpedo Co. v. Clarendon, 19 Fed. Rep., 231.

As where right of appeal exists. Levy v. Shreveport, 27 La. Ann., 620; Browne v. New Orleans, 38 La. Ann., 517.

Abuse of discretion by municipal authorities is not sufficient

§ 286. Injunction to prevent violation of ordinances. Ordinarily, injunction will not lie to prevent threatened violation of an ordinance.⁶³ The usual remedy is by action to recover

ground, when. Rosenbaum v. Newbern, 118 N. C., 83; 32 L. R. A., 123; 24 S. E. Rep., 1.

Where the authorities are acting within their powers, and no fraud is imputed or shown, no invasion of private rights, no manifest oppression and no gross abuse, their actions are not subject to judicial control. Brennan v. Sewerage & Water Board of New Orleans (La., 1902), 32 So. Rep., 563.

Ordinance for local improvement. Injunction denied. Sought on ground that ordinance was unreasonable, oppressive and unjust. It appeared that there was an adequate remedy at law by objection on application to confirm the special tax levied to pay for the improvement. Field v. Western Springs, 181 Ill., 186; 54 N. E. Rep., 929.

Injunction denied to prevent the letting of contract, there being no irreparable injury shown or threatened. Barto v. San Francisco, 135 Cal., 494; 67 Pac. Rep., 758; McBride v. Newlin, 129 Cal., 36; 61 Pac. Rep., 577.

Forbidding erection of wooden building in fire limits. Hine v. New Haven, 40 Conn., 478.

Franchise ordinance. New Orleans Water Works Co. v. New Orleans, 164 U. S., 471.

To stop issue of bonds. Joliet v. Alexander, 194 Ill., 457; 62 N. E. Rep., 861; Ottumwa v. City Water Supply Co. (U. S. C. C. A.), 119 Fed. Rep., 315.

ORDINANCE AS TO WHARFAGE.
Ordinance prescribing certain
rates of wharfage on vessels "that
may discharge or receive freight

or land on, or anchor at, or in front of, any public landing or wharf belonging to the city, for the purpose discharging orreceiving freight." Here it was contended by a transportation company engaged in interstate commerce that the wharfage was extortionate and was merely a pretext for levying a duty of tonnage. An injunction suit was brought in the federal court praying that the prosecution of a suit brought in the state court to collect the wharfage be enjoined and that the ordinance be declared void. Held that the character of the charges must be determined by the ordinance itself and as it on its face imposed them for the use of the wharf only, and not for entering the port or lying at anchor in the river, the court will refuse injunction. Transportation Co. v. Parkersburg, 107 U. S., 691.

Dairy ordinance. Hottinger v. New Orleans, 42 La. Ann., 629; 8 So. Rep., 575.

Defective title of ordinance no ground. Barton v. Pittsburg, 4 Brewst. (Pa.), 373.

Fact ordinance is not enforced against other violators is no ground for injunction. Wagner v. Rock Island, 146 Ill., 139; 21 L. R. A., 519; 34 N. E. Rep., 545.

Denied where ordinance is not wholly void. Davis v. Fasig, 128 Ind., 271; 27 N. E. Rep., 726.

Laches. Parker v. Concord, 71 N. H., 468; 52 Atl. Rep., 1095.

63 Illinois—Finegan v. Allen, 46 Ill. App., 553.

rates of wharfage on vessels "that Michigan—St. Johns v. McFarmay discharge or receive freight lan, 33 Mich., 72; 20 Am. Rep., 671.

the penalties imposed.⁶⁴ However, injunction proceedings have been sustained where the violation would constitute a public nuisance and result in special and irreparable damage to the complainant, as, for example, by the erection or removal of a wooden building to a place within the fire limits where it is to be located dangerously near complainant's premises.⁶⁵

\$287. **Certiorari.** In New Jersey, certiorari will lie to test the validity of the ordinance. Where the local corporation has no power to enact the ordinance it will be annulled by certiorari instituted by a person who may be affected by the enforcement of such ordinance, notwithstanding no attempt has been made to enforce it. Thus where an ordinance granting a franchise to lay railroad tracks in the streets is passed without previous notice to persons interested and where one of the members of the board of public works who votes for it is interested as a stockholder in the road, the ordinance may be annulled by certiorari. The owners of the fee simple of land in a street may prosecute a certiorari to test the validity of a municipal ordinance purporting to authorize a railway company to place rails, poles and wires on their lands in the street. So an abutting owner can maintain certiorari to re-

New Hampshire—Manchester v. Smyth, 64 N. H., 380; 10 Atl. Rep., 700.

New York—New Rochelle v. Lang, 75 Hun. (N. Y.), 608; 27 N. Y. Suppl., 600; Hudson v. Thorne, 7 Paige (N. Y.), 261.

Wisconsin—Waupun v. Moore, 34 Wis., 450; 17 Am. Rep., 446.

64 See sec. 303, post.

65 Sustained at instance of property owner to enjoin removal of a wooden building to a place within fire limits in violation of ordinance where it is to be located dangerously near plaintiff's frame house. Kaufman v. Stein, 138 Ind., 49; 46 Am. St. Rep., 368.

So injunction was sustained to prevent erection of wooden building in violation of ordinance within fire limits by property owner on a showing that the erection would work special and irreparable injury to him and his property. First Nat. Bk. v. Sarlls, 129 Ind., 201; 28 Am. St. Rep., 185.

Depreciation in value of land held not to be such special damage as would sustain injunction. Mc-Closkey v. Kreling, 76 Cal., 511; 18 Pac. Rep., 433.

⁶⁶ Camden v. Mulford, 26 N. J.
 L., 49; State (Leland) v. Long
 Branch Comrs., 42 N. J. L., 375.

Delay in bringing—Effect. State (Doyle) v. Newark, 30 N. J. L., 303, 306.

Irregularly adopted, will not be set aside, when. State (Vanatta) v. Morristown, 34 N. J. L., 445.

⁶⁷ New Jersey R. & Transp. Co. v. Jersey City, 29 N. J. L., 170.

68 State (West Jersey Traction
Co.) v. Board of Public Works. 56
N. J. L., 431; 29 Atl. Rep., 163.

69 State (Kennelly) v. Jersey

view an ordinance changing grade of street in front of his property.⁷⁰ So certiorari lies where the prosecutors are included in the descriptive words of the ordinance when its restraints on their business have been enforced against them, causing pecuniary loss, and they have submitted to it without an action and conviction.⁷¹

§ 288. **Quo** warranto. Quo warranto may be invoked for the unwarranted assumption of public powers. Thus in an early South Carolina case, the writ was allowed against a municipal corporation by the attorney-general, in behalf of the state, in order to test the right of the corporation to tax by ordinance certain bonds, notes and other obligations.⁷² But the writ is generally employed to try the right of persons to exercise the functions of a public office, and not to test the legality of their acts.⁷³ The remedy has sometimes been permitted to try the right of the local corporation to exercise civil government over

City, 57 N. J. L., 293, 298; 30 Atl. Rep., 531; 26 L. R. A., 281.

70 Read v. Camden, 54 N. J. L., 347; 24 Atl., 549.

⁷¹ State (Staates) v. Washington, 44 N. J. L., 605, 607.

Where the passage of an ordinance is a legislative act rather than judicial, it is not subject to review by *certiorari* in Iowa. Iske v. Newton, 54 Iowa, 586; 7 N. \hat{W} . Rep., 13.

Certiorari. Marion v. Chandler, 6 Ala., 899; Carroll v. Tuskaloosa, 12 Ala., 173. See secs. 364, 365, post.

CERTIORARI BY TAXPAYER.

Iowa—Dodge v. Council Bluffs,
57 Iowa, 560; 10 N. W. Rep., 886.
Nebraska—Grand Island Gas Co.
v. West, 28 Neb., 852; 45 N. W.
Rep., 242.

New Jersey—Lewis v. Cumberland, 56 N. J. L., 416; 28 Atl. Rep., 553; Stroud v. Consumers' Water Co., 56 N. J. L., 422; 28 Atl. Rep., 578; State v. Robbins, 54 N. J. L., 566; 25 Atl. Rep., 471, reversing Middleton v. Robins, 53 N. J. L.,

555; 22 Atl. Rep., 481; Read v. Atlantic City, 49 N. J. L., 558; 9 Atl. Rep., 759.

Pennsylvania—Frame v. Felix,
167 Pa. St., 47; 31 Atl. Rep., 375.
Texas—Altgeld v. San Antonio,
81 Tex., 436; 13 L. R. A., 383; 17
S. W. Rep., 75.

⁷² State v. Charleston, 1 Mill's Const. Rep. (S. C.), 36.

"Such use of the remedy is very rare." 2 Dillon, Mun. Corp. (4th Ed.), § 897.

73 People v. Maynard, 15 Mich., 463; State ex rel. v. Lawrence, 38 Mo., 535; State ex rel. v. Perpetual Ins. Co., 8 Mo., 330; State ex rel. v. Stone, 25 Mo., 555.

Denied at relation of a private citizen to vacate charter of a municipal corporation on account of the passage of an unauthorized ordinance fixing the price of the license for retailing liquors. "Whether quo warranto is the appropriate remedy for vacating an invalid ordinance we do not now determine." Stone, J., in State ex rel. v. Cahaba, 30 Ala., 66, 68.

added territory.74 But such jurisdiction has been denied, and it has been held that it cannot be invoked to question the authority of municipal officers to exercise public functions within added territory by virtue of a legislative act. It is asserted that the proper way to test the validity of such law is to present this as a defense to the enforcement of the ordinances within the extended territory, or in event of an attempt to levy and collect taxes for municipal purposes within such territory, to appeal to a court of equity to enjoin such proceedings. 75 So the writ has been denied for the purpose of testing the power to pass certain ordinances. The remedy in such case is to enjoin any steps that may be taken to enforce the ordinance or to proceed by quo warranto against any persons who may claim to hold an office under and by virtue of the provisions of the ordinances alleged to be void.⁷⁶ So it has been asserted (dictum) that the writ will not lie for the purpose of annulling an ordinance passed in the irregular and improper exercise of a power conferred by law.77

§ 289. Rules of construction. The construction of an ordinance is a question of law for the court.⁷⁸ The rules for the

Denied to enforce execution of public obligation. Atty. Gen. v. Salem, 103 Mass., 138.

Denied in People ex rel. v. Hillsdale & Chatham Turnpike Co., 2 Johns (N. Y.), 190.

Denied where purpose was to deprive a certain gas company of the right to lay pipe and distribute gas in the city, on the ground that it has forfeited the right by violating certain conditions imposed by the city, in granting it. The court expressed the opinion that the state was not concerned, and that the injury, if any, should be redressed by the "usual legal remedies." Per Campbell, C. J., in Reople ex rel. v. Mutual Gas Light Co., 38 Mich., 154, 156.

74 People v. Reclamation Dist., 130 Cal., 607; 63 Pac. Rep., 27; People v. Peoria, 166 Ill., 517, 522; 46 N. E. Rep., 1075; State ex rel. v. Fleming, 147 Mo., 1; 44 S. W. Rep., 758; State *ex rel.* v. Mote, 48 Neb., 683; 67 N. W. Rep., 810; State *ex rel.* v. Dimond, 44 Neb., 154, 162; 62 N. W. Rep., 498.

75 State ex rel. v. Whitcomb, 55Ill., 172, 177.

⁷⁶ State *ex rel.* v. Newark, **57** Ohio St., 430; 49 N. E. Rep., 407.

77 "Our attention has not been directed to, nor have we been able to find, any case in the books where proceedings by quo warranto, or information in the nature thereof, has been entertained for the purpose of declaring void or annulling a legislative act, whether passed by a state or an inferior municipal legislature." Per Cole, J., in State ex rel. v. Lyons, 31 Iowa, 432, approved in State ex rel. v. Newark, 57 Ohio St., 430; 49 N. E. Rep., 407.

Examine State v. Evans, 3 Ark., 585.

78 Pennsylvania Co. v. Frana, 13

construction of state statutes usually apply to the construction of ordinances.⁷⁹ Where the ordinance is open to two constructions one legal, and the other illegal, if possible, the former will be adopted.⁸⁰ "Although it is desirable that by-laws

Ill. App., 91; Denning v. Yount, 9Kan. App., 708; 59 Pac. Rep., 1092;61 Pac. Rep., 803.

Whether an ordinance is reasonable is a question for the court. Long v. Jersey City, 37 N. J. L., 348; Austin v. Austin City Cemetery Assn., 87 Tex., 330; 47 Am. St. Rep., 114; 28 S. W. Rep., 528.

The construction of an ordinance should not be submitted to the jury. In this respect it stands as a state statute. Denver & R. G. Ry. Co. v. Olsen, 4 Colo., 239.

Thus the construction of an ordinance requiring a railroad company to keep a flagman at a crossing is not for the jury but for the court alone. Wilson v. New York, N. H. & H. R. Co., 18 R. I., 598; 29 Atl. Rep., 300.

Reasonableness is a question of law for the court. Sec. 185, supra.

⁷⁰ In re Yick Wo, 68 Cal., 294; 58 Am. Rep., 12; 9 Pac. Rep., 139; Zorger v. Greensburgh, 60 Ind., 1; Denning v. Yount, 9 Kan. App., 708; 59 Pac. Rep., 1092, affirmed 61 Pac. Rep., 803; State v. Kirkley, 29 Md., 85; Quinette v. St. Louis, 76 Mo., 402.

so Bicycle ordinance. Swift v. Topeka, 43 Kan., 671; 23 Pac. Rep., 1075.

Salary ordinance. Lowry v. Lexington, 24 Ky. Law Rep., 516; 68 S. W. Rep., 1109.

Street paving ordinance. Baltimore v. Hughes, 1 Gill & J. (Md.), 480.

Dogs at large — Non-residents. Commonwealth v. Dow, 10 Met. (Mass.), 382.

Architect license. St. Louis v. Herthel, 88 Mo., 128.

Tax on railroad cars. Johnson v. Philadelphia, 60 Pa. St., 445.

Rule applied to statutory construction. Bigelow v. West Wisconsin Railroad Co., 27 Wis., 478; Iowa Homestead Co. v. Webster County, 21 Iowa, 221, per Wright, T

England—Dearden v. Townsend, L. R. 1 Q. B., 10; Paulterers Co. v. Phillips, 6 Bingham's N. C. (C. P.), 314.

Canada—Re Cameron and Tp. of East Nissouri, 13 Up. Can. Q. B. Rep., 190; Re Gibson & U. C. of H. & B., 20 Up. Can. Q. B. Rep., 11; Re Borthwick and City of Ottawa, 9 Ontario Rep., 401.

Hucksters living within one mile of corporate limits. Suell v. Belleville, 30 Up. Can. Q. B., 81.

"Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power, and a contrary conclusion will never be reached upon slight consideration. It is the province and the right of the municipality to regulate its local affairs, within the law, of course; and it is the duty of the courts to uphold such regulations, except it manifestly appears that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the constitution, or laws made in pursuance thereof." Ex parte Haskell, 112 Cal., 416; 44 Pac. Rep., 725; 32 L. R. A., 527, approved in Los Angeles County v. Eikenberry (Cal., 1901), 63 Pac. Rep., 766.

Interpretation will be adopted that will fully effectuate the in-

should be so free from doubt that 'he who runs may read,' yet as even in the case of higher legislative bodies this is not always possible; and the courts should strive so to construe a by-law as to give reasonable effect to the object aimed at." 81 Scrutiny unreasonably rigid will not be resorted to, in considering the meaning of by-laws.82 A by-law will not be declared void because of "a want of clearness of expression or a difficulty in construing or adopting its provisions." 83 doubts are resolved in favor of the validity of the ordinance.84 The presumption is in favor of the validity and the burden is upon the one who asserts its invalidity, to demonstrate it.85 Ordinances are to be tested by the charter, or local constitution.86 An ordinance passed by virtue of a state statute fixing the time and manner of holding certain elections has the same power and effect and is to be interpreted as part of the statute itself.87 Ordinances are to be construed in harmony with the laws and general legislative policy of the state.88 the ordinance will not be so construed as to affect a repeal of the general state law with which it conflicts.89 Ordinances

tent of the municipal legislation. One which violates the charter or law will be avoided, if possible and consistent, etc. St. Louis v. Kaime, 2 Mo. App., 66, 68.

"The by-laws of a corporation are to receive a reasonable construction, so as, if practicable, to make them consistent with the law of its incorporation, and likewise with the general and fundamental laws of the state." Gass v. Greenville, 4 Sneed (Tenn.), 62, 64.

"The language of a charter created for the public good will be construed liberally in order to support a by-law that tends reasonably to effect that purpose." Rule applied to ordinance forbidding Sunday sales of liquor. Gabel v. Houston, 29 Tex., 335, 343.

Every fair intendment and presumption will be indulged to support an ordinance within the local jurisdiction. Baltimore v. Clunet, 23 Md., 449. 81 Kruse v. Johnson, 2 Q. B., 91, 93; 14 Times L. R., 416, 417, per Lord Russell of Killowen.

82 Whitlock v. West, 26 Conn.,
406; Re Arkell and Town of St.
James, 38 Up. Can. Rep., 594, 598;
Re Croome and City of Brantford,
6 Ontario Rep., 188, 192.

ss Per Draper, C. J., in *Re* Smith and City of Toronto, 10 Up. Can. Com. Pleas, 225, 228.

St Stafford v. Chippewa Valley Electric R. C., 110 Wis., 331; 85 N. W. Rep., 1036. Sec. 186, supra. St Chicago & A. Ry. Co. v. Carlinville, 103 Ill. App., 251. Compare Schott v. People, 89 Ill., 195. St Gabel v. Houston, 29 Tex., 335. St San Luis Obispo v. Fitzgerald, 126 Cal., 279; 58 Pac. Rep., 699.

88 Rule applied to an ordinance taxing peddlers. Moberly v. Hoover, 93 Mo. App., 663.

89 Bailey v. Com., 23 Ky. Law
 Rep., 1223; 64 S. W. Rep., 995.
 See ch. XV. Of Municipal Con-

and by-laws should be so construed as to give every part of them effect, if possible. The court cannot insert words, qualifications or conditions and thus amend the ordinance. Its province is to construe only. If possible, every clause and word in the ordinance will be given full force and effect. 92

§ 290. Same subject. When the ordinance is to be treated as a contract and its words are plain and explicit in the construction the court will confine itself to the words. A reasonable construction will be adopted. The intent of the ordinance controls in its construction. The constitutionality should be specific. The constitutionality of an ordinance is to be tested not by what has been done under it but by what it authorized to be done by virtue of its provisions. All ordinances relating to the same subject should be construed together. Thus where two ordinances are passed on the same day, one to widen a street and the other granting a franchise to a railroad company to lay its tracks in such street, they are to be construed as a single ordinance. Thus where the law provides that in conferring upon a water company the privilege for a stated pe-

trol of Offenses Against the State.

90 Whitlock v. West, 26 Conn.,

91 Pittsburg v. Keech Co., 21 Pa. Super. Ct., 548.

92 Metropolitan Life Ins. Co. v.Darenkamp, 23 Ky. Law Rep.,2249; 66 S. W. Rep., 1125.

93 People's Gaslight & Coke Co.v. Hale, 94 Ill. App., 406.

94 First Municipality v. Cutting,4 La. Ann., 335.

It is proper to apply liberal rules of construction to town by-laws. Whitlock v. West, 26 Conn., 406.

An ordinance is not void because its subdivisions are not numbered in consecutive order. Los Angeles County v. Eikenberry (Cal.,1901), 63 Pac. Rep., 766.

95 Merriam v. New Orleans, 14 La. Ann., 318.

96 New Orleans v. Chappuis, 105La., 179; 29 So. Rep., 721.

97 Brown v. Denver, 7 Colo., 305,

312; 3 Pac. Rep., 455; Davidson v. New Orleans, 96 U. S., 97; San Mateo County v. S. Pac. R. R. Co., 8 Sawyer (U. S.), 238; Thomas v. Gain, 35 Mich., 155; Stuart v. Palmer, 74 N. Y., 183.

98 Reynolds v. Baldwin, 1 La. Ann., 162.

99 Ligare v. Chicago, 139 Ill., 46;32 Am. St. Rep., 179; 28 N. E.Rep., 934.

Statutes relating to the same matter should be considered together and that construction adopted which will give effect to all of them. Andrew Co. ex rel. v. Schell, 135 Mo., 31; 36 S. W. Rep., 206.

And in determining the meaning of an existing statute, it is proper to consider the prior law and all changes therein. State ex rel. v. Hostetter, 137 Mo., 636; 39 S. W. Rep., 270.

¹ Favorable to city, when public

riod to furnish water the company should charge such rates as might be "fixed by ordinance," and two constructions may be adopted—the rate fixed by ordinance to be permanent and the rate so fixed to be altered from time to time as justice may require—the latter construction being favorable to the public will be adopted.² Doubts as to whether an ordinance is invalid, as conflicting with individual rights, should be resolved against the city.³ The rule *ejusdem generis* is often applied in the construction of ordinances.⁴

§ 291. **Title in construction.** The title of an ordinance or statute may be construed in its interpretation.⁵ So the preamble to an act "may be used to explain an equivocal expression used in the enacting clause, but never to control its obvious

interest conflicts with private. Philadelphia v. Western Union Tel. Co., 11 Phila. (Pa.), 327.

² Freeport Water Co. v. Freeport, 180 U. S., 587; Danville Water Co. v. Danville, 180 U. S., 619; Rogers Park Water Co. v. Fergus, 180 U. S., 624, affirming 178 Ill., 571; 53 N. E. Rep., 363.

³ Slaughter v. O'Berry, 126 N. C., 181; 35 S. E. Rep., 241; 48 L. R. A., 442.

4 St. Louis v. Laughlin, 49 Mo., 559; State v. Schuchmann, 133 Mo., 534; 2 S. W. Rep., 836; State W. Rep., 842; State v. Bryant, 90 Mo., 534; 2 S. W. Rep., 836; State v. Dinnisse, 109 Mo., 434; 19 S. W. Rep., 92; State v. South, 136 Mo., 673; 38 S. W. Rep., 716; St. Louis Agr. and Mech. Assn. v. Delano, 108 Mo., 217; 18 S. W. Rep., 1101, following same case, 37 Mo. App., 284, and overruling State v. Williams, 35 Mo. App., 541.

Ordinance held to include horse racing though not specifically named. Webber v. Chicago, 148 Ill., 313; 36 N. E. Rep., 70.

See sections 48 to 52, supra.

⁵ Dart v. Bagley, 110 Mo., 42, 51; 19 S. W. Rep., 311; Martindale v. Palmer, 52 Ind., 411; Portland v. Schmidt, 13 Oreg., 17, 23; 6 Pac. Rep., 221; Ex parte Gregory, 20 Tex. App., 210; 54 Am. Rep., 516.

THE ENGLISH RULE was that "the title cannot be resorted to in construing the enactment." Hunter v. Nockolds, 1 McN. & Cord, 651.

"But the better rule, as we think, is to presume that the true intent and meaning is to be found in the title, unless it is plainly contradicted by the express terms of the body of the act." Conn. Mutual Life Ins. Co. v. Albert, 39 Mo., 181.

THE TITLE DOES NOT CONTROL. The provisions of the ordinance itself and not the title are to be construed in order to determine the class of persons to which it is intended to apply. Spring Valley v. Henning, 42 Ill. App., 159.

Title: "To prevent the establishment of tippling houses." The ordinance went farther and forbade any sale of lager beer, ale or other malt liquor, without a license. The evidence was that defendant sold a small quantity of beer by the quart. The conviction was sustained, the court

meaning, nor to supply matter not embraced in its spirit and meaning." 6

§ 292. Contemporaneous construction. The general rule is that the meaning of an ordinance must be gathered from the law itself and not from contemporaneous statements of the individuals who framed it or those who voted for it. This rule is particularly enforced where the provisions of the ordinance are clear. In such case, contemporaneous construction adopted by the municipal officers charged with its enforcement will be held inadmissible, to aid its construction. However, in doubtful cases where the language of the ordinance is ambiguous, a contemporaneous construction adopted by the parties interested in the enforcement of the ordinance, while not controlling, is entitled to great weight. In

Respecting a discriminating ordinance, drawn in general terms, Mr. Justice Field observed: "The class character of this legislation is none the less manifest because of the general terms in which it is expressed. The statements of the supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose

saying, "The title is unnecessary and cannot control the tenor of the enactment." Per Dixon, in State (Hershoff) v. Beverly, 45 N. J. L., 288, 291.

⁶ Dictum, Johnson, J., in Clark v. Bynum, 3 McCord (S. C.), L. 298, 299.

"It is, in general, true that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs which are intended to be remedied by the statute. This rule must not, however, be carried so far as to restrain the general words of an enacting clause by the particular words of the preamble. Although the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms, yet if any doubt arises on the words of the enacting part, the preamble may be resorted to, to explain it." Per Thompson, C. J., in Jackson v. Gilchrist, 15 John (N. Y.), 89, 116.

The preamble cannot be invoked to control or restrain the obvious meaning of an ordinance. Bohle v. Stannard, 7 Mo. App., 51, 55.

Barnes v. Mobile, 19 Ala., 707.
 Martin v. Swift, 120 Ill., 488;

12 N. E. Rep., 201; Beardstown v. Virginia, 76 Ill., 34; Frye v. C., B. & Q. R. R. Co., 73 Ill., 399; Stadler v. Fahey, 87 Ill. App., 411.

⁹ Wesson v. Collins, 72 Miss.,844; 18 So. Rep., 360, 917.

A construction put upon the ordinance itself for a long period will preclude its officers from adopting a different construction. Harrison v. People, 97 Ill. App., 421.

10 State ex rel. v. Severance, 49 Mo., 401; Wright v. Chicago, etc., R. R. Co., 7 Ill. App., 438.

of ascertaining the general object of the legislation proposed, and the mischief sought to be remedied. Besides we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness and forbidden to know, as judges, what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete. If this were not so, the most important provisions of the constitution, intended for the security of personal rights, would by the general terms of an enactment, often be evaded and practically annulled." 11

§ 293. Construction of penal ordinances. Ordinances penal in their nature are usually subject to strict construction. ¹² Every law in derogation of rights of property, or that takes away the estate of the citizen, ought to be construed strictly. ¹³ But ordinarily rigid rules by which the validity of penal statutes are to be tested are not applicable to the by-laws of municipal corporations. "The by-laws of very few of these corporations could stand such test. They should receive a

11 Per Field, J., in Ah Kow v. Nunan, 5 Sawyer (U. S.), 552, 560, 561 (San Francisco "queue Ordinance"); Brown v. Piper, 91 U. S., 37, 42, per Mr. Justice Swayne; Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (57 U. S.), 416, 435, per Mr. Chief Justice Taney; Scott v. Sandford (Dred Scott case), 19 How. (60 U. S.), 393, 407, per Mr. Chief Justice Taney.

¹² Illinois—Chicago v. Rumpff, 45 Ill., 90, 99.

Kentucky—Krickle v. Commonwealth, 1 B. Mon. (Ky.), 361.

Missouri-St. Louis v. Dorr, 145

Mo., 466; 37 S. W. Rep., 1108; 41 S. W. Rep., 1094; 46 S. W. Rep., 976; State v. Gritzner, 134 Mo., 512; 36 S. W. Rep., 39; State v. Bryant, 90 Mo., 534; 2 S. W. Rep., 836; Pacific v. Seifert, 79 Mo., 210, 215; State v. Jaeger, 63 Mo., 403; St. Louis v. Goebel, 32 Mo., 295.

New Jersey—McConville v. Mayor, 39 N. J. L., 38, 42, 43; People v. Rosenberg, 138 N. Y., 410, 415.

This is the statutory rule. Exparte Simms, 40 Fla., 432; 25 So. Rep., 280.

13 Fowler v. St. Joseph, 37 Mo.,228.

reasonable construction, and their terms should not be strictly scrutinized for the purpose of making them void." 14

§ 294. Construction of words and terms. It is competent for the ordinance to define words and terms used therein, and such definitions will usually be controlling.¹⁵ Where a resolution imposes duties on citizens in regard to care of sidewalks, with a provision that "a copy of the resolution may be served," on citizens, the word "may" will be read as "must," the resolution being in protection of public interests and imposing a duty.¹⁶ General words and phrases, which are preceded by specific enumeration, are usually limited by such particular descriptions.¹⁷ The ordinance will be construed according to its reason and spirit. A literal interpretation will be rejected if such would defeat its purpose.¹⁸ In construction words will sometimes be rejected.¹⁹ Inaccurate use of prepositions will not defeat the law.²⁰

¹⁴ Per Eustis, C. J., in First Municipality v. Cutting, 4 La. Ann., 335.

Reasonable construction is usually adopted. Merriam v. New Orleans, 14 La. Ann., 318; Commonwealth v. Robertson, 5 Cush. (Mass.), 438; Rounds v. Mumford, 2 R. I., 154.

¹⁵ St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045.

"His," as used in the organic and statutory law, applies to females as well as males, unless a different intent is exhibited by the context. State *ex rel.* v. Hostetter, 137 Mo., 636; 39 S. W. Rep., 270.

PLURAL NUMBER construed in State v. Sweeney, 93 Mo., 38; 5 S. W. Rep., 614.

16 Doane v. Omaha, 58 Neb., 815;80 N. W. Rep., 54.

See sections 82 and 83, supra.

¹⁷ Keokuk, etc., Co. v. Quincy, 81 Ill., 422; Snyder v. North Lawrence, 8 Kan., 82; St. Louis v. Herthel, 88 Mo., 128; St. Louis v. Laughlin, 49 Mo., 559; Grumley v. Webb, 44 Mo., 444; Knox City v. Thompson, 19 Mo. App., 523; Shultz v. Cambridge, 38 Ohio St., 659.

¹⁸ Indianapolis v. Huegele, 115
 Ind., 581, 588; 18 N. E. Rep., 172.
 ¹⁹ State v. Acuff, 6 Mo., 54.

20 Worrell v. State, 12 Ala., 732. An ordinance made it an offense to be found associating with certain characters "in a public place, street, alley, common, or within said city limits," construed to read "in any public place, street, alley or common within said city," thus making the conjunction "or" to precede instead of to follow the word "common." Zorger v. Greensburgh, 60 Ind., 1.

"Policy," in a penal ordinance forbidding "policy playing," the court will take notice of the fact that the term was in current use, in the town, when the ordinance was passed. State v. Carpenter, 60 Conn., 97, 102; 22 Atl. Rep., 497.

The charter required election of stated number of "aldermen who

§ 295. Construction where ordinance void in part. The fact that an ordinance may be void in part does not necessarily render the whole ordinance invalid. The rule established is that, where the valid parts are not necessarily dependent upon the void provisions, as where the former are independent of and not necessarily connected with the latter, and it is practicable to separate them the court will sustain those parts which are valid. In other words, the valid and void parts must be entire and distinct from each other, and the former must be capable of distinct enforcement. But if the ordinance is entire, each part being essential and connected with the rest, the invalidity of one part renders the whole invalid.²¹ Ordi-

shall be known as the city council." The ordinance regulating municipal elections used the word "councilmen" instead of "aldermen"; held, not material, as meaning of ordinance is the same. State ex rel. v. Anderson, 26 Fla., 240, 257; 8 So. Rep., 1.

constitution authorized election of "justice of the peace." The statute provided for election of "police magistrates." The ordinance under which the election was held followed the statutory designation. Some votes were cast for "police justice," some for "magistrate," some for magistrate of City of Chicago." Held, terms "police magistrate" and "police justice" were equally within the meaning of the constitution and the intention of the The election was held statute. valid as the intention of the voter should govern. People ex rel. v. Matteson, 17 Ill., 157, 169, per Caton, J.

Punctuation. Must yield to manifest intention of council as expressed in an ordinance. Charleston v. Reed, 27 W. Va., 681, 696; 55 Am. Rep., 336.

USAGE AND CUSTOM, when may be invoked in construing ordinances, see sec. 73, supra.

²¹ Alabama—Ex parte Bizzell, 112 Ala., 210; 21 So. Rep., 371; Birmingham v. Alabama G. S. R. Co., 98 Ala., 134; 13 So. Rep., 141; Ex parte Byrd, 84 Ala., 17; 4 So. Rep., 397; 5 Am. St. Rep., 328; Ex parte Florence, In re Jones, 78 Ala., 419, 425.

Arkansas—Ft. Smith v. Scruggs, 70 Ark., 549; 69 S. W. Rep., 679; 91 Am. St. Rep., 100.

California — San Luis Obispo County v. Greensberg, 120 Cal., 300; 52 Pac. Rep., 797; Ex parte Haskell, 112 Cal., 412, 420; 44 Pac. Rep., 725.

Florida—State v. Dillon, (Fla. 1900), 28 So. Rep., 781; Tampa v. Salomonson, 35 Fla., 446; 17 So. Rep., 581.

Illinois—Poyer v. Des Plaines, 123 Ill., 111; 13 N. E. Rep., 819; 5 Am. St. Rep., 494; Baker v. Normal, 81 Ill., 108; Harbaugh v. Monmouth, 74 Ill., 367; Alton v. Foster, 74 Ill. App., 511; Kettering v. Jacksonville, 50 Ill., 39.

Kentucky—Baker v. Lexington, 21 Ky. Law Rep., 809; 53 S. W. Rep., 16.

Louisiana—State v. Riley, 49 La. Ann., 1617; 22 So. Rep., 843; Villavaso v. Barthet, 39 La. Ann., 247, 258; 1 So. Rep., 599.

Michigan-Detroit v. Ft. Wayne,

nances relating to the same subject are generally to be conetc., R. Co., 95 Mich., 456; 54 N. W. Rep., 558; People v. Armstrong, 73 Mich., 288; 16 Am. St. Rep., 578; 2 L. R. A., 721; 41 N. W. Rep., 275.

Minnesota-Wykoff v. Healey, 57 Minn., 14; 58 N. W. Rep., 685; Duluth v. Krupp, 46 Minn., 435; 49 N. W. Rep., 235: State v. Cantieny, 34 Minn., 1; 24 N. W. Rep., 458.

Missouri-Neosho Water Co. v. Neosho, 136 Mo., 498; 38 S. W. Rep., 89; Verdin v. St. Louis, 131 Mo., 26; 33 S. W. Rep., 480; 36 S. W. Rep., 52; Carroll v. Campbell, 108 Mo., 550; 17 S. W. Rep., 884; State ex rel. v. Cramer, 96 Mo., 75; 8 S. W. Rep., 788; St. Louis v. St. Louis R. Co., 89 Mo., 44; 58 Am. Rep., 82; 1 S. W. Rep., 305; 14 Mo. App., 221; Rockville v. Merchant, 60 Mo. App., 365; County Court v. Griswold, 58 Mo., 175; State v. Clarke, 54 Mo., 17; 14 Am. Rep., 471.

Nebraska—Bailey v. State, 30 Neb., 855; 47 N. W. Rep., 208; State v. Hardy, 7 Neb., 377.

New Jersey-Haynes v. Cape May, 52 N. J. L., 180; 19 Atl. Rep., 176; State (Staats) v. Washington. 45 N. J. L., 318; 46 N. J. L., 209; State (Trowbridge) v. Newark, 46 N. J. L., 140; State (Chamberlain) v. Hoboken, 38 N. J. L., 110.

New York-Rogers v. Jones, 1 Wend, (N. Y.), 237; 19 Am. Dec., 493; Broadway & S. A. R. R. Co. v. New York, 49 Hun. (N. Y.), 126.

North Carolina-State v. Webber. 107 N. C., 962; 12 S. E. Rep., 598; 22 Am. St. Rep., 920.

Ohio-Piqua v. Zimmerlin, 35 Ohio St., 507; Stever v. McConnell, 10 Ohio Dec., 573; Weaver v. Mt. Vernon, 6 Ohio Dec., 436.

Texas-Bassett v. El Paso (Tex. Civ. App., 1894), 28 S. W. Rep., 554. Utah-Eureka City v. Wilson, 15 Utah, 67; 62 Am. St. Rep., 904; 48 Pac. Rep., 150.

Washington-Seattle v. Pearson, 15 Wash., 575; 46 Pac. Rep., 1053.

Wisconsin-State ex rel. v. Newman, 96 Wis., 258; 71 N. W. Rep., 438; Wilcox v. Hemming, 58 Wis., 144; 46 Am. Rep., 625; 15 N. W. Rep., 435.

England and Canada-Fazakerley v. Wiltshire, 1 Stra., 469; Gunmakers' Co. v. Fell, Willes, 390; Reg. v. Lundie, 8 Jur. N. S., 640; 31 L. J. M. C., 157; 10 W. R., 267; 5 L. T. N. S., 830; per Lord Kenyon in Rex v. Favershan, 8 Term Rep., 356, 357; Rex v. Bumstead, 2 Barn. & Ad., 704; Blackpool L. B. of Health v. Bennett, 4 H. & N., 138; Lee v. Wallis, 1 Ken., 295; Ross v. United Counties of York and Peeland Town of Belleville, 30 Up. Can. Q. B., 81; Re Harris and City of Hamilton, 44 Up. Can. Q. B., 641; Reg. v. Jim Sing, 4 British Columbia Rep., 338.

VARIOUS ILLUSTRATIONS.

Improvement ordinance. Bitzer v. Dinwiddie, 20 Ky. Law Rep., 298; 45 S. W. Rep., 1049; Fehler v. Gosnell, 99 Ky., 380; 35 S. W. Rep., 1125.

Discriminating in part. Indianapolis v. Bieler, 138 Ind., 30; 36 N. E. Rep., 857.

One section which is void will not invalidate other sections of the Belleville v. Citizens' ordinance. Horse Ry. Co., 152 Ill., 171; 38 N. E. Rep., 584; In re Ah Toy, 45 Fed. Rep., 795.

Retrospective in part, only inoperative and void to that extent. Salary ordinance. Rau v. Little Rock, 34 Ark., 303.

VOID IN PENALTY.

strued together. Thus where two ordinances are passed on the

Arkansas—Eureka Springs v. O'Neal, 56 Ark., 350; 19 S. W. Rep., 969.

Iowa—Keokuk v. Dressell, 47 Iowa, 597.

Massachusetts—Com. v. Dow, 10 Met. (Mass.), 382.

Nebraska—Magneau v. Fremont, 30 Neb., 843; 27 Am. St. Rep., 436; 9 L. R. A., 786; 47 N. W. Rep., 280.

New Jersey—Sterling v. Camden, 65 N. J. L., 190; 46 Atl. Rep., 781; Doran v. Camden, 64 N. J. L., 666; 46 Atl. Rep., 724.

United States—Cooper v. District of Columbia, 11 Dist. of Col. (MacArthur & M.), 250.

ORDINANCE Too COMPREHENSIVE. An ordinance covering matters beyond the jurisdiction of the local corporation, held entirely void. Guilford v. Clark, 2 Vent. (K. B.), 247; Dodwell v. Oxford, 2 Vent. (K. B.), 33.

Compare Elwood v. Bullock, 6 Q. B. Eng. L. R., 383; Reg. v. Robinson, 17 Q. B. Eng. Law Rep., 46.

Contra. In such case, the ordinance may be enforced in cases within the jurisdiction. Shelton v. Mobile, 30 Ala., 540; 68 Am. Dec., 143; Canova v. Williams, 41 Fla., 509; 27 So. Rep., 30; Schofield v. Tampico, 98 Ill. App., 324; Eldora v. Burlingame, 62 Iowa, 32; 17 N. W. Rep., 148.

Compare (regulating sale of liquor) Eureka v. Jackson, 8 Kan. App., 49; 54 Pac. Rep., 5; Cantril v. Sainer, 59 Iowa, 26; 12 N. W. Rep., 753; New Hampton v. Conroy, 56 Iowa, 498; 9 N. W. Rep., 417; Santo v. State, 2 Iowa, 165; 63 Am. Dec., 487.

VALID AND VOID PARTS INSEPAR-ABLE renders whole ordinance void. Hannibal v. M. & K. Tel. Co., 31 Mo. App., 23; Kirkwood v. Meramec Highlands Co., 94 Mo. App., 637; 68 S. W. Rep., 761.

Where clause defining the offense is inseparably connected with the penal clause, and the latter being void, invalidates the whole ordinance. Landis v. Vineland, 54 N. J. L., 75; 23 Atl. Rep., 357.

CONFLICT WITH CHARTER OR GEN-ERAL LAW; valid and void provisions.

Alabama—Shelton v. Mobile, 30 Ala., 540; 68 Am. Dec., 143.

California—In re Mansfield, 106 Cal., 400; 39 Pac. Rep., 775; San Luis Obispo v. Pettit, 87 Cal., 499; 25 Pac. Rep., 694; Ex parte Holmquist (Cal., 1901), 27 Pac. Rep., 1099; Ex parte Christensen, 85 Cal., 208; 24 Pac. Rep., 747.

Connecticut—State v. Smith, 67 Com., 541; 35 Atl. Rep., 506; 52 Am. St. Rep., 301; State v. Welch, 36 Conn., 215, 217.

Dakota—Elk Point v. Vaughn, 1 Dak., 113; 46 N. W. Rep., 577.

Illinois—Walker v. People, 170 Ill., 410; 48 N. E. Rep., 1010; Illinois Central R. Co. v. People, 161 Ill., 244; 43 N. E. Rep., 1107.

Louisiana—Second Municipality v. Morgan, 1 La. Ann., 111.

New Jersey—Landis v. Vineland, 54 N. J. L., 75; 23 Atl. Rep., 357.

North Carolina—State v. Earnhardt, 107 N. C., 789; 12 S. E. Rep., 426.

CONFLICT WITH STATE CONSTITU-TION—Rule applied.

Arkansas—Rau v. Little Rock, 34 Ark., 303.

Iowa-Keokuk v. Dressell, 47 Iowa, 597.

Louisiana—Villavaso v. Barthet, 39 La. Ann., 247; 1 So. Rep., 599.

Minnesota—State v. Kantler, 33 Minn., 69; 21 N. W. Rep., 856. same day and one is dependent upon the other, if one is void both must fall.²²

An ordinance regulating the rate of speed of trains may be void as applied to the sparsely settled portions of the corporation where the road is fenced and the circumstances are such as not to require any restriction in the rate of speed, and valid as applied to other portions of the city.²³

§ 296. Construction of ordinances—Illustrative cases. An ordinance forbidding wagons to stand on certain named streets and sell products therefrom was held not to be violated by the wagon casually stopping to sell; that the ordinance was intended to prevent such wagons standing in the streets for the

Missouri—St. Louis v. St. Louis R. Co., 14 Mo. App., 221.

UNREASONABLE IN PART—Eureka Springs v. O'Neal, 56 Ark., 350; 19 S. W. Rep., 969; Lamar v. Weidman, 57 Mo. App., 507; Pennsylvania R. Co. v. Jersey City, 47 N. J. L., 286; Rahway Gas Light Co. v. Rahway, 58 N. J. L., 510; 34 Atl. Rep., 3.

MISCELLANEOUS—Ordinance imposing an occupation tax and providing only an illegal method for its enforcement, is rendered wholly void. Omaha v. Harmon, 58 Neb., 339; 78 N. W. Rep., 623; German American Fire Ins. Co. v. Minden, 51 Neb., 870; 71 N. W. Rep., 995.

But an ordinance providing for licensing certain occupation and also taxing the same, the fact the latter is void does not invalidate former, which is valid, the two being severable and independent. State *ex rel.* v. Schoenig, 72 Minn., 528; 75 N. W. Rep., 711.

Franchise ordinance granting exclusive use of streets for thirty years for laying water pipes, etc., to supply the city with water, and fixing compensation city shall pay for use of the water. The ordinance may be void as to the grant of the exclusive use, and also as

to the indebtedness, yet valid as to the right of the grantee to construct the water works and lay his mains and pipes in the street for the purpose of supplying water for private use. Quincy v. Bull, 106 Ill., 337.

STATUTORY CONSTRUCTION; same rule applies.

Alabama—McCreary v. State, 73 Ala., 480; Powell v. State, 69 Ala., 10; Vines v. State, 67 Ala., 73; Ex parte Pollard, 40 Ala., 77.

Massachusetts—Fisher v. Mc-Girr, 1 Gray (Mass.), 1; 61 Am. Dec., 381; Warren v. Charleston, 2 Gray (Mass.), 84.

New Jersey—State (McClosky) v. Chamberlin, 37 N. J. L., 388.

New York—Duryee v. New York, 96 N. Y., 477.

Ohio—State v. Sinks, 42 Ohio St., 345, 365.

Rule applied to by-law of insurance company. Amesbury v. Bow-ditch M. F. Ins. Co., 6 Gray (Mass.), 596.

²² Jacksonville v. Ledwith, 26
Fla., 163; 23 Am. St. Rep., 558; 9
L. R. A., 69; 7 So. Rep., 885; compare State v. Tenant, 110 N. C., 609; 14 S. E. Rep., 387; 28 Am. St. Rep., 715.

23 Meyers v. C., R. I. & P. R. Co.,

purpose of selling and with no intention of moving until all the products therein were sold. The purpose of the ordinance was to prohibit incumbering or obstructing the streets with vehicles, animals, etc.²⁴ An ordinance may be too comprehensive in its provisions and cover cases which the city has no power to control, but that is no reason why courts should refuse to enforce it in cases over which the jurisdiction of the local corporation is unquestioned.25 An ordinance providing that "hay bought or brought within the corporation" to be used therein, "shall be weighed on the hay-scales of the corporation erected for the mutual accommodation of seller and buyer," was construed to apply only to persons bringing hay within the limits of the corporation to be sold and used there. Thus where one purchased a stack of hay beyond the corporate limits and hauled it with his own wagons and teams within the city to be used therein at a livery stable of which he was proprietor he is not a violator of such ordinance.26 So an ordinance forbidding

57 Iowa, 555; 10 N. W. Rep., 896; 42 Am. Rep., 50. See §§ 29 and 30, supra.

²⁴ People v. Keir, 78 Mich., 98;
 43 N. W. Rep., 1039.

Regulating sale of meat, etc., at market. Snell v. Belleville, 30 Up. Can. Q. B., 81.

25 Ordinance forbade sale of liquor and beer generally. City had no power as to sale of liquor by wholesale. Prosecution was for sale of beer by the glass, in what is called a "saloon" and therefore did not involve the question of the power of the city to forbid its sale as an article of commerce, to be carried beyond the limits of the city, or used for mechanical purposes. The violation of the ordinance as proved was held within the jurisdiction of city and a proper police regulation. Kettering v. Jacksonville, 50 Ill., 39, 41.

Contra—Where the city has only power to regulate the sale of liquor not prohibited by state statutes, an ordinance which includes all kinds of intoxicating liquor, held too comprehensive and therefore void. Cantril v. Sainer, 59 Iowa, 26; 12 N. W. Rep., 753; Santo v. State, 2 Iowa, 165; 63 Am. Dec., 487; New Hampton v. Conroy, 56 Iowa, 498; 9 N. W. Rep., 417. Compare Eldorado v. Burlingame, 62 Iowa, 32; 17 N. W. Rep., 148.

MUNICIPAL LIMITS.

Ordinance was not limited in its scope and operation to territorial limits of corporation. But the prosecution was for a sale of intoxicating liquor conceded to have been made within the corporate limits of the village. Held valid. Schofield v. Tampico, 98 Ill. App., 324, 326.

DISTURBING PEACE — Charivari. St. Charles v. Meyer, 58 Mo., 86.

A PERMIT TO OPEN A STREET for the purpose of laying a drain is not to be construed as a grant of a right to lay and continue a drain, but simply as what purports to be a license to disturb the surface of the street. Glasby v. Morris, 18 N. J. Eq., 72.

SEVERAL CLAUSES. First clause

sale of hay within corporate limits, without its being first weighed by city weigher, was held not applicable to a sale made without the city to be delivered within it.²⁷

§ 297. Same subject. Where an ordinance relating to cattle going at large upon the streets, etc., recited that the practice of letting cattle lie in the streets at night had become a dangerous nuisance, and then provided, first, that the owner of cattle shall pen them every night, by or before dark, under penalty for each omission; and second, that "all cattle found in the street between dark and daybreak shall be taken up and penned by the town constable and turned out the next morning," it was held that the first part did not apply to cattle of non-residents; that the penalty was directed against the owner of the beast for not penning it, and was not given for

of ordinance recited that it shall be unlawful for any person, persons or corporation, etc. The second clause was connected with the first by the copulative conjunction "and." Held, in absence of anything in the ordinance to show contrary intent, the second clause should be construed as applying to and binding upon the same class of persons mentioned in the first clause. Wright v. C. & N. W. R. R. Co., 7 Ill. App., 438, 447.

EXCEPTIONS FROM OPERATION. Ordinance relating to storing guano or commercial fertilizer within corporate limits, held not to apply to one who at large expense erected building for this purpose, without objection on the part of the city authorities. The doctrine of estoppel was applied. Athens v. Georgia R. R. Co., 72 Ga., 800.

Map Includes Survey. An ordinance directing one to "have a map made" authorizes the payment of making a map and the necessary survey also. Corsicana v. Kerr, 75 Tex., 207; 12 S. W. Rep., 982.

26 Question how are words to be understood: "All hay bought and brought within the limits of the corporation," etc. "It is obvious that the ordinance in question operates upon the and not upon the buyer. No one would be heard to say that it was intended to prohibit a farmer of the county from selling a stack or load of hay, on his farm, to a member of the corporation without having the same weighed." "The bylaw seems to admit of but one sensible construction, and that is, that persons bringing hay within the limits of the corporation to be sold, and used there, shall be required to sell it by weight. And of this, no just complaint can be made; for, coming voluntarily within the jurisdiction of the corporation and offering the product of their farm in the market they subject themselves to the corporate regulations, ordained for the benefit and portection of the members of the corporation." Gass v. Greenville, 4 Sneed (Tenn.), 62, 64.

²⁷ Heminger v. Cleveland, 2 Ohio Dec., 428.

any cattle found in the streets, but for cattle not penned; that it was not given for the nuisance but for an act tending to produce it.28 So a by-law concerning licensing, regulating and restraining dogs from going at large within the town, was construed to apply only to dogs owned or kept in the town, although, in its terms, it applied to "any person permitting his dog to go at large within the town." 29 An ordinance authorizing the marshal to seize sheep found running at large in the streets, etc., was held not to apply to sheep herded by competent persons within the city limits and in perfect control.30 An ordinance providing a penalty for one who should "permit" horses, etc., to run at large within the corporate limits, was held applicable to a non-resident owner living near the city who turned his horse loose, which strayed into the city. He did "permit" his horse to run at large.31 An ordinance which provides that, "no person shall put, or cause to be put in any street, sidewalk or other public place within the city limits, any dust, dirt, filth, shavings or other rubbish or

28 "When an offense is made to consist of the omission to do an act in the town, he only is within the purview of the law, upon whom, by that or some other law, the act is imposed as a duty to be performed within the town. General terms used in reference to such duty and penalty are restrained by the subject matter, and cannot be extended to persons who have no rights to be exercised and no duties to be performed within the place, since that would be to render them liable, not for the omission within the town (which is the specific offense) but for the consequential evil resulting from the omission of a similar act at another place, at which it was no duty. There ought to be express or plain words to include such persons." Plymouth v. Pettijohn, 4 Dev. Law (N. C.), 591, 594, 595, per Ruffin, C. J.

²⁹ Com. v. Dow, 10 Metc. (51 Mass.), 382.

A Dog Is "Going at Large" where he is following through the streets, his master, or the clerk of his master, loose, and at such a distance as that such control could not be exercised as would prevent mischief. Com. v. Dow, 10 Metc. (51 Mass.), 382.

SWINE AT LARGE, ETC. "No swine shall be kept in any town to be fed on swill, offal, or any other decaying substance brought from any town except in such places as shall be designated by the town council thereof." Held that the intent was not to forbid a person living in one town to feed his swine on swill from another town unless he kept the swine purposely to be fed in that way. The intent was to prohibit the business of keeping swine to be fed in places other than those designated for it. State v. McMahon, 14 R. I., 285, 287, per Durfee, C. J.

³⁰ Spect v. Arnold, 52 Cal., 455.

³¹ Moore v. Crenshaw, 1 White &

obstruction of any kind," was held broad enough to embrace the obstruction of a street by a railroad company with its cars.³² Where one section of an ordinance provides what kind of vehicles shall be licensed, and the next what amounts shall be paid for such licenses, the use of a general term of description in the latter does not enlarge the scope of the former section, but on the contrary, the general words in the latter are limited by the particular words in the former.³³

§ 298. Same—Who liable—Landlord and tenant. The law seeks to place responsibility upon the author of the wrong. In case of nuisance the one who creates it or suffers it to continue is made liable. Where premises are leased or rented for a specified term and the landlord surrenders for the time being to the tenant complete control thereof, as a rule, ordinances relating to keeping premises safe and free from nuisances operate directly upon the tenant and not on the landlord.³⁴ Thus an

W. Civ. Cas. Ct. App. Tex., sec. 264.

32 Hlinois Central R. R. Co. v. Galena, 40 Ill., 344, per Breese, J.
33 Snyder v. North Lawrence, 8
Kan., 82; Shultz v. Cambridge, 38
Ohio St., 659. See Sec. 294, supra.

RETROACTIVE. Ordinance providing a tribunal for municipal election contests and course of procedure may be made applicable to election contests growing out of election held before ordinance enacted. State v. Johnson, 17 Ark., 407.

34 Rule applied in civil action for damages resulting from falling into a coal hole which was not properly covered. The tenant was to keep the premises in good repair. West Chicago Masonic Assn. v. Cohn, 192 Ill., 210; 61 N. E. Rep., 439, reversing 94 Ill. App., 333.

"If the premises are so constructed, or in such a condition, that the continuance of their use by the tenant must result in a nuisance to a third person, and a nuisance does so result, the landlord is liable." Knauss v. Brua, 107 Pa. St., 85, 88, per Gordon, J.

Landlord held liable to plaintiff for damages resulting from falling into a dangerous opening in a sidewalk on premises in the possession of a tenant, where it appeared that the dangerous opening was in existence before and at the time of the execution of the lease and continued in the same condition to the time of the injury. Reading City v. Reiner, 167 Pa. St., 41; 31 Atl. Rep., 357.

Landlord held liable to civil action for damages resulting from ice on the sidewalk in front of his premises, though the premises had been rented. Brown v. White, 202 Pa. St., 297; 51 Atl. Rep., 962.

Owner liable for an existing nuisance at the time the premises are let. Rule applied to damages resulting from leakage from a cess-pool on the demised premises, which had been defectively con-

ordinance which provides that, "if any person or persons shall erect and build," etc., wooden buildings within certain limits, the tenant who erects a building in violation of such ordinance is liable and not the owner of the premises.35 So under ordinance requiring the owner, agent or occupant to abate a nuisance on the premises, a mere agent of the owner of the fee simple cannot be held punishable for failure to enter upon the premises in lawful possession of a tenant. in order to abate a nuisance within the tenant's exclusive control for the time being. "The simple statement of the question seems to furnish its answer. When an owner lets to a tenant he surrenders the entire possession and control for the term, having then no more right of entry than any stranger, unless for certain exceptional purposes affecting his future enjoyment of the freehold. Outside of such purposes, the tenant may resist his invasion of the premises as a violator of the law which protects the domicile against the world. * * * The person having the actual occupancy or control of any premises is alone responsible for a private nuisance maintained thereon. If there be a tenant or occupant, he is the party to whom the penalty will attach if he fail to obey the notice and direction provided for by the municipal regulation. If there be no occupant, then the actual control is in the owner or his agent, or both, and to him or them the ordinance will apply."36

In a Georgia case, the ordinance made it the duty of the

structed. But if the construction is proper and the leakage is due to subsequent neglect of the tenant, the latter alone is liable. Wunder v. McLean, 134 Pa. St., 334; 19 Atl. Rep., 749.

The question discussed and the above rules applied in the following comparatively recent cases:

California—Morrison v. McAvoy (Cal., Oct. 30, 1902), 70 Pac. Rep., 626; Rider v. Clark, 132 Cal., 382; 64; Pac., Rep., 564.

Illinois—Peoria v. Simpson, 110 Ill., 294; 51 Am. Rep., 683; Gridley v. Bloomington, 68 Ill., 47; Chicago v. O'Brennan, 65 Ill., 160.

Massachusetts—Stevenson v. Joy, 152 Mass., 45; 25 N. E. Rep., 78;

Boston v. Gray, 144 Mass., 53; 10 N. E. Rep., 509.

Mississippi—Jones v. Millsaps, 71 Miss., 10; 14 So. Rep., 440; 23 L. R. A., 155, note.

New York—Canandaigua v. Foster, 156 N. Y., 354; 50 N. E. Rep., 971; 41 L. R. A., 554.

Pennsylvania—Fow v. Roberts, 108 Pa. St., 489, 491, per Paxson, J. Wisconsin—Selleck v. Tallman, 93 Wis., 246; 67 N. W. Rep., 36.

Canada—Organ v. Toronto (C. P.), 24 Ont. Rep., 318.

35 Douglass v. Commonwealth, 2 Rawle (Pa.), 262, 265.

³⁶ Per Lewis, J., St. Louis v. Kaime, 2 Mo. App., 61, 68, owner of every "untenanted or unoccupied" store-house or building, within the corporate limits, to cause the same to be opened and ventilated at least once a week, from May to November, in every year. It appeared that the premises in question had been leased and at the time of the prosecution the term had not expired. In denying the liability of the landlord, Lumpkin, J., remarked: "He (landlord) has no right to enter upon the premises for the purpose of opening and ventilating the buildings. To do so would be to subject him to an action of trespass at the instances of the leasee. A lot thus situated is not 'untenanted' in the language of the ordinance. The duty of ventilation devolved upon the tenant. He is the temporary owner." "A"

Under an ordinance imposing a penalty on the "owner or occupier" of any house or room, the chimney of which shall take fire and blaze out at the top, the tenant is meant and not the landlord.³⁸ Under an ordinance of Boston which requires the removal of snow from the adjoining sidewalk by the "tenant, occupant, and, in case there shall be no tenant, the owner," the landlord is not liable where he had let part of the premises to one tenant and part to another, although he occupies rooms in the building as a boarder with one of his tenants.³⁹

³⁷ Shields v. Savannah, 20 Ga., 57, 59.

38 "Words so unequivocal as to be incapable of any other interpretation would be required to show a matter so unreasonable, as that a landlord who, by a lease for vears, had transferred to a tenant the exclusive enjoyment and care of a house for a term, should during the term be liable for the tenant's negligence in respect to the house. * * * It appears to us that the city ordinance by the alternative, owner or occupier, intended to provide that the owner should be liable, if he occupied personally, or by agent, or servant, or guest; but that the occupant should be liable if there was a person in possession under some definite right, not subject to the will of the owner, him who has the title in revision. The notion that both owner and occupier were intended to be liable, we think altogether untenable." Wardlaw, J., in Charleston v. Blake, 12 Rich. Law (S. C.), 66, 68.

The ordinance recited that, "no person shall cast or lay or suffer or run in or upon, or within three feet of any wharf, or in any lane, alley, lot or vacant place, * * * the contents of any sink, tub, privy or cestpool," etc., under penalty. The premises had been leased for a term of five years and actually occupied by tenant. Held landlord not liable. New York v. Corlies, 2 Sandf. Sup. Ct. Rep. (N. Y.), 301, 303.

30 Com. v. Watson, 97 Mass., 562.
 Fire Escape — Schmalzried v.
 White, 97 Tenn., 36; 36 S. W. Rep., 393; 32 L. R. A., 782.

CHAPTER X.

OF ACTIONS TO ENFORCE POLICE ORDINANCES.

- 1. The Court and Its Jurisdiction.
- 2. The Action-Its Form, Nature and Institution.
- 3. The Statement, Complaint or Information.
- 4. The Trial—Summary or Jury -Proceedings.
- 5. The Evidence for the Corporation.
 - Defenses.
- The Judgment, Record and Execution.
 - 8. Review.

1. THE COURT AND ITS JURISDICTION.

- ance of Local Courts.
 - 300. Jurisdiction of Local Courts.
 - 301. Territorial Limits of Jurisdiction.
- § 299. Establishment and Continu- § 302. Who Authorized to Act as Judges, Jurors and Witnesses.
 - THE ACTION-ITS FORM, NATURE AND INSTITUTION.
- § 303. How Ordinances Enforced— § 306. Arrest Without Warrant. Form of Action.
 - 304. How Far the Proceedings are Criminal or Quasi Criminal.
 - 305. Institution of Proceedings-Notice-Appearance.
- - 307: Sufficiency of Summons or Warrant.
 - 308. Bail Bond.
 - 309. Name in Which Action Should Be Brought.
- THE STATEMENT, COMPLAINT OR INFORMATION.
- § 310. Formal Parts of Complaint § 317. Negativing Exceptions. or Information.
 - 311. Allegation of Notice of Ordinance Unnecessary-Jurisdiction.
 - 312. Averment of Power to Pass Ordinance.
 - 313. Requisites of Statement. Complaint or Information -Substance.
 - 314. Form of Complaint-Verification-Conclusion.
 - 315. Pleading Ordinance Violated -Judicial Notice.
 - 316. Same Reference to Ordinance Violated Required.

- 318. Several Offenses-Joinder.
- 319. Same-Joint Liability.
- 320. Statement or Information for Penalty for Second Offense.
- 321. Sufficient of Complaint or Statement-Illustrative Cases.
- 322. Sufficiency of Report of Police.
- 323. Amendment of Statement or Information.
- 324. How Defective Statement or Information Cured.

4. THE TRIAL—SUMMARY OR JURY—PROCEEDINGS.

- § 325. Arraignment and Plea.
 - 326. Mode of Conducting Trial-Civil or Criminal.
 - 327. Pleading the Defense.
 - 328. Summary Trial-Origin.
 - 329. Summary Jurisdiction of Municipal Offenses-Enumeration.
 - 330. Constitutional Right of Trial by Jury Does Not Apply to Municipal Offenses.
 - 331. When Jury Trial Allowed.
 - 332. Same Crimes Criminal Prosecution.

- § 333. Same—Crime, Misdemeanor and Municipal Offenses Distinguished.
 - 334. Same-Misdemeanor.
 - 335. Jury Trial On Appeal.
 - 336. Application for Jury-Conditions-Waiver.
 - 337. Method of Conducting Jury Trial.
 - 338. Technical Rules of Procedure Disregarded-Practice.
 - 339. Costs.

THE EVIDENCE FOR THE CORPORATION.

- § 340. Proof of Ordinance.
 - 341. Proof of Offense.
 - 342. Same—Illustrative Cases.
 - 343. Proving the Intent.
 - 344. Liability of Participants. Keepers, Subordinates. Servants, etc.
- § 345. Liability of Principal for Acts of Employes, Servants, etc.
 - 346. Burden of Proof-Negative Averment.
 - 347. Variance.

6. DEFENSES.

- § 348. Defenses Enumerated.
 - 349. Corporate Existence Cannot Be Questioned as a Defense.
 - 350. No Defense Because Prosecution Under Validated Ordinance.
- § 351. Former Acquittal or Punishment.
 - 352. Estoppel as a Defense.
 - 353. When Defendant Estopped from Pleading Unreasonableness of Ordinance.
 - 354. Defenses-Miscellaneous.
 - 355. Defenses-Illustrative Cases.

7. THE JUDGMENT, RECORD AND EXECUTION.

§ 356. The Verdict.

- § 358. Record of Conviction.
- 357. The Judgment.
- 359. Execution.

8. REVIEW.

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- § 360. Right of Review.
- 361. Review by Appeal.
- 362. Same-Time and Method of Taking.
- 363. Same Trial De Novo on 369. Prohibition. Appeal.
- 364. Review by Certiorari.
- § 365. Record on Certiorari.
 - 366. Same-Writ of Error.
 - 367. Habeas Corpus.
 - 368. Injunction.

 - 370. Sufficiency of Record for Review.

THE COURT AND ITS JURISDICTION.

§ 299. Establishment and continuance of local courts. The establishment and continuance of local courts, variously styled police courts, eity courts, municipal corporation courts, recorder's courts, mayors' courts, hustings courts, etc., depend entirely upon the constitution and general laws of the particular state. Ordinarily, the power to establish such courts is vested in the legislature; but municipal charters frequently provide for their establishment and confer upon them the jurisdiction they will be permitted to exercise. Unless the power is given by the constitution a municipal corporation cannot establish a court without express legislative sanction.

The jurisdiction of such local courts is generally confined to violations of ordinances and local police regulations, but in the absence of constitutional restriction they may be invested with

¹ Local Courts. Perkins v. Corbin, 45 Ala., 103; 6 Am. Rep., 698; Williamson v. Commonwealth, 4 B. Mon. (Ky.), 146; Atkins v. Fraker, 32 Wis., 510.

Acts creating, as special laws. Chesney v. McClintock, 61 Kan., 94; 58 Pac. Rep., 993; *In re* Greer, 58 Kan., 268; 48 Pac. Rep., 950.

City court. Schroder v. Charleston, 3 Brevard (S. C.), 533; 2 Const. Rep. (S. C.), 726; Gray v. State, 2 Harrington (Del.), 76.

The legislature may create the office of police judge for a city and the election of such officer may be vested in the electors of such city. But the mere creation of the officer without defining his duties, etc., does not constitute a court. People ex rel v. Curley, 5 Colo., 412.

Territorial legislature may provide police courts for municipal corporations. Kansas v. Young, 3 Kan., 445; Uridias v. Morrill, 22 Cal., 473.

² In Florida charters authorize municipal corporations to estab-

lish municipal courts for the trial of all offenses against local ordinances. Atkins v. Phillips, 26 Fla., 281; 8 So. Rep., 429.

The City of St. Louis, Mo., has power to establish police courts and to provide for clerks and define their duties. *Ex parte* Kiburg, 10 Mo. App., 442, 446.

Police courts may be established by ordinance under proper delegation of power. State v. Charleston, 12 Rich. Law (S. C.), 480; State v. Helfrid, 2 Mott & McCord (S. C.), 233.

³ People v. Curley, 5 Colo., 412; Pittsburg v. Young, 3 Watts, Pa., 363; Gettysburg v. Zeigler, 2 Pa. Co., Ct. Rep., 326.

City cannot without express authority confer judicial powers upon its officers. Weeks v. Forman, 16 N. J. L., 237.

Where the constitution authorizes the establishment of such courts, according to population, a legislative act for this purpose is necessary. *In re* Cahill, 110 Pa. St., 167; 20 Atl. Rep., 414.

civil jurisdiction, and, also, power to enforce penalties for violations of state laws.4

In Washington cities authorized to adopt their own charters cannot create police or municipal courts. Such power is delegated by the constitution to the legislature. In re Cloherty, 2 Wash., 137; 27 Pac. Rep., 1064. Before the recent amendment of the constitution of California the same conclusion was reached in that state. People v. Toal, 85 Cal., 333; 24 Pac. Rep., 603; Ex parte Reilly, 85 Cal., 632; 24 Pac. Rep., 807.

The constitution of California confers express power upon cities which are authorized to adopt their own charters to establish police courts. Const., 1880, Art. XI., Sec. 8½. Creating by adopting freeholders' charter. Ex parte Sparks, 120 Cal., 395; 52 Pac. Rep., 715.

Punishment of offenses against municipal ordinances has been held not to be a judicial function, but merely an exercise of a branch of the police power. Shafer v. Mumma, 17 Md., 331; 79 Am. Dec., 656. Contra. In re Cloherty, 2 Wash., 137, 141; 27 Pac. Rep., 1064.

The establishment of such courts is limited by the state constitution. Montrose v. State, 61 Miss., 429, 432.

Corporation courts in Texas are not a part of the state's judicial system except by virtue of express constitutional provision. Subject fully discussed in ExparteCoombs, 38 Tex. Crim. Rep., 648; 44 S. W. Rep., 854; Leach v. State, 36 Tex. Crim. Rep., 248; 36 S. W. Rep., 471; Ex parte Knox (Tex. Crim. App., 1897) 39 S. W. Rep., 670.

Act conferring judicial powers on the mayor in violation of state

constitution is void. Lafon v. Dufrocq, 9 La. Ann., 350.

Legislature may confer greater jurisdiction upon municipal or police courts than upon trial justices if not restrained by state constitution. State v. Cram. 84 Me., 271; 24 Atl. Rep., 853.

Under a constitution authorizing the establishment of "such municipal and other inferior courts as may be deemed necessary," the legislature may establish a city court with jurisdiction of causes arising under municipal ordinances, involving sum not exceeding constitutional limit. City Council v. Ashley P. Co., 33 S. C., 25: 11 S. E. Rep., 386.

4 MUNICIPAL COURTS IN ENGLAND. English municipal charters, "from the earliest times, contain grants of various of courts degrees importance. The mayor and aldermen were, in some cases, made magistrates ex officio, and authorized to hold courts Quarter Sessions; and these grants were accompanied or not, as the case might be, by a clause called the 'non-intromittant clause.' which ousted the jurisdiction of the county magistrate. In some cases towns were made counties of themselves." 1 Stephen's His. of the Crim. Law of Eng., p. 116; Haddock's Case, Raymond, 435.

LORD MAYOR'S COURT—A court of civil jurisdiction held by the Lord Mayor of London and dealing with cases in which the whole cause of action arises within the city.

Various kinds of local courts. Marine Court of New York City. Callahan v. New York, 66 N. Y., 656. An act establishing a local court known as Hustings Court of

Unless restricted by the state constitution the legislature may abolish local courts or change their jurisdiction at pleasure,⁵ but a court established by the constitution cannot be

Richmond, Va., held valid. Chahoon v. Commonwealth, 21 Gratt. (Va.), 822; Richmond Mayoralty Case, 19 Gratt. (Va.), 673. "Police judge"; Deitz v. Central, 1 Colo., 323.

MUNICIPAL COURT, a court whose territorial jurisdiction is usually conterminous with the jurisdiction of the municipal corporation; such court may exercise either civil or criminal jurisdiction and sometimes both.

Constitutions do not usually define municipal courts. The words are used as having an established meaning. State ex rel Stark v. MacArthur, 13 Wis., 383, 385.

Where the inferior state courts are divided into justice, municipal and city courts, a city court cannot be held to be a municipal court. "We think when an act contains a provision relating to a municipal court, referring to it in express terms by the name municipal, it means one distinctively of that name and nothing more." Peck v. Powell, 62 Vt., 296, 298; 19 Atl. Rep., 227.

Police court with the same power and jurisdiction of a justice of the peace, and exclusive jurisdiction of all cases arising under the city charter and ordinances, and with the same power in cases of contempt as a court of record, is a "Municipal court," within the meaning of the constitution of Mathie v. McIntosh, Wisconsin. 40 Wis., 120; Atkins v. Fraker, 32 Wis., 510; Connors v. Gorey, 32 Wis., 518; Jenkins v. Morning, 38 Wis., 197; Zitske v. Goldberg, 38 Wis., 216,

In California the term "Municipal court" has a legal meaning and signification, and clearly includes mayor's and recorder's courts, as those were well known and universally recognized as being of that character when the constitution was adopted. Uridias v. Morrill, 22 Cal., 473, 478.

Inferior Courts—Nugent v. State, 18 Ala., 521; Ex parte Stratman, 39 Cal., 517; Thomas v. State, 5 How. (Miss.), 20.

Inferior City Court—State v. Helfrid, 2 Nott & McC. (S. C.). 233; Tesh v. Commonwealth, 4 Dana (Ky.), 522. A city court in Alabama is an inferior court. Perkins v. Corbin, 45 Ala., 103; 6 Am. Rep., 698. The mayor's court is an inferior court. Gray v. State, 2 Harrington (Del.), 76.

The recorder is not a judicial officer of the state. Egleston v. Charleston, 1 Mill's Const. Rep., (S. C.), 45.

When municipal criminal court is an inferior court within the meaning of that term as used in the constitution of California. In re Stratman, 39 Cal., 517; People v. Nyland, 41 Cal., 129; People v. Henshaw, 76 Cal., 436; 18 Pac. Rep., 413. Superior Court of San Francisco held to be an inferior court. Hickman v. O'Neal, 10 Cal., 292.

Of inferior police courts by classification of cities. People ex rel v. Henshaw, 76 Cal., 436; 18 Pac. Rep., 413.

Inferior courts of chancery. Houston v. Royston, 7 How. (Miss.), 543.

⁵ Boyd v. Chambers, 78 Ky., 140;

abolished by the legislature.⁶ And a local court established for the convenience of the local community cannot be abolished by the corporation through its council.⁷ A franchise to hold a municipal court cannot be lost by non-user, however long continued.⁸

§ 300. Jurisdiction of local courts. Jurisdiction of municipal corporation, police and other inferior courts, established for the enforcement of local police regulations, depends upon the constitution and laws of the state, and the particular charter or legislative act creating them. In the absence of constitutional restriction the legislature may define the jurisdiction of such courts. Ordinarily their jurisdiction is limited to prosecutions for the violation of municipal ordinances and local police regulations. Local courts are limited to the jurisdiction expressly conferred with such other incidental authority as may be necessary to give proper effect to the powers conferred. As a rule, such local courts have no power to punish for contempt; but it has been held where a

State v. Henshaw, 76 Cal., 436; 18 Pac. Rep., 413; Ex parte Sparks, 120 Cal., 395; 52 Pac. Rep., 715; Perkins v. Corbin, 45 Ala., 103; 6 Am. Rep., 698; Tesh v. Com., 4 Dana (Ky.), 522.

⁶ Alexander v. Bennett, 60 N. Y., 204.

⁷ Vason v. Augusta, 38 Ga., 542. Effect of repeal of charter. Boyd v. Chambers, 78 Ky., 140.

8 Disuse for two hundred years. Rex v. Wells, 4 Dowling, 562.

Fifty years. King v. Avering Atte Bower, 5 Barn & Ald., 691; King v. Hastings, 5 Barn & Ald., 692.

9 Rohland v. St. Louis, §9 Mo., 180; 1 S. W. Rep., 147; People v. Slaughter, 2 Doug. (Mich.), 334; Zylstra v. Charleston, 1 Bay (S. C.), 382.

¹⁰ Uridias v. Morrill, 22 Cal., 473; Holmes v. Fihlenburg, 54 Ill., 203; Connors v. Gorey, 32 Wis., 518. 11 Santa Barbara v. Stearns, 51
Cal., 499; St. Louis v. Pahl, 114
Mo., 32; 21 S. W. Rep., 448; State
v. Charleston, 12 Rich. Law (S. C.), 480.

The jurisdiction of the mayor over violation of an ordinance will not be defeated by the fact that a provision in the ordinance attempts to make his jurisdiction exclusive, if the laws give him at least a co-ordinate jurisdiction. State v. Higgs, 126 N. C., 1014; 35 S. E. Rep., 473; 48 L. R. A., 446.

¹² People ex rel. v. Board of Excise of N. Y., 3 N. Y. St. Rep., 253; St. Peters v. Bauer, 19 Minn., 327, 333.

¹³ In re Rich, 10 Kan. App., 280;62 Pac. Rep., 715.

A recorder or magistrate having power to fine and imprison in a summary manner without express power to commit in execution cannot commit for contempt. Under the common law this power could municipal court is a court of record it has such power.¹⁴ Unless the power is expressly conferred, police and local courts have no power to disbar an attorney,¹⁵ nor jurisdiction of proceedings by *quo warranto*.¹⁶

The proceeding must show upon its face that the case is within the jurisdiction of the court.¹⁷

Unless the power is expressly given municipal and local in-

only be exercised by court of record. *In re* Kerrigan, 33 N. J. L., 344.

¹⁴ Morrison v. McDonald, 21 Me., 550.

CONTEMPT — Police court may punish for contempt in like manner as court of record. Mathie v. McIntosh, 40 Wis., 120.

Power to punish for contempt discussed. State v. Galloway, 5 Coldw. (Tenn.), 326; 98 Am. Dec. 404, and note, p. 413, et seq.; note to Piper v. Pearson, 2 Gray (Mass.), 120; 61 Am. Dec., 442; note to Clark v. People, 12 Am. Dec. 178, 186; note to Ex parte Grace, 79 Am. Dec. 536.

JUDICIAL POWERS — Question of judicial power discussed. Court and judicial officer discussed in Waldo v. Wallace, 12 Ind., 569.

When mayor is judicial officer. Howard v. Shoemaker, 35 Ind., 111; Waldo v. Wallace, 12 Ind., 569; Gulick v. New, 14 Ind., 93.

Act conferring judicial powers on mayor is constitutional. Baton Rouge v. Dearing, 15 La. Ann., 208.

Recorder of a municipal court is not a judicial officer. Morrison v. McDonald, 21 Me., 550.

15 State ex rel. Storts v. Peabody,63 Mo. App., 378.

¹⁶ People *ex rel*. Hughes v. Gillespie, 1 Cal., 342.

¹⁷ Averment as to jurisdiction held not necessary. Truchelut v. City Council, 1 Nott & McCord (S. C.), 227, 229. Jurisdiction should be shown on the record. Grand Rapids N. & L. S. R. R. Co. v. Gray, 38 Mich., 461.

Agreement cannot give a police court jurisdiction of a cause within the exclusive jurisdiction of another court. Bailey v. Commonwealth, 22 Ky. Law Rep., 512; 64 S. W. Rep., 995.

Jurisdiction of particular inferior courts. Wiggins v. Chicago, 68 Ill., 372; Hensoldt v. Petersburg, 63 Ill., 157; Madison v. Hatcher, 8 Blackf. (Ind.), 341; Louisiana v. Hardin, 11 Mo., 551; Fayette v. Shafroth, 25 Mo., 445; Edina v. Brown, 19 Mo., App., 672; Borough v. Hoagland, 3 Pa. Co. Ct. Rep., 283; McNulty v. Wilson, 4 Strob. (S. C.), 231; Landers v. Staten Island R. R. Co., 53 N. Y., 450.

Of particular municipal court under special statute. State v. Lockwood, 43 Wis., 403.

Municipal court of New York City is a new inferior court. *In re* Schultes, 33 N. Y. App. Div., 524, 534.

Justice of the peace has no jurisdiction of violation of municipal ordinances. State v. Carreau, 45 La. Ann., 1446; 14 So. Rep., 292; Goodrich v. Brown, 30 Iowa, 291. Contra, Metcalf v. People, 2 Colo. App., 262; 30 Pac. Rep., 39; Jaquith v. Royce, 42 Iowa, 406; Jackson v. Boyd, 53 Iowa, 536; 5 N. W. Rep., 734; State v. Wood, 94 N. E., 855.

State district courts have no ju-

ferior courts have no jurisdiction relative to the violation of acts of the legislature. However, such jurisdiction may be conferred if the state constitution does not forbid. Where

risdiction. Lansing v. C., M. & St. P. Ry. Co., 85 Iowa, 215; 52 N. W. Rep., 195.

State circuit court has jurisdiction, when. Janesville v. Milwaukee & M. R. R. Co., 7 Wis., 484.

Circuit court has concurrent jurisdiction with justices of the peace. Brookville v. Gagle, 73 Ind., 117; Redden v. Covington, 29 Ind., 118.

County criminal court has no jurisdiction. Garland v. Denver, 11 Colo., 534; 19 Pac. Rep., 460.

Superior city court has no jurisdiction. State v. White, 76 N. C., 15; State v. Threadgill, 76 N. C., 17.

Mayor has jurisdiction. McNulty v. Conners, 50 Ind., 569, denying jurisdiction of city judge; Wills v. Boonville, 28 Mo., 543; Flack v. Fry, 32 W. Va., 364; 9 S. E. Rep., 240.

Police courts have jurisdiction. Owensboro v. Simms, 99 Ky., 49; 34 S. W. Rep., 1085; Kansas City v. Neal, 49 Mo. App. 72; Wong v. Astoria, 13 Oregon, 538; 11 Pac. Rep., 295.

Recorder has jurisdiction. Vason v. Augusta, 38 Ga., 542; Guillotte v. New Orleans, 12 La. Ann., 432; State v. Mack, 41 La. Ann., 1079; 6 So. Rep., 808; State v. Lochte, 45 La. Ann., 1405; 14 So. Rep., 215.

A burgess with jurisdiction of a justice of the peace only has jurisdiction to impose fines for violations of ordinances. Com. v. Thompson, 110 Pa. St., 297; 1 Atl. Rep., 375. Town council given by statute powers of a trial justice in all cases of violation of the town ordinances. Lexington v. Wise, 24 S. C., 163.

¹⁸ Failure to take out water license, required by state statutes. St. Louis v. Tiefel, 42 Mo., 578.

Keeping open a saloon on Sunday in violation of state law. Reich v. State, 53 Ga., 73; 21 Am. Rep., 265; Spencer v. Cline, 28 Ind., 51.

Recorder's court of Augusta, Ga., has no jurisdiction to hear offenses for the violation of state statutes. Williams v. Augusta, 111 Ga., 849; 36 S. E. Rep., 607.

The jurisdiction of inferior courts is necessarily confined to the act creating them. Gray v. Delaware, 2 Harrington (Del.), 76.

Corporation courts in have not jurisdiction of the general laws of the state, but such jurisdiction only as may pertain to them as incidents to municipal charters. Such courts are not a part of that state's judicial system, and a city or town of that state has no power to pass an ordinance making that an offense against the city or town which has been declared by statute an offense against the state. Ex parte Coombs, 38 Tex. Crim. Rep., 648; 44 S. W. Rep., 854; Leach v. State, 36 Tex. Crim. Rep., 248; 36 S. W. Rep., 471.

¹⁰ May be invested with jurisdiction of all offense below the grade of felony. Brown's Case, 152 Mass., 1; 24 N. E. Rep., 857; Ex parte Slattery, 3 Ark., 484.

Assault and battery is criminal and can only be punished by presentment or indictment. Rector v. State, 6 Ark., 187; Durr v. Howard, 6 Ark., 461.

Larceny, power to try for, where property is found within the city. Myers v. People, 26 Ill., 173.

the powers of a municipal court are restricted by the constitution to "municipal purposes," which are such matters as relate to the affairs of the local corporation where alone they are authorized to be established, the recorder of a city cannot "possess the powers and exercise the duties of committing magistrates," etc.²⁰ Frequently local courts possess civil jurisdiction to a limited extent.²¹ Some such courts have the same jurisdiction as courts of general jurisdiction.²²

Jurisdiction of misdemeanors. Darden v. State, 74 Ga., 842.

Corporation courts may have jurisdiction of felony cases, empanel grand juries, etc. Chahoon v. Commonwealth, 21 Gratt. (Va.), 822.

²⁰ Meagher v. Storey County, 5 Nev., 244.

21 California—Vassault v. Austin,
 36 Cal., 691; Hickman v. O'Neal,
 10 Cal., 292, 294; Seale v. Mitchell,
 5 Cal., 401, 403.

Illinois-Wilson v. McKenna, 52 Ill., 43.

Kentucky—Smither v. Blanton, 1 Met. (Ky.), 44.

Louisiana—State ex rel. v. Judge, 37 La. Ann., 583.

Massachusetts—Bossidy v. Branniff, 135 Mass., 290; Walker v. Cooke, 163 Mass., 401; 40 N. E. Rep., 185.

Minnesota—Crawford v. Hurd R. Co., 57 Minn., 187; 58 N. W. Rep., 985.

New Jersey—Hutchings v. Scott, 9 N. J. L., 218.

Generally, local courts possess no equity jurisdiction. Gentle v. Atlas Savings & L. A., 105 Ga., 406; 31 S. E. Rep., 544; Butler v. M. A. L. & I. Co., 94 Ga., 562; 20 S. E. Rep., 101; Petsch v. Biggs, 31 Minn., 392; 18 N. W. Rep., 101; Norton v. Beckman, 53 Minn., 456; 55 N. W. Rep., 603; Hause v. Newel, 60 Minn., 481; 62 N. W. Rep., 817; Tilleny v. Knoblauch, 73 Minn., 108; 75 N. W. Rep., 1039;

McConologue v. McCaffrey, 29 Misc. (N. Y.), 139.

Have equity jurisdiction, when. People v. Green, 58 N. Y., 295.

City court of New York has no jurisdiction to issue writs of mandamus. People ex rel. v. Board of Excise of N. Y., 3 N. Y., St. Rep., 253

Municipal court of New York City cannot entertain an action of mechanic's lien. Smith v. Silsbe, 53 N. Y. App. Div., 462; McConologue v. McCaffrey, 29 Misc. (N. Y.), 139.

Jurisdiction of action on replevin bond. Walker v. Cooke, 163 Mass., 401; 40 N. E. Rep., 185.

Unlawful detainer. Petsch v. Biggs, 31 Minn., 392; 18 N. W. Rep., 101; Norton v. Beckman, 53 Minn., 456; 55 N. W. Rep., 603.

Forcible entry and detainer. Tilleny v. Knoblauch, 73 Minn., 108; 75 N. W. Rep., 1039.

Action by receiver. Hause v. Newel, 60 Minn., 481; 62 N. W. Rep., 817.

Action for damages for false and fraudulent warranty. Carlson v. Segog, 60 Minn., 498; 62 N. W. Rep., 1132.

Jurisdiction under particular charters or legislative acts. Lewis v. State, 21 Ark., 209; People v. Wong Wang, 92 Cal., 277; 28 Pac. Rep., 270; Goodrich v. Brown, 30 Iowa, 291; Commonwealth v. Pindar, 11 Met. (Mass.), 539; Commonwealth v. Roark, 8 Cush,

Unless restrained by the constitution, the legislature may confer upon police justices and judges of local inferior courts the jurisdiction of justices of the peace.²³ Sometimes the civil jurisdiction is limited to residents.²⁴

§ 301. Territorial limits of jurisdiction. Usually the territorial jurisdiction of municipal courts is confined to the cor-

(Mass.), 210; People v. Goosemann, 80 Mich., 611; 45 N. W. Rep., 369; People v. Mangold, 71 Mich., 335; 39 N. W. Rep., 6; Averill v. Perrott, 74 Mich., 296; 41 N. W. Rep., 929; People v. Phalen, 49 Mich., 492, 494; 13 N. W. Rep., 830.

²² Civil jurisdiction equal to court of general jurisdiction may be given to municipal courts. Atkins v. Fraker, 32 Wis., 510, explaining State *ex rel.* v. Judges, etc., 11 Wis., 50.

May issue writs of attachment. Bledsoe v. Gary, 95 Ala., 70, 73; 10 So. Rep., 502.

May hear and determine condemnation proceedings. Hercules Iron Works v. Elgin, J. & E. Ry. Co., 141 Ill., 491; 30 N. E. Rep., 1050.

²³ California—Uridias v. Morrill, 22 Cal., 473.

* Kentucky—Smither v. Blanton, 1 Met. (Ky.), 44.

Maine—Allen v. Somers, 68 Me., 247.

Missouri—Lonergan v. Louisiana, 83 Mo. App., 101.

Minnesota—Petsch v. Biggs, 31 Minn., 392; 18 N. W. Rep., 101.

New Jersey —State v. Zeigler, 32 N. J. L., 262; Hutchings v. Scott, 9 N. J. L., 218.

Ohio-Steamboat Northern Indiana v. Milliken, 7 Ohio St., 383.

Wisconsin—Mathie v. McIntosh, 40 Wis., 120.

JURISDICTION OF JUSTICE OF THE PEACE.

Under the constitution of New

Jersey of 1776 it was held that the legislature had power to declare the mayor, recorder and aldermen of cities justices of the peace for the trial of certain causes. Hutchings v. Scott, 9 N. J. L., 218.

Under the constitution of Colorado there may be different classes or grades of police courts. McInerney v. Denver, 17 Colo., 302; 29 Pac. Rep., 516.

Power to confer criminal jurisdiction on chief magistrate of a town distinguished from power to confer civil jurisdiction. State v. Pender, 66 N. C., 313.

Under certain state constitutions the legislature cannot confer on the mayor the judicial powers of a justice of the peace in civil action. Edenton v. Wool, 65 N. C., 379; Wilmington v. Davis, 63 N. C., 582.

Cannot confer on recorder's court of a city jurisdiction of a justice of peace. Ex parte Knox, (Tex. Crim. App., 1897), 39 S. W. Rep., 670.

Right of mayor to act as justice of the peace. State *ex rel.* v. Maynard, 14 Ill., 419.

Mayor has no judicial power. Beesman v. Peoria, 16 Ill., 484.

Ordinances conferring power of a justice of the peace on the mayor are void, *quo ad hac*. Weeks v. Forman, 16 N. J. L., 237.

Power of mayor to act as justice of the peace, and police powers as conservator of the peace. Hagerstown v. Dechert, 32 Md., 369.

porate limits.²⁵ Under a constitutional provision "that inferior local courts" may be established in the "cities of the state," and that "such courts shall have an uniform organization and jurisdiction in such cities," the legislature cannot authorize such a court to issue its summons beyond the city limits.²⁶ But it has been held that the legislature may authorize a superior court of a city to send its process out of the city, and this for the reason that such power does not enlarge its jurisdiction, or render it less an inferior court under the con-

"All the powers and jurisdiction of a justice of the peace in civil and criminal cases," gives power to issue an attachment, not to exceed the limit of amount provided by statute. Bain v. Mitchell, 82 Ala., 304; 2 So. Rep., 706.

The rule applies to notaries public empowered to act as justices of the peace. Griffin v. Appleby, 69 Ala., 409; Rice v. Watts, 71 Ala., 593.

Under such authority mayor may take affidavits generally. Robinson v. Benton County, 49 Ark., 49, 51; 4 S. W. Rep., 195.

Act conferring the powers of a justice of the peace on the mayor, does not empower him to administer the official oath to members of the common council. State v. Perkins, 24 N. J. L., 409.

²⁴ Where the constitution forbids, such courts cannot have jurisdiction of an action against a foreign corporation for the recovery of money. Rieser v. Parker. 27 Misc. (N. Y.), 205; The Phillip Semmer Glass Co. v. Nassau Showcase Co., 28 Misc. (N. Y.), 577.

Such action may be against resident in municipal court. Sufficiency of record. Tyroler v. Gummersbach, 28 Misc. (N. Y.), 151.

Jurisdiction irrespective of residence. Allen v. Somers, 68 Me., 247; Johnson v. Hilton Lumber Co., 103 Ga., 212; 29 S. E. Rep., 819; Landers v. Staten Island R.

R. Co, 13 Abb. Pr. N. S. (N. Y.). 338.

Of foreign corporations having an office within the city. Worthington v. London G. & A. Co., 164 N. Y., 81, reversing 47 App. Div., 609; Crofut v. Brooklyn Ferry Co., 36 Barb. (N. Y.), 201.

²⁵ Arkansas—Ex parte Slattery, 3 Ark., 484.

California—Meyer v. Kalkmann, 6 Cal., 582.

Illinois—Joslyn v. Dickerson, 71 Ill., 25; People ex rel. v. Murphy, 67 Ill., 333.

Michigan—G. R., N. & L. S. R. R. Co. v. Gray, 38 Mich., 461.

New York—In re Schultes, 33 N. Y. App. Div., 524, 534.

Ohio—State v. Peters, 67 Ohio St., 494; 66 N. E. Rep., 521.

South Carolina—State v. Helfrid, 2 Nott & McCord (S. C.), 233, 237.

Wisconsin—Mathie v. McIntosh, 40 Wis., 120; Atkins v. Fraker, 32 Wis., 510, overruling Lane v. Burdick, 17 Wis., 92, and Brockway v. Carter, 25 Wis., 510; Connors v. Gorey, 32 Wis., 518.

Cannot sit outside of corporate limits, to try causes of violation of ordinances. State (Hershoff) v. Beverly, 43 N. J. L., 139.

Referee appointed by a city court has no power to try a cause beyond city limits. Bonner v. Mc-Phail, 31 Barb. (N. Y.), 106.

²⁶ Holmes v. Fihlenburg, 54 Ill., 203; People *ex rel.* v. Evans, 18 Ill., 361.

stitution.²⁷ Sometimes the jurisdiction includes the limits of the county in which the municipal corporation is located.²⁸ Thus a constitutional provision authorizing the legislature to "vest such jurisdiction as may be necessary in municipal courts," confers power to invest a municipal court with jurisdiction over the entire county.²⁹

§ 302. Who authorized to act as judges, jurors and witnesses. At common law citizens of the corporation could not act as judges and jurors because of their interest.³⁰ But this doctrine does not obtain in this country. It is no objection to the jurisdiction of a city or municipal court that the presiding judge, officers of the court, jurors and witnesses are

²⁷ Hickman v. O'Neal, 10 Cal., 292, overruling Meyer v. Kalkman, 6 Cal., 582; Chipman v. Bowman, 14 Cal., 157.

²⁸ Darden v. State, 74 Ga., 842;
 Johnson v. Hilton & D. L. Co., 103
 Ga., 212; 29 S. E. Rep., 819.

²⁹ State *ex rel*. Stark v. McArthur, 13 Wis., 383.

DISTINCTION BETWEEN JUDGE OF LOCAL COURT AND JUSTICE OF THE PEACE.

One distinction between the constitutional office of justice of the peace and that of a judge of a local court established by the legislature, even when such judge is called a justice of the peace, is the territorial restriction which limits the jurisdiction of the latter court. In re Schultes, 33 N. Y. App. Div., 524, 534; Brandon v. Avery, 22 N. Y., 469; Geraty v. Reid, 78 N. Y., 64; People ex rel. v. Terry, 108 N. Y., 1.

30 COMMON LAW RULE. A penalty of a by-law on custom cannot be sued for in the municipal court, "for they would be both party and judge." "If the penalty be made recoverable by the chamberlain, it seems that he cannot sue in the municipal court, for there is an interest in the judges, the sheriff and the jury, to sup-

port the custom against the defendants. In which respect proceedings or by-laws founded on exclusive customs. differ those which relate to freemen alone." But a penalty for "violating a custom to the injury of a particular company, and given to that company or its masters in trust for them, may be made recoverable in the corporation courts; for the corporation is no party, and has no general interest in the question." Willcock, Mun. Corp., p. 157.

If the penalty be given to the corporation the action cannot be brought in any municipal court, in which the mayor presides either personally or by deputy; "for he would appear in the character of judge and party, which is inconsistent with all rules of law." Willcock, Mun. Corp., 165.

What actions may be brought in the corporation courts, and when freemen may be jurors and witnesses, see Willcock, Mun. Corp., 165, et seq.

A challenge to the array of jurors on the ground that the sheriff who summoned them, and the mayor and jurors who were to try the case were citizens and freemen of the city, and therefore in-

all corporators or inhabitants and therefore interested in the penalty.³¹ But resident tax payers are incompetent as jurors

terested, held well founded. Hesketh v. Braddock, 3 Burr, 1847, per Lord Mansfield.

If the establishment and jurisdiction of municipal courts depend upon the common law such objection would be fatal. Charleston v. Pepper, 1 Rich. Law (S. C.), 364, 366.

31 The establishment and jurisdiction of the city court is a grant of power from all the people of the state, through their legislature, "and surely they have the power to dispense with the common law objection that the corporations were interested an 1 ought not to be entrusted with the enforcement of their laws against others." Such authority pliedly declares, that notwithstanding the common law objection, it was right and proper to give it the power to enforce the city laws against all offenders. That there was great reason in this cannot be doubted when it is remembered that the interest of the corporation is so minute as not to be even thought of, by sheriff, juror or judge. It is very much like the interest which similar officers would feel in enforcing a state law, the sanction of which was a penalty. The sum thus to be recovered goes in exoneration of some part of the burden of government to which every citizen is subjected; but such an interest has no effect upon the It is too slight to excite prejudice against a defendant. The same is the case here. For the judge, sheriff and jurors are members of a corporation of many thousand members. What interest of value have they in a fine of \$20? It would put a most eminent calculator to great trouble ascertain the very minute grain of interest which each of these gentlemen might have." (1845) Charleston v. Peper, 1 Rich Law (S. C.), 364, 367, per O'Neall, J.; Deitz v. Central, 1 Colo., 323, 329; State v. Craig, 80 Me., 85; 13 Atl. Rep., 129; State v. Intoxicating Liquors, 54 Me., 564; Fletcher v. Somerset R. R. Co., 74 Me., 434; State v. Severance (Me.), 2 New Eng. Rep., 425; Commonwealth v. Reed, 1 Gray (Mass), 472; Lincoln v. Prince, 2 Mass., 544; Commonwealth v. Worcester. 3 Pick (Mass.), 461, 471; Com. v. Ryan, 5 Mass., 90: Hill v. Wells, 6 Pick (Mass.), 104; Lufkin v. Haskell, 3 Pick (Mass.), 355; Jonesboro v. McKee, 2 Yerg. (Tenn.), 167, 169.

Mayor not disqualified to act as police justice, because he is an inhabitant of the town. Thomas v. Mount Vernon, 9 Ohio, 290.

So the fact that a part of the penalty would go to the town is not sufficient reason to disqualify a justice from hearing a case. Corwein v. Hames, 11 John (N. Y.), 76; City Council v. King, 4 McCord. (S. C.), 487.

But a justice of the peace was held to be disqualified because of his interest in the penality as an inhabitant of the town where other justices of the peace within the county, but not inhabitants of the town, could have been selected to try the case. Pearce v. Atwood, 13 Mass., 324, 340:

Resident and taxpaying jurors are not disqualified. Commonwealth v. Ryan, 5 Mass., 90; State v. Wells. 46 Iowa, 662, 664; Johnson v. Americus, 46 Ga., 80, 87.

in actions to recover damages against the local corporation.³² This was the rule at common law and unless changed by statute or charter it is usually enforced.³³

Constitutional qualifications of judges of superior courts do not always apply to judges of inferior courts. The law establishing such courts ordinarily prescribes the qualifications of the judges thereof.³⁴

³² Gibson v. Wyandotte, 20 Kan.,
156; Boston v. Baldwin, 139 Mass.,
315; 1 N. E. Rep., 417; State v.
Williams, 30 Me., 484; Russell v.
Hamilton, 3 Ill., 56.

Cramer v. Burlington, 42 Iowa, 315, where a challenge to a juror was sustained in an action for damages against a city on the ground that the proposed juror was a citizen and taxpayer of the city. Dively v. Cedar Falls, 21 Iowa, 565, is a like case.

Rose v. St. Charles, 49 Mo., 509; Fulweiler v. St. Louis, 61 Mo., 479; Fine v. St. Louis Public Schools, 30 Mo., 166; Eberle v. St. Louis Public Schools, 11 Mo., 247; Johnson v. Americus, 46 Ga., 80, 87; Columbus v. Goetchius, 7 Ga., 139; Bailey v. Trumbull, 31 Conn., 581; Jefferson County v. Lewis, 20 Fla., 980. Contra: Kemper v. Louisville, 14 Bush. (Ky.), 87; Omaha v. Olmstead, 5 Neb., 446; Middleton v. Ames, 7 Vt., 166.

³³ Diveny v. Elmira, 51 N. Y., 506.

34 People ex rel. v. Wilson, 15 Ill., 388; Respublica v. Dallas, 3 Yeates (Pa.), 300.

In Massachusetts a special justice of a police court is a judge of any court of that commonwealth (except the court of sessions) within the meaning of the constitution, and therefore cannot act as such judge and also as a member of the state legislature. Full discussion by Gray, C. J., Com. v. Hawkes, 123 Mass., 525.

Constitutional provisions of tenure, election, etc., held not applicable to corporation judges. Schroder v. Charleston, 3 Brev. (S. C.), 533, 539.

CIVIL LIABILITY OF LOCAL AND It is univer-MUNICIPAL JUDGES. sally held that judges of courts of superior and general jurisdiction are exempt from liability to damages for judicial acts, even when such acts are in excess of their jurisdiction. Bradley v. Fisher, 13 Wall. (U. S.), 335; Randall v. Brigham, 7 Wall. (U. S.), 523; Cooley on Torts (2nd ed.), p. 489. A distinction is made between acts done by them in excess of their jurisdiction and acts done by them in the clear absence of all jurisdiction over the subject-matter. to a court of general jurisdiction, to escape liability, it seems that the act must have been done by the judge in his judicial capacity, that is, it must have been a judicial act. The judges of courts of inferior or limited jurisdiction are generally held to be liable in a private action for judicial acts which are both in excess and outside of that jurisdiction. And such jurisdiction is not presumed, but must be proved. 7 Am. & Eng. Ency. of Law 668, 669. This distinction is stated and explained by Judge Cooley. Cooley on Torts (2d ed.), pp. 489-492. But this distinction has been denied. Thompson v. Jackson, 93 Iowa, 376: 61 N. W. Rep., 1004; 27 L. R. A., 92, 95, where it is held that a justice of

2. THE ACTION-ITS FORM, NATURE AND INSTITUTION.

§ 303. How ordinances enforced—form of action. The only method of compelling obedience to penal ordinances is by the imposition of authorized penalties for their violation. Thus under the power "to compel all persons or corporations landing passengers within the corporate limits to construct such suitable and safe platforms and accommodations as may be necessary for the safety of passengers," a railroad company cannot be required by ordinance, within a specified period, to reconstruct a platform and stairway for this purpose upon land

the peace, like judges of the superior courts, is protected from personal liability for judicial acts in excess of his jurisdiction, if he acted in good faith believing he had jurisdiction. See Bishop's Non-Contract Law, § 783; Bell v. McKinney, 63 Miss., 187; Henke v. McCord, 55 Iowa, 378; 7 N. W. Rep., 623; Brooks v. Mangan, 86 Mich., 576; 49 N. W. Rep., 633; Clark v. Holdridge, 58 Barb., 61. The supreme court of Georgia in denying the distinction, says that in all cases where judges of courts of general jurisdiction are exempt from civil liability in damages for their judicial acts, presiding officers of courts of limited jurisdiction are likewise exempt. Therefore, in that case it was held that where the presiding officer of a municipal court judicially determines that a given ordinance is valid, though in fact, it is void for want of authority in the municipal corporation to pass it, he will not be liable in damages to a person convicted in his court of offense against such ordinance, and punished under such ordinance by imprisonment, without having been given an opportunity to pay a fine, provided the court in which such person is convicted has jurisdiction of the subject-matter of the offense; but it is said arguendo,

where there is a clear absence of jurisdiction over the subject-matter, the officer will be liable for exercising it, provided such want of jurisdiction is known to him. Calhoun v. Little, 106 Ga., 336; 32 S. E. Rep., 86; 43 L. R. A., 630. The English rule is that, "no action will lie against the judge for any acts done or words spoken in his judicial capacity in a court of justice." "But in order to establish the exemption as regards proceedings in an inferior court, the judge must show that at the time of the alleged wrong doing some matter was before him in which he had jurisdiction (whereas in the case of a superior court it is for the plaintiff to prove want of jurisdiction): and the act complained of must be of a kind which he had power to do as judge in matter." Webb's Pollock. Torts, pp. 130, 139, 327-330. "It is a cardinal principle of our jurisprudence that if an action be brought against a judge of a court of record for an act done in his judicial capacity, if he plead that he did it as judge of a court of record, this is a complete justification: and where a ministerial officer does an act as a judge or does a judicial act which is within his power and jurisdiction he is not liable in a civil action by any

not belonging to it, and mandamus will not lie to compel the performance of the duty enjoined by the ordinance.³⁵

In this country there are two modes recognized for enforcing penal ordinances: one is an action of debt to recover the penalty, and the other is the ancient and familiar summary proceeding on information or complaint.³⁶ At common law the action was, in form, either debt or assumpsit. It was merely to recover the penalty imposed for the violation of the ordinance.³⁷ In the action of assumpsit, the theory was that there had been a breach of duty, and by fiction of law it was assumed that the defendant had promised the municipal corporation, which in most cases became the plaintiff, to perform the duty. The action of debt was allowable, as the penalty was for a sum certain and in the nature of what might be termed liquidated damages.³⁸

In this country municipal charters, or state laws which control, usually provide particular proceedings. Not often, however, do they present a complete code of procedure. The power of enforcement of ordinances is conferred in general terms, with a declaration of right of action on the part of the local corporation, or some designated officer thereof, in the local courts, to recover the penalty, but the rules of practice, in so far as they have become definite, are largely the result of judicial construction. In their development the common law method, as in

person injured by his said act unless it be proved that the act was willful and malicious." Albers v. Merchants' Exchange of St. Louis, 138 Mo., 140, 164; 39 S. W. Rep. 473; Pike v. Megoun, 44 Mo., 491; Reed v. Conway, 20 Mo., 22; Scoettgen v. Wilson, 48 Mo., 253; Wertheimer v. Howard, 30 Mo., 420; Stone v. Graves, 8 Mo., 149; Lenox v. Grant, 8 Mo., 254; Edwards v. Ferguson, 73 Mo., 686.

³⁵ People *ex rel.* v. N. Y., N. H. & H. R. R. Co., 11 Hun. (N. Y.), 297.

Injunction against violating, see § 286, ch. IX.

36 Recovery by warrant in debt. Meaher v. Chattanooga, 1 Head (38 Tenn.), 74. Information. State (Hershoff) v. Beverly, 43 N. J. L., 139; 45 N. J. L., 288, 289.

Penalty recoverable by complaint in town police court. Com. v. Dow, 10 Metc. (51 Mass.), 382.

37 Willcock, Mun. Corp., 154.

** 1 Dillon, Mun. Corp. (4th ed.), § 409; Tiedeman, Mun. Corp., § 156, p. 278.

IN ENGLAND the penalty of the by-law on custom "is in the nature of liquidated damages, and stands instead of such damages as would be assessed by the jury in an action of trespass founded on the custom." Willcock, Mun. Corp., 154.

ACTION OF ASSUMPSIT permitted, to recover, among other things,

all branches of our jurisprudence, generally has been a controlling factor. The rules in some jurisdictions constitute mainly the local judicial view of the organic law as dealt with by the legislature and the courts through a series of years of interpretation.

The method prescribed by charter or legislative act applicable is exclusive and the local corporation is generally confined to the method provided.³⁹ Thus the early English rule is stated to be that, when a corporation is empowered to enforce its bylaws by fine or amerciament, it is, by implication, precluded from adopting any other method of punishing disobedience to them. 40 And where, under charter power, the local corporation imposes a license tax and declares a penalty for doing business without a license, but makes no provision for enforcing by action the payment of the license fee, the corporation cannot proceed by action to recover such fee from one who fails to pay it, but is restricted to an enforcement of the penalties prescribed against those who do business without a license.41 If the method for enforcement is not specified the common law remedy may be adopted, 42 and where the common law forms have been abolished it is said that the statutory civil

penalties for obstructing streets in violation of an ordinance. Columbia v. Harrison, 2 Mill's Const. Rep. (S. C.), 213.

ACTION OF DEBT, where common law form was adopted. Coates v. New York, 7 Cow. (N. Y.), 585.

39 Illinois—Eubanks v. Ashley, 36 Ill., 177; King v. Jacksonville, 3 Ill., 305; Israel v. Jacksonville, 2 Ill., 290.

Kentucky—Williamson v. Com., 4 B. Mon. (Ky.), 146, 151.

Louisiana—Bolte v. New Orleans, 10 La. An., 321, denying right to close grog-shops summarily for failure to take out license where there was power to fine, action to recovery, tax or criminal prosecution.

New Jersey—State (Smith) v. Clinton, 53 N. J. L., 329; 21 Atl. Rep., 304; State v. Zeigler, 32 N. J. L., 262.

New York—Coonley v. Albany, 132 N. Y., 145.

Pennsylvania—Barter v. Com., 3 Pa. (Penrose & Watts), 253.

Ohio—Earnhart v. Lebanon, 5 Ohio Cir. Ct., 578.

Not necessary to impose a fine for breach of the ordinance and then institute suit for its recovery. King v. Jacksonville, 3 Ill., 305.

40 Willcock, Mun. Corp., 180;
 Kirk v. Nowill, 1 Term Rep., 125.
 41 Charleston v. Ashley Phosphate Co., 34 S. C., 541, 552; 13 S.
 E. Rep., 845; Santa Cruz v. Santa Cruz R. R. Co., 56 Cal., 143.

Whatever be the mode of enforcing obedience to a by-law, prescribed by that by-law, that mode must be strictly pursued. 2 Kyd. Corp., p. 169.

⁴² Eubanks v. Ashley, 36 Ill., 177, 180.

Rule applied in permitting sev-

action will lie.⁴⁸ And it has been held, unless expressly prohibited, inherent power exists in the municipal corporation to provide for an action of debt to recover a penalty for a breach of its ordinances in its own courts.⁴⁴

- § 304. How far the proceedings are criminal or quasi criminal. The decisions present some apparent conflict respecting the precise nature of the proceedings. Whether in character they are to be considered civil or quasi-civil, criminal or quasi-criminal has been discussed
- (1) in connection with the method of instituting the proceedings,
 - (2) the name in which the action should be brought,
 - (3) the sufficiency of the pleadings,
 - (4) the mode of trial, whether summary or by jury,
 - (5) the arraignment and plea of the defendant
 - (6) the admission of evidence, burden and degree of proof,
- (7) the verdict, judgment and sentence and mode of execution, and
 - (8) the method of review.

Leaving the details of the judicial rules to be presented in the sections which follow, only a few general observations will be mentioned here.

The weight of judicial authority declares that the prosecution is in the nature of a civil action for the recovery of a debt. Sometimes the action is regarded as criminal, especral penalties to be included in one Indiana—Shea v. Muncie. 148

eral penalties to be included in one declaration. Brooklyn v. Cleves, Hill & Denio Supp. (N. Y.), 231, 233, per Nelson, C. J.

⁴³ 1 Dillon, Mun. Corp. (4th ed.), § 410, p. 478.

⁴⁴ Per Lord Mansfield in Hesketh v. Braddock, 3 Burr, 1847, 1858. Approved by Gibson, C. J., in Barter v. Com., 3 Pa. (Penrose & Watts), at p. 260; and by Judge Dillon, 1 Dillon, Mun. Corp. (4th ed.), § 410.

45 Colorado—Greeley v. Hamman, 12 Colo., 94; 20 Pac. Rep., 1; Walton v. Cañon City, 13 Colo. App., 77, 56 Pac. Rep., 671.

Illinois—Chicago v. Kenney, 35 Ill. App., 57; Israel v. Jacksonville, 2 Ill., 290.

Indiana—Shea v. Muncie, 148
Ind., 14, 33; 46 N. E. Rep., 138;
Brookville v. Gagle, 73 Ind., 117;
Greensburg v. Corwin, 58 Ind.,
518; Hammond v. N. Y. C. & St. L.
Ry. Co., 5 Ind. App., 526; 31 N. E.
Rep., 817; Quigley v Aurora, 50
Ind., 28; Indianapolis v. Fairchild,
1 Ind., 315; Tippecanoe County v.
Chissom, 7 Ind., 688.

Missouri—Delaney v. Kansas City Police Court, 167 Mo., 667, 678; 67 S. W. Rep., 589; St. Louis v. Coffee, 76 Mo. App., 318; St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045; St. Louis v. Knox, 74 Mo., 79; St. Louis v. Schoenbusch, 95 Mo., 618; 8 S. W. Rep., 791; St. Louis v. Vert, 84 Mo., 204; Ex parte Hollwedell, 74

cially where the offense constitutes a misdemeanor under the

Mo., 395; Kansas City v. Clark, 68 Mo., 588; Kansas City v. Muhlback, 68 Mo., 638; Marshall v. Standard, 24 Mo. App., 192; Kansas City v. Neal, 49 Mo. App., 72; St. Louis v. Sternberg, 69 Mo., 289. 295: St. Louis v. Smith, 10 Mo., 439; St. Louis v. Life Assn. of Am., 53 Mo., 466; Memphis v. O'Connor, 53 Mo., 468; St. Joseph v. Levin, 128 Mo., 588; 31 S. W. Rep., 101; Kirkwood v. Cairns, 44 Mo. App., 88: Sylvester Coal Co. v. St. Louis. 130 Mo., 323, 330; 32 S. W. Rep., 649; Cassville v. Jimerson, 75 Mo. App., 426; Golden City v. Hall, 68 Mo. App., 627; De Soto v. Brown, 44 Mo. App., 148.

New Jersey—State (Greely) v. Passaic, 42 N. J. L., 429; State (Smith) v. Clinton, 53 N. J. L., 329; 21 Atl. Rep., 304.

South Dakota—Lead v. Klatt, 13 S. D., 140; 82 N. W. Rep., 391; Lead v. Klatt, 11 S. D., 109; 75 N. W. Rep., 896; Sioux Falls v. Kirby, 6 S. D., 62; 60 N. W. Rep., 156; 25 L. R. A., 621.

ILLUSTRATIONS.

Georgia—Prosecutions for violations of ordinances, not involving the elements of offenses known to the state penal law, are not "criminal," as used in the constitution and statutes. Rule applied to ordinance forbidding retailing liquor without license. Floyd v. Eatonton, 14 Ga., 354.

So, to ordinance regulating the keeping and retailing of gunpowder. Williams v. Augusta, 4 Ga., 509.

Indiana—Fact that process shall be a warrant and that the one named therein may be arrested and retained in custody or under reasonable recognizance until the next sitting of the city court and that in event of judgment against defendant and it is not paid, defendant may be committed for a period not exceeding 30 days does not make the case criminal. Quigley v. Aurora, 50 Ind., 28; White v. Neptune City, 56 N. J. L., 222; 28 Atl. Rep., 378.

Missouri—Fact that original writ shall be a capias, instead of a summons or notice, does not make proceedings criminal. In re Miller, 44 Mo. App., 125.

New York—The violation of an ordinance prohibiting the sale of liquor on Sunday "is neither a breach of the peace, nor, as has been decided by the Supreme Court in similar cases, a crime or misdemeanor." Per Strong, J., in Wood v. Brooklyn, 14 Barb. (N. Y.), 425, 431.

Ohio-Notwithstanding the violation is quasi criminal, the penalty results from such violation. "It is a sum of money due by reason thereof, and the remedy is strictly civil." "Is debt the proper form of action? If not it is very clear there is no remedy. Assumpsit cannot be supported for the want of a promise. Covenant will not lie, for there is no obligation under seal. Neither trespass nor case are any more appropriate. Debt is, in fact, the only form of action recognized by the principles of the common law for the recovery of fines, penalties or forfeitures." Markle v. Akron, 14 Ohio. 586, 591, citing 1 Chitty Pl., 101; Cincinnati v. Gwynne, 10 Ohio, 192.

South Dakota—Where the act is not essentially criminal a municipal ordinance will not make it so. Huron v. Carter, 5 S. D., 4; 47 N. W. Rep., 947.

laws of the state. Such proceeding "is civil in form and quasi-criminal in character. It is governed by the rules of pleading applicable to civil cases, but if it were solely civil no fine or imprisonment could be inflicted. It is therefore a quasicivil and criminal action. Partaking of some of the features of each, its similitude to either is not complete. In pleading it is more like a civil action, but in its effect and consequences it more nearly resembles a criminal proceeding." ¹⁴⁷

Tennessee—Although act committed is a misdemeanor the action is civil. Bristol v. Burrow, 5 Lea (73 Tenn.), 128.

Wisconsin—Civil actions merely for the collection of forfeitures. Fact that action is in name of state, does not make it criminal. Chafin v. Waukesha County, 62 Wis., 463, 467; 22 N. W. Rep., 732; State v. Smith, 52 Wis., 134; 8 N. W. Rep., 870; Sutton v. McConnell, 46 Wis., 269; 50 N. W. Rep., 414.

Penal action for violations of ordinances as are not also misdemeanors, are civil actions. Oshkosh v. Schwartz, 55 Wis., 483; 13 N. W. Rep., 552; Platteville v. Bell, 43 Wis., 488.

Wyoming—Code of procedure of Wyoming provides that ordinances shall be enforced by "civil action." Jenkins v. Cheyenne, 1 Wyo. Ter., 287.

46 Connecticut—If the offense is a misdemeanor the penalty may be recovered by criminal action. State v. Keenan, 57 Conn., 286; 18 Atl. Rep., 104.

Iowa—Violation of ordinance, held to be a public offense subjecting the guilty party to criminal prosecution. Jaquith v. Royce, 42 Iowa, 406.

New York—Where warrant and arrest permitted, proceedings held criminal. People v. Van Houten, 35 N. Y. Supp., 186; 13 Misc. Rep. (N. Y.), 603.

Where the charter makes the

violation of any city ordinance a misdemeanor it has been held to authorize an indictment for its violation. Cronin v. People, 82 N. Y., 318.

North Carolina—Violation of ordinance, criminal offense, when. State v. Powell, 97 N. C., 417; 1 S. E. Rep., 482.

47 Per Marshall, J., in Stevens v. Kansas City, 146 Mo., 460, 465; 48 S. W. Rep., 658, approved in Douglas v. Kansas City, 147 Mo., 428, 436, 437; 48 S. W. Rep., 851. See U. S. v. Chouteau, 102 U. S., 603; McDonald v. Hearst, 95 Fed. Rep., 656.

"The form of the proceeding is an action of debt for the penalty, but, substantially, it is a criminal proceeding on the part of the city, for the violation of her laws." Charleston v. Pepper, 1 Rich. Law (S. C.), 364, 366.

The rule that the action is of a quasi criminal nature was applied in an Illinois case in determining the jurisdiction of a particular local criminal court (Chicago.) As used in the Constitution of Illinois it is said in that case: "When the entire section is considered, in the light of our jurisprudence, we must conclude that it was intended to embrace all offenses not crimes or misdemeanors, but that are in the nature of crimes-a class of offenses against the public which have not been declared crimes. but wrongs

In referring to the nature of a prosecution under an ordinance regulating bowling alleys, to recover the penalty, wherein the question of the disposition of the cost of the proceedings was involved, Bell, J., observed: "The question whether a legal proceeding is to be deemed civil or criminal, or as partaking of the nature of civil and criminal proceedings, is to be determined by the consideration whether the law is designed to suppress and punish a public wrong, an injury affecting the peace and welfare of the community and the general security, or whether it is designed mainly to afford a remedy to an individual for an injury done to his person or property. Upon this question the appropriation of the fine or penalty has a bearing, since if it is applied to the public use, no idea can be entertained that the proceeding is designed as a remedy for a private loss or injury, though it may sometimes have a different tendency, where the amount is appropriated to the use of a suffering party. * * * The present case is one of a prosecution for an offense made penal by a city ordinance, because of its supposed evil consequences to society. It has no relation to any individual wrong, and the remedy prescribed is such as indicates a criminal proceeding. It is prosecuted by a public officer, as part of his official duty, but might be prosecuted by any other person as well. The fine is payable to the city, but not to compensate any wrong to the corporation. The burden of administering justice is here imposed upon counties, cities and towns, and fines and forfeitures are payable to them, as the representatives of the public, to aid in defraying this

against the general local public which it is proper should be repressed or punished by forfeitures and penalties. This would embrace all qui tam actions and forfeitures imposed for the neglect or violation of a public duty. A quasi crime would not embrace an indictable offense, whatever might be its grade, but simply forfeiture for a wrong done to the public, whether voluntary or involuntary, where a penalty is given, whether recoverable by criminal or civil process; and it would embrace prosecutions for bastardy, and informations in the nature of quo warranto, etc." Per Walker, J., in Wiggins v. Chicago, 68 Ill., 372, 375.

Quasi criminal prosecution. Naylor v. Galesburg, 56 Ill., 285, 287; People v. Van Houten, 69 N. Y. St., 265.

Civil in form and only quasicriminal in character. Rule applied respecting right of appeal. Baldwin v. Chicago, 68 Ill., 418; Greenfield v. Mook, 12 Ill. App., 281.

Prosecution for unlawful sale of liquor under ordinance is quasicriminal. Boscobel v. Bugbee, 41 Wis., 59; Platteville v. McKernan,

part of the expenses of civil government. The case then seems to us to lack all the indicia of a civil action, and to be, in fact, as it appears, a criminal prosecution."⁴⁸

§ 305. Institution of proceedings — Notice — Appearance. The proceedings to recover the penalty for violation of an ordinance are governed by local laws. Ordinarily the action takes its inception upon complaint being made by some competent person, or, in some cases, upon the view of the magistrate, or knowledge on the part of the officer duly empowered to act. Usually this is followed by legal notice of the charge to the person accused, trial, sufficient evidence of guilt, conviction and judgment. These are the essentials of a summary conviction. Unless the defendant enters his appearance voluntarily, he must be duly notified of the proceedings. If one is notified

54 Wis., 487; 11 N. W. Rep., 798; State v. Grove, 77 Wis., 448; 46 N. W. Rep., 532.

⁴⁸ State v. Stearns, 31 N. H., 106, 110, 111.

⁴⁹ Keeler v. Milledge, 24 N. J. L., 142; State (Hershoff) v. Beverly, 45 N. J. L., 288; White v. Neptune City, 56 N. J. L., 222; 28 Atl. Rep., 378; Commonwealth v. Borden, 61 Pa. St., 272.

50 NOTICE REQUIRED. Alexandria v. Bethlehem, 29 N. J. L., 375, 377, where it is said that "the principle is too plain to require illustration that no penalty can be imposed upon a person without previous notice. Our law condemns no man unheard, or at least without his having an opportunity of being heard."

"In this country no person can be injured, in his personal property, without an opportunity of defending himself. He has the right of being confronted with his accusers, and of being apprised of the accusation against him. 'Audi alteram partem,' is a maxim of natural justice dear to the human heart and associated with every principle of our jurispru-

dence. Conviction, founded upon ex parte accusation is the most terrible species of despotism that the human mind can conceive. It is not only a violation of the most obvious dictates of common law, but it is destitute of every principle by which the social compact is supported. * * * No law is better established than that of coiporations; and it is settled, by that law that a corporation can inflict no punishment or proceed against any person for a supposed offense, unless particular notice is given to the person against whom they are about to proceed, in order that he may prepare his defense." Charlton, J., in State v. Savannah, 1 T. U. P. Charlton (Ga.), 235; 4 Am. Dec., 708, citing Rex v. Liverpool, 2 Burr., 731, and quoting from Rex v. University of Cambridge, 1 Str., 567, per Justice Fortescue, as follows: "The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity of making his defense if he has any. I remember to have heard it said by a very learned man upon such an occasion, that even God

to appear on a named charge, as violating one ordinance, he cannot be tried and convicted for a different offense, as one created by another ordinance.⁵¹

Voluntary appearance to be effectual must be with full knowledge on the part of the defendant that there is a charge pending against him and the appearance must be with an intention on his part to waive process and voluntarily appear therein. "The mere presence of a defendant in a court room does not authorize a magistrate to proceed and render a judgment against him, without advising him a suit is pending against him, nor without a full understanding on the part of the defendant as to the nature of the proceedings." 52

Where the action is regarded as civil jurisdiction of the person of the defendant can be obtained as in other civil suits,

himself did not pass sentence upon Adam before he was called upon to make his defense. 'Adam,' says God, 'where art thou; hast thou eaten of the tree whereof I commanded that thou shouldst not eat?' And the same question was put to Eve also."

NOTICE — JOINT DEFENDANTS. Service on one of two members of a firm is not notice to the other. So held in case of notice to abate a nuisance. St. Louis v. Flynn, 128 Mo., 413; 31 S. W. Rep., 17.

Two defendants cannot be served by leaving only one copy for both with a member of their family at the usual place of abode—the method prescribed by law for copy service. St. Louis v. Flynn, 128 Mo., 413; 31 S. W. Rep., 17; Laney v. Garbee, 105 Mo., 355; 16 S. W. Rep., 831; Madison County Bank v. Suman, 79 Mo., 527; Brown v. Langlois, 70 Mo., 226; Stewart v. Stringer, 41 Mo., 400.

If a warrant is issued against two overseers, and only one of them has been served with notice, the warrant will be set aside. Alexandria v. Bethlehem, 29 N. J. L., 375. 51 Columbus v. Arnold, 30 Ga., 517; Lesterjelle v. Columbus, 30 Ga., 936; Gates v. Aurora, 44 Ill., 121. Or when charged with a misdemeanor, he cannot be convicted under an ordinance charge. People v. Miller, 38 Hun. (N. Y.), 82.

52 Merkee v. Rochester, 13 Hun. (N. Y.), 157, 160.

Voluntary appearance—If defendant appears and submits himself to the court's jurisdiction, he waives all defects in the process and the service thereof. Baldwin v. Murphy, 82 Ill., 485.

In one case the suit was brought before one justice of the peace and tried before another. The defendant appeared and went to trial. "It is a matter of no consequence how the case was transferred from Police Magistrate Scully to Police Magistrate Banyon, as appellant appeared before the latter, and went to trial, and appealed the case to the criminal court. magistrate having jurisdiction of the subject-matter of the suit, there cannot be the slightest question that he also acquired jurisdiction of the person of appellant, when he entered his appearance to as by notice or summons.⁵³ Sometimes he is brought in by warrant.⁵⁴

The method of beginning the proceedings differ. Under some charters they can only be commenced upon the complaint of a police officer,⁵⁵ or on information or statement filed by the city attorney.⁵⁶ Where the law required the mayor to begin the proceeding on information and proof of the violation, it was held that it was not necessary to show that proof was furnished as authority to institute the proceedings.⁵⁷ So where the law permitted the recorder to issue a warrant for arrest, on com-

the suit." Per Walker, J., in Wiggins v. Chicago, 68 Ill., 372, 375.

Rule applied where defendant appeared, on defective summons and defended an action before justice of peace. Roberts v. Formhalls, 46 Ill., 66, per Breese, J.

The principle is well supported. Ohio & M. R. R. R. Co. v. McCutchin, 27 Ill., 9, approving Swingley v. Haynes, 22 Ill., 214, 216; Vaughn v. Thompson, 15 Ill., 39; Ballard v. McCarty, 11 Ill., 501; Shook v. Thomas, 21 Ill., 87; Mayson v. Atlanta, 77 Ga., 662.

 53 In re Ada Jones, 90 Mo. App., 318.

Where civil, begun by writ of summons. Milton v. Hoagland, 3 Pa. Co. Ct. Rep., 283.

Where law provides action of debt, suit instituted by warrant and arrest in error. Pottsville v. Marburger, 1 Leg. Chron. (Pa.), 60.

Sufficiency of notice. Rothschild v. Darien, 69 Ga., 503.

Civil, though commenced by warrant. Tippecanoe County Com'rs v. Chisson, 7 Ind., 688; Levy v. State, 6 Ind., 281; Bogart v. New Albany, 1 Ind., 38.

Writ in form of capias, served by reading, without arrest, held good, though summons is proper process. Eubanks v. Ashley, 36 Ill., 177, 179. 54 People v. Van Houten, 35 N.
Y. Supp., 186; 13 Misc. Rep. (N.
Y.), 603; Newark v. Murphy, 40
N. J. L., 145; St. Peters v. Bauer,
19 Minn., 327, 329.

Held in an early South Carolina case that process in the city court to recover the penalty, may bear test before the accrual of the cause of action. Charleston v. Schmidt, 11 Rich. (S. C.), 343, 345.

Arrest of violator not permitted unless expressly authorized. State v. Ruff, 30 La. Ann., 497.

55 State v. Robitshek, 60 Minn., 123; 33 L. R. A., 33; 61 N. W. Rep., 1023.

"The prosecution for the violation cannot be instituted otherwise than by the corporate authorities, and however grievous the wrong inflicted on an individual, it is not within his control." Montgomery v. Foster, 54 Ala., 62, 63, per Brickell, C. J.

⁵⁶ Kansas City v. O'Connor, 36 Mo. App., 594; Kansas City v. Flanagan, 69 Mo., 22.

Affidavit or formal complaint not required. Chicago v. Kennedy, 35 Ill. App., 57.

Warrant and arrest. Schweitzer v. Beottcher, 84 Ill., 289.

Affidavit and warrant. Camden v. Bloch, 65 Ala., 236.

⁵⁷ Portland v. Rolfe, 37 Me., 400.

plaint made under oath, it was held that the recorder could issue the warrant without complaint and oath, upon his own knowledge that the ordinance had been violated.⁵⁸

§ 306. Arrest without warrant. There are many loose general statements in the books as to the authority of officers to make arrests without warrants. At common law peace officers had power to arrest without warrant when the offense was committed in their view.⁵⁹ If the power is conferred by charter, an ordinance may authorize the officer to arrest without a warrant where the offense is committed in his view.⁶⁰ But unless the violation is committed within his view process or

⁵⁸ Meaher v. Chattanooga, 1 Head. (38 Tenn.), 74, 77.

Provision that proceedings shall be begun on complaint of any person, held to harmonize with the charter requirement that all prosecutions for violations of ordinances shall be conducted by the city attorney. Spokane v. Robison, 6 Wash., 547; 33 Pac. Rep., 960.

⁵⁹ Power discussed in Prell v. McDonald, 7 Kan., 426; State v. Lafferty, 5 Harr. (Del.), 491.

Allowed for breach of the peace committed in officer's presence. Quinn v. Heisel, 40 Mich., 576; Knot v. Gay, 1 Root (Conn.), 66; State v. Brown, 5 Harr. (Del.), 505.

Arrest cannot be made on information to the officer or suspicion without a warrant for past offenses not amounting to felony. Quinn v. Heisel, 40 Mich., 576, 578; Com. v. Carey, 12 Cush. (Mass.), 246, 252; Compare McCullough v. Com., 67 Pa. St., 30.

Police officer may arrest, without warrant for felony, which includes petit larceny. Carpenter v. Mills, 29 How. Pr. (N. Y.), 473, 477.

60 Chicago v. Kenney, 35 Ill.
 App., 57, 63; Bryan v. Bates, 15
 Ill., 87; Scircle v. Neeves, 47 Ind.,

289; Nealis v. Hayward, 48 Ind., 19.

Keeping open tippling house on Sunday. Maine v. McCarty, 15 Ill., 441.

Disorderly conduct. Johnson v. Americus, 46 Ga., 80, 87.

Conducting auction in public place. White v. Kent, 11 Ohio St., 550, 554.

Charter may confer power to arrest one while in the act of violating a state law or borough ordinance, without warrant. St. Peters v. Bauer, 19 Minn., 327, 329.

A "policeman," held to be legal equivalent to "watchman" at common law. State v. Evans, 161 Mo., 95; 61 S. W. Rep., 590.

Questioned, whether an ordinance can justify arrests without process, where common law principles do not. Quinn v. Heisel, 40 Mich., 576.

Where the charge was cruelty to animals, it was held that the officer could not arrest without a warrant although committed in his presence. This was said to be a mere misdemeanor not amounting to a breach of the peace. The charter may confer such power. Butolph v. Blust, 5 Lans. (N. Y.), 84.

For obstructing bridge in violation of an ordinance it was held warrant for arrest is required.⁶¹ In an early Tennessee case, an ordinance authorizing police officers to make arrests without a warrant for breaches of ordinances not committed in their presence was held void.⁶² On the other hand, it was early held in Maryland that one violating an ordinance in depositing night soil in view of the officer may be arrested without warrant on the order of the board of health.⁶³ In Minnesota an ordinance was declared void which authorized specified officers to arrest and detain, until the extinguishment of a fire, any person refusing to obey their directions. Its invalidity was based upon the constitutional ground that it deprived those arrested of their liberty without due process of law or trial by jury.⁶⁴

§ 307. Sufficiency of summons or warrant. The requisites of the summons or warrant are controlled by the local laws. It should clearly notify the defendant of the offense with which he is charged. A reference to the ordinance or section upon which the complaint is founded is often required. Ordinarily if the substance of the offense is precisely stated this will be sufficient. In view of the quasi-criminal nature of such actions, some courts demand considerable technical accuracy. 66

that a police officer could not arrest, without a warrant, unless power expressly conferred by charter. Even if misdemeanor, no power exists "unless such misdemeanor was accompanied by a breach of the peace at common law." Hennessy v. Connolly, 13 Hun. (N. Y.), 173.

An arrest without process cannot be made on Sunday for a violation of an ordinance. Wood v. Brooklyn, 14 Barb. (N. Y.), 425, 431.

Obstructing sidewalk in view of officer; arrest without warrant authorized by statute. People v. Van Houten, 69 N. Y. St., 265.

⁶¹ Summary arrest not allowed without process, when. Clark v. New Brunswick, 43 N. J. L., 175.

⁶² Pesterfield v. Vickers, 3 Coldw. (Tenn.), 205.

63 Rule applied in action against police officer for trespassing and

false imprisonment. Mitchell v. Lemon, 34 Md., 176, 181.

64 Judson v. Reardon, 16 Minn., 431.

The question whether the officer who arrested defendant had a warrant does not affect the legality of his conviction, after he is once within the jurisdiction of court. People v. Iverson, 14 N. Y. Cr. Rep., 155; 61 N. Y. Supp., 220; 46 App. Div., 301, relying on People v. Eberspacher, 79 Hun. (N. Y.), 410; 29 N. Y. Supp. 796, where the general rule is declared "that it is no defense to a criminal prosecution that the defendant was illegally or forcibly brought within the jurisdiction of the court."

65 Reference to wrong ordinance held would vitiate proceedings. Keeler v. Milledge, 24 N. J. L., 142, 145.

66 Warrant must set forth the offense substantially within the

The defendant must be precisely designated in the warrant. Omission therein of the Christian name of the one intended to be charged, without otherwise describing such person, vitiates the warrant.⁶⁷ The warrant or notice need not set out the ordinance violated,⁶⁸ nor authority to pass it.⁶⁹ Generally the law is liberal in permitting amendments, especially those relating to form.⁷⁰

purview of the law. White v. Washington, 2 Cranch. C. C., 337.

Offense to be described with reasonable certainty. Barney v. Washington, 1 Cranch. C. C., 248; 2 Fed. Cas. No. 1,033.

Vague and uncertain. Washington v. Lynch, 5 Cranch. C. C., 498; 29 Fed. Cas. No. 17,231; Delany v. Washington, 2 Cranch. C. C., 459; 7 Fed. Cas. No. 3,755.

By-law to be specified and violation should be stated. Boothe v. Georgetown, 2 Cranch. C. C., 356; 3 Fed. Cas. No. 1,651.

A summons to answer "for a violation of an ordinance of said town relative to nuisances" is bad. Israel v. Jacksonville, 2 Ill., 290.

It should state whether it is an action of debt, or an information. State (Hershoff) v. Beverly, 43 N. J. L., 139.

Where law permits the warrant to issue "upon information of the city attorney," an information signed by a deputy city attorney is bad. Kansas City v. Flanagan, 69 Mo., 22.

Chief clerk of police court may sign. O'Brien v. Cleveland, 4 Ohio Dec., 189; 1 Cleve. Law Rev., 100.

Warrant on charge of fast and reckless driving. State v. Merritt, 83 N. C., 677.

Rescuing impounded animals. Sheldon v. Hill, 33 Mich., 171.

Forbidding negroes from loitering in liquor stores. Process need not state names and sexes of negroes or names of their owners. Charleston v. Seeba, 4 Strob. (S. C.), 319.

Liquor selling. State (Hershoff) v. Beverly, 43 N. J. L., 139.

67 Prell v. McDonald, 7 Kan.,
426, 454; Levy v. State, 6 Ind., 281.
68 State v. Cainan, 94 N. C., 880.
69 State v. Merritt, 83 N. C., 677.

Prior to change in law it was required in North Carolina that the warrant should set forth the state law authorizing the ordinance. Washington v. Frank, 46 N. C., 436.

Effect of discrepancies between reference to section number of ordinance violated in complaint and summons, see White v. Neptune City, 56 N. J. L., 222; 28 Atl. Rep., 378.

Endorsement of reference to ordinance required to be on the copy of the summons. The state law requirement was applied. New York v. Eisler, 10 Daly (N. Y.), 396.

The warrant need not allege that the offense was committed in the county in which the city is situated. Beasley v. Beckley, 28 W. Va., 81.

70 Bristol v. Burrow, 5 Lea (73 Tenn.), 128; Childress v. Nashville, 3 Sneed (35 Tenn.), 347.

Amendment of defective warrant authorized after verdict on payment of costs. Washington v. Frank, 46 N. C., 436.

Defective statement in warrant may be corrected after verdict or judgment. McGunnigle v. Wash§ 308. Bail bond. Unless the authority is conferred by law, a local magistrate has no power to issue a warrant of arrest for the violation of an ordinance which does not constitute a public offense against the criminal laws of the state, and take a bail bond for the defendant's appearance. "If the power exists it must be found in the statute. Otherwise officers and courts cannot assume it, however, convenient it may appear. It does not exist at common law as incident to municipal corporations."

§ 309. Name in which action should be brought. The charter or local law applicable usually designates the name in which the action for the enforcement of ordinances should be brought. Prosecutions for the violation of ordinances have been sustained which were brought in the name of the state, people or commonwealth.⁷² Ordinarily the action is required to be brought in the corporate name of the municipal corporation.⁷³ If the charter expressly directs the proceedings to be ington, 2 Cranch. C. C., 460; 16 Wisconsin—Chafin v. Waukesha

71 "The proceedings in our criminal procedure, regarding bail, are all directed to offenses against the state. It must appear that the party is charged with a public

offense." Canthorn v. State, 43

Ark., 128, 131.

Fed. Cas. No. 8,818.

Bail authorized. People v. Justices, 74 N. Y., 406; 18 Alb. L. J., 254.

72 California—Santa Barbara v. Sherman, 61 Cal., 57; Pillsbury v. Brown, 47 Cal., 477.

Massachusetts — Commonwealth v. Worcester, 3 Pick. (20 Mass.), 462; In re Goddard, 16 Pick. (Mass.), 504.

Michigan—Vicksburg v. Briggs, 85 Mich., 502; 48 N. W. Rep., 625. Nebraska—Brownville v. Cook, 4 Neb., 101.

Pennsylvania—Van Swartow v. Com., 24 Pa. St., 131.

South Carolina—In re Oliver, 21 S. C., 318; 53 Am. Rep., 681.

Washington—State v. Fountain, 14 Wash., 236; 44 Pac. Rep., 270.

Wisconsin—Chafin v. Waukesha County, 62 Wis., 463, 468; 22 N. W. Rep., 732.

Being criminal, the state is the party plaintiff. But if justice erroneously enters in his docket the name of the local corporation as plaintiff, it is irregular, but did not oust the jurisdiction of the justice, nor did it in any manner prejudice the defendant. State v. Graffmuller, 26 Minn., 6; 46 N. W. Rep., 445.

73 Arkansas—Graham v. State, 1 Ark., 79.

Illinois—Chicago v. Kenney, 35 Ill. App., 57; Partridge v. Snyder, 78 Ill., 519; Havana v. Biggs, 58 Ill., 483; Lewiston v. Proctor, 27 Ill., 414; Webster v. People, 14 Ill., 365; Israel v. Jacksonville, 2 Ill., 290.

Iowa—Centerville v. Miller, 51 Iowa, 712; 2 N. W. Rep., 527.

Kansas—Emporia v. Volmer, 12 Kan., 622.

Michigan—Cooper v. People, 41 Mich., 403; 2 N. W. Rep., 51; Smith v. Adrian, 1 Mich., 495. in the name of the city it is error to bring the action in the name of the commonwealth.⁷⁴ Constitutional and statutory provisions requiring all prosecutions to be in the name of the state or people are generally construed as relating alone to criminal proceedings for violations of state laws, and not to the recovery of penalties under municipal ordinances.⁷⁵ The prevailing judicial view is, that cases of violation of ordinances are not criminal prosecutions, but are merely penal actions on the part of the local corporation and have for their object the vindication of their own domestic regulations, and, to adopt the language of the Supreme Court of Michigan, "it is a mistake to suppose the people have any right to sue." Some-

New Jersey—State (Greely) v. Passaic, 42 N. J. L., 429.

Pennsylvania — Philadelphia v Nell, 3 Yeates (Pa.), 475.

Texas—Bautsch v. Galveston, 27 Tex. App., 342; 11 S. W. Rep., 414.

Washington—Spokane v. Robison, 6 Wash., 547; 33 Pac. Rep., 960.

Code provides that local corporation shall be plaintiff. Jenkins v. Cheyenne, 1 Wyo. Ter., 287.

Name of president and trustees of village. King v. Jacksonville, 3 Ill., 305.

74 Williamson v. Com., 4 B. Mon. (Ky.), 146, 151.

Where it is in the name of the state, instead of the corporation, the case will not be reversed on appeal, especially if the objection was not presented to the trial court. State v. King, 37 Iowa, 462.

75 Alexander v. Greenville, 54 Miss., 659; Davenport v. Bird, 34 Iowa, 524; Centerville v. Miller, 51 Iowa, 712; 2 N. W. Rep., 527; Chicago v. Kenney, 35 Ill. App., 57; Romero v. Chapman, 2 Mich., 179; Lemon v. Reidel, 1 Lanc. Law Rev. (Pa.), 3; Abbeville v. Leopard, 61 S. C., 99; 39 S. E. Rep., 248; Smith v. Marston, 5 Tex., 426. Contra—

Brownville v. Cook, 4 Neb., 101, 105.

⁷⁶ Cooper v. People, 41 Mich., 403; 2 N. W. Rep., 51; Mixer v. Manistee Co. Supervisors, 26 Mich., 422.

Where the corporate name is "The mayor and council of the town," etc., the name of the individual officers should not be set out in the statement or declaration. Powers v. Decatur, 54 Ala., 214, 216.

Particular case, where there was change of class. "A part of the name is simply descriptive of the kind of municipal organization. And a change of the organization carries with it a change of these mere words of description." Per Brewer, J., in West v. Columbus, 20 Kan., 633, 636.

The warrant as originally issued ran in the name of the state, but in the subsequent papers and in the record of the proceeding it was entitled in the name of the city. The irregularity was held immaterial, even if the proceedings were to be considered criminal in their nature. Faribault v. Wilson, 34 Minn., 254; 25 N. W. Rep., 449. Misnomer in indictment. People v. Potter, 35 Cal., 110.

times the law directs the action to be instituted in the name of a special local officer or board.⁷⁷ Thus where the law provided that all fines, etc., incurred under the ordinances, bylaws and regulations of any town or city relating to health "may be recovered by complaint in the name of the treasurer," an action to recover a penalty under an ordinance concerning burial grounds, etc., pertains to health and cannot be instituted in the name of the commonwealth by a police officer.⁷⁸

3. THE STATEMENT, COMPLAINT OR INFORMATION.

§ 310. Formal parts of complaint or information. To be in proper form the information, complaint or statement should contain, and the order of its parts will be:

First. The title of the cause. This should specify the term (if court terms exist), the name of the court and the names of the parties to the action, plaintiff and defendant.

Second. If a statement, a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition, where the action is simply a civil one of debt. If a formal information or complaint is required the particular offense must be definitely charged therein, in accordance with the rules of criminal pleading.

TAUBURN COM'RS OF Excise v. Burtis, 103 N. Y., 136; 8 N. E. Rep., 482; Auburn Com'rs of Excise v. Merchant, 103 N. Y., 143; 57 Am. Rep., 705; 8 N. E. Rep., 484; Yonkers Excise Comrs. v. Glennon, 21 Hun. (N. Y.), 244.

Name of treasurer. Townsend v. Hoadley, 12 Conn., 541; Tyler v. Lawson, 30 N. J. L., 120; Watts v. Scott, 1 Dev. (12 N. C.), 291.

78 "May" was construed to mean "shall," since the court deemed the legislative intent to be to provide a uniform method, and thus prevent the confusion theretofore prevailing respecting the method of enforcing of such laws. "This provision seems to be broad and comprehensive in its object, as well as precise and exact in its terms, and intended to prescribe a general

rule easily understood and applicable to all cases." Commonwealth v. Fahey, 5 Cush. (Mass.), 408, per Shaw, C. J., denying the applicability of *In re* Vandine, 6 Pick. (Mass.), 187.

Where one-half of the penalty recovered under a by-law was to go to the informer and one-half to the town treasurer it was held that a qui tam action for such penalty would lie in the name of the informer and the town treasurer. Bradley v. Baldwin, 5 Conn., 288. Compare Lemon v. Reidel, 1 Lanc. Law Rev. (Pa.), 3; Lancaster v. Hirsh, 1 Lanc. Law Rev. (Pa.). 209; Com. v. Bean, Thacher Cr. Cas. (Mass.), 85.

"The plaintiff is that person or body politic alone to whom the penalty is given by the by-law." Third. Though not always required, it is better to set out the ordinance in substance or so much thereof as has been violated, with a specific reference to it, as by title, number, date of passage, etc.

Fourth. Where the action is of debt the amount demanded (which is usually the maximum penalty prescribed by the ordinance) should be stated. However, a failure in this respect would not be fatal, since the sum to be recovered is definitely stated in the ordinance and the defendant would be held to have knowledge thereof.

Though not always required it is better that the information conclude by alleging that the offense was committed against the form of the ordinance, or contrary to the ordinance, or against the peace and dignity of the city, etc. (sometimes contrary to the form of the statute), observing in this respect the form of criminal pleading.

Fifth. The signature of the officer designated by law, as the city attorney, magistrate or police officer; or when required, the signature of the informer.

Sixth. The verification, when required. 79

§ 311. Allegation of notice of ordinance unnecessary—Jurisdiction. As notice of the existence of valid ordinances is required to be taken by all upon whom they are binding, whether residents or non-residents, so it cannot be necessary that there should be an allegation that defendant had notice of the ordinance. So

Thus where the penalty is given to the chamberlain for the use of the corporation, the action must be brought in the name of the chamberlain and not in that of the corporation. Willcock, Mun. Corp., 164.

79 COMPLAINT DEFINED. Campbell v. Thompson, 16 Me., 117, 120; Com. v. Davis, 11 Pick. (Mass.), 432, 436; Com. v. Haynes, 107 Mass., 194; In re Durant, 60 Vt., 176; 12 Atl.Rep., 650; People v. Liscomb, 6 Thomp. & C. (N. Y.), 258, 280; 60 N. Y., 559; State v. Baker, 38 Wis., 71, 81; McMath v. Parsons, 26 Minn., 246; 2 N. W. Rep., 703.

Complaint and information dis-

tinguished. Goddard v. State, 12 Conn., 448; People v. Ayhens, 85 Cal., 86, 88; 24 Pac. Rep., 635.

In the English law, in case of proceedings before justices, a distinction is drawn between proceedings on information culminating in conviction and proceedings on complaint culminating in an order or an adjudication of the existence of a civil debt or liability. 4 Encyclopedia of the Laws of England, tit. "Crime."

How complaint differs from affidavit. State v. Richardson, 34 Minn., 115, 117; 24 N. W. Rep., 354.

⁸⁰ Section 22, supra.

⁸¹ Willcock, Mun. Corp., 176;

Of course, the statement or information must show jurisdiction, as that the offense was committed within the corporate limits, or within the jurisdiction of the court.⁸²

§ 312. Averment of power to pass ordinance. At common law if the by-law is made under the incidental power in the body at large, it is not necessary to set forth the authority of the corporation to make it; but if made under a special power of making by-laws, that must be shown in the pleadings, and also that it was made by the body in whom such power is reposed and at what time it was so made. But in this country it has been declared that it is not necessary to aver that the members of the legislative body who passed the ordinance were duly elected, that they had authority to pass the ordinance violated, are that it had been published as required by law. So Nor is it necessary to allege the reasons for the enactment of the ordinance or the exigencies out of which it grew.

Substance. In the statement, complaint or information—Substance. In the statement, complaint or information only that degree of certainty is required which will inform the defendant of what he is called upon to answer.⁸⁷ It will be held sufficient if it substantially sets forth the nature of the violation alleged.⁸⁸ A complaint is sufficient which describes the

Langon v. Barnardston, 1 Lev., 16; James v. Putney, Cro. Car., 498.

82 State ex rel. v. Baker, 74 Mo., 394.

83 Willcock, Mun. Corp., 172, 173.
84 State v. Merritt, 83 N. C., 677;
Janesville v. Railroad Co., 7 Wis.,
484.

⁸⁵ Hardenbrook v. Ligonier, 95 Ind., 70.

Power to pass an ordinance is a matter of law of which the court will ex officio take notice. Green v. Indianapolis, 22 Ind., 192; Green v. Indianapolis, 25 Ind., 490.

Allegation that ordinance was duly adopted is sufficient. Wagner v. Garrett, 118 Ind., 114; 20 N. E. Rep., 706; Linkenhelt v. Garrett, 118 Ind., 599; 20 N. E. Rep., 708.

86 Cronin v. People, 82 N. Y., 318, 323; Stuyvesant v. New York, 7

Cow. (N. Y.), 588, 606, 607; Martin v. Mott, 12 Wheat. (U. S.), 19. See §§ 139 and 140, supra.

87 Springfield v. Ford, 40 Mo.
App., 586; St. Louis v. Smith, 10
Mo., 438; St. Joseph v. Levin, 128
Mo., 588, 592; 31 S. W. Rep., 101;
St. Louis v. Frein, 9 Mo. App., 590.

⁸⁸ Indiana—Huntington v. Cheesbro, 57 Ind., 74; Frankfort v. Aughe, 114 Ind., 77; 15 N. E. Rep., 802; Goshen v. Croxton, 34 Ind., 239; Huntington v. Pease, 56 Ind., 305.

Kansas-Emporia v. Volmer, 12 Kan., 622.

New Jersey—Kip v. Paterson, 26 N. J. L., 298; Nicoulin v. Lowery, 49 N. J. L., 391; 8 Atl. Rep., 513.

North Carolina—State v. Edens, 85 N. C., 522; Hendersonville v. McMinn, 82 N. C., 532; Greensboro v. Shields, 78 N. C., 417. act complained of in the language of the ordinance, ⁸⁹ especially where the ordinance so clearly individuates the offense that the defendant has proper notice from the mere adoption of the terms of the ordinance what the offense that he is to be tried for really is. ⁹⁰ Even in those jurisdictions where the proceeding is regarded as criminal or *quasi* criminal and a formal information is provided, that particularity which is technically necessary to constitute a good indictment is not required. ⁹¹ In

South Dakota—Lead v. Klatt, 13 S. D., 140; 82 N. W. Rep., 391.

Sufficiency of complaint under particular statutes. Durango v. Reinsberg, 16 Colo., 327; 26 Pac. Rep., 820; Commonwealth v. Nightingale, Thatcher Crim. Cas., 251; Miles City v. Kern, 12 Mont., 119; 29 Pac. Rep., 720.

A charge that defendant "committed a certain offense contrary to an ordinance of the town," is insufficient. Memphis v. O'Connor, 53 Mo., 468.

So Connecticut—State v. Carpenter, 60 Conn., 97; 22 Atl. Rep., 497.
Massachusetts—Com. v. Cutter, 156 Mass., 52, 57; 29 N. E. Rep., 1146

Minnesota-Mankato v. Arnold, 36 Minn., 62; 30 N. W. Rep., 305.

Missouri—Gallatin v. Tarwater, 143 Mo., 40, 46; 44 S. W. Rep., 750; St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045; Kansas City v. Zahner, 73 Mo. App., 396; St. Louis v. Knox, 74 Mo., 79; 6 Mo. App., 247.

Vermont—Winooski v. Gokey, 49 Vt., 282, 286.

⁹⁰ If it follows the language of the ordinance, ordinarily it will be sufficient. However, it must allege an illegal act which the ordinance designed to forbid. State v. Goulding, 44 N. H., 284.

Rule applies to indictments. Com. v. Barrett, 108 Mass., 302; Wharton's Cr. Pr., sec. 220. In crimes against the state the doctrine is that where all the facts which constitute the offense are set forth in the statute it is only necessary to follow the language of the statute. State v. Davis, 70 Mo., 467; State v. Adams, 108 Mo., 208, 211; 18 S. W. Rep., 1000. 91 State v. Dunbar, 43 La. Ann., 836; 9 So. Rep., 492; State v. Baker, 44 La. Ann., 79; 10 So. Rep., 405; Springfield v. Ford, 40 Mo. App., 586; Gallatin v. Tarwater, 143 Mo., 40, 46; 44 S. W. Rep., 750; St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045; St. Louis v. Knox, 74 Mo., 79; Trenton v. Devorss, 70 Mo. App., 8; St. Louis v. Smith, 10 Mo., 439; St. Joseph v. Levin, 128 Mo., 588, 592; 31 S. W. Rep., 101.

In passing upon the sufficiency of an indictment, Mr. Justice Brewer "But the true rule is, not whether it might possibly have been made more certain, but whether * * * it sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Cochran v. United States, 157. U. S., 286; Evans v. United States, 153 U. S., 584, 587, 588; Batchelor v. United States, 156 U. S., 426.

misdemeanors rigid nicety is ever exacted.⁹² Liberal rules of pleading and practice pertain to suits and prosecutions to enforce municipal ordinances.⁹³

In most jurisdictions the statement is not tested by the rules appertaining to criminal procedure, but by those applicable to civil actions.⁹⁴ The action is merely in the nature of an action for the recovery of a debt, and being such, it will be sufficient if it states a good cause of action.⁹⁵

§ 314. Form of complaint—Verification—Conclusion. The complaint should be in writing. 96 Its form is generally directed by local laws. Where the action is brought in the name of an officer as chamberlain (in England), or treasurer, it is sufficient for him to aver generally that he is such officer without setting

92 State v. Kesslering, 12 Mo.,565, 566.

93 St. Louis v. Levin, 128 Mo., 588, 592; 31 S. W. Rep., 101; Hardenbrook v. Ligonier, 95 Ind., 70; Brookville v. Gagle, 73 Ind., 117; Greensburgh v. Corwin, 58 Ind., 518; Goshen v. Croxton, 34 Ind., 239; Bogart v. New Albany, 1 Ind., 38; Smith v. Emporia, 27 Kan., 528.

Same strictness is not required as an information by a common informer. Complaint for the violation of an ordinance is not of this nature. Keeler v. Milledge, 24 N. J. L., 142, 145.

94 Greensburgh v. Corwin, 58 Ind., 518; Goshen v. Croxton, 34 Ind., 239; Springfield v. Ford, 40 Mo. App., 586; St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045.

⁹⁵ Lippman v. South Bend, 84
Ind., 276; Murphy v. Lambert, 59
Ind., 477; McMillen v. Terrell, 23
Ind., 163.

Good if it includes all facts necessary to constitute the offense. Com. v. Cutter, 156 Mass., 52, 57; 29 N. E. Rep., 1146; Com. v. Barrett, 108 Mass., 302.

The complaint need not contain the requisites of a written declaration as required at common law. It will be sufficient if it declares generally on debt. Deitz v. Central, 1 Colo., 323.

DEMAND. As to necessity of demand before suit. Willcox, Mun. Corp., 174, 175; Butchers v. Bullock, 3 Bos. & P., 434, 437.

State of demand need not be filed. Johnson v. Barclay, 16 N. J. L., 1.

Name. Charging defendant by surname, alleging his Christian name to be unknown, held sufficient identification. Levy v. State, 6 Ind., 281. Omission of Christian name fatal, when. Prell v. Mc-Donald, 7 Kan., 426, 454.

96 Allen v. Gray, 11 Conn., 95,
102; Tracy v. Williams, 4 Conn.,
107; Prell v. McDonald, 7 Kan.,
426, 450.

ORAL GOOD. State v. Northern Bell M., etc., Co., 12 Nev., 89, 92.

Officer may make orally. Hobbs v. Hill, 157 Mass., 556; 32 N. E. Rep., 862.

None Required before justice of the peace. Ewbanks v. Ashley, 36 Ill., 177, 180. out his election or appointment.⁹⁷ The same rule applies to boards.

Sometimes the law requires the complaint or information to he made under oath, 98 unless it is filed by some officer in his public capacity. 99

In Massachusetts it has been held that the complaint should not only conclude against the form of the by-law in such case made and provided, but also against the form of the statute by which alone a prosecution can be maintained. The same rule has been announced in New Hampshire, where the action was founded as well upon the statute, which authorized the town to make the by-law, as upon the by-law, and hence the court concluded that it was necessary to allege in the declaration that the offense was committed as well against the form of the statute as against the form of the by-law. But it does not seem necessary to aver that the offense was committed contrary to the form of the statute where the right of action accrues under and by virtue of the ordinance upon which the proceeding is based, since as stated in a Vermont case, "the act of the defendant was not contra forman statuti." The allega-

When required. Alton v. Kirsch, 68 Ill., 261; Chicago v. Kenney, 35 Ill. App., 57, 64.

97 Willcock, Mun. Corp., 164.

98 Prell v. McDonald, 7 Kan., 426. Verification implied in criminal prosecutions. Campbell v. Thompson, 16 Me., 117, 120.

In absence of law so directing, complaint not made under oath, held good. Alton v. Kirsch, 68 Ill., 261.

Distinction between complaint and affidavit. State v. Richardson, 34 Minn., 115; 24 N. W. Rep., 354; McMath v. Parsons, 26 Minn., 246; 2 N. W. Rep., 703.

App., 597; O'Brien v. Cleveland, 4 Ohio Dec., 189; 1 Cleveland Law Rep., 100.

VERIFICATION on information—Sufficiency. Clarence v. Patrick, 54 Mo. App., 462.

JURAT may be signed by magistrate on return day of summons.

State v. Perth Amboy, 51 N. J. L., 406; 17 Atl. Rep., 971.

A police judge in signing his name to the jurat attached to complaint put immediately underneath the letters "J. P." meaning justice of the peace, instead of "P. J." meaning police judge, his appropriate official title. It was contended that this slight irregularity rendered the complaint void. But the court held otherwise and declared it "a weak point." Cherokee v. Fox, 34 Kan., 16, 19; 7 Pac. Rep., 625.

¹ Commonwealth v. Gay, 5 Pick. (Mass.), 44; Commonwealth v. Worcester, 3 Pick. (Mass.), 461, 475, where question was raised but not decided.

² Stevens v. Dimond, 6 N. H., 330, 331, relying upon the Massachusetts cases cited in the last note.

Winooski v. Gokey, 49 Vt., 282,
 286, per Royce, J.

tion that the offense was in violation of the ordinance is equivalent to the words "contrary to the form," etc.4

§ 315. Pleading ordinance violated—Judicial notice. common law the by-law itself must be set out fully in an action of debt upon it and not by way of recital; therefore, it is not sufficient to aver that the defendant incurred the penalty by virtue of a certain by-law, as, for example, having refused an office; but this latter averment appears to be sufficient in an action of assumpsit founded upon the same by-law; for in that form of action greater latitude is allowed, because after all it comes to a question of evidence, what legal consideration there is either to support or raise the assumpsit.⁵ In view of this common law rule, it has often been declared in this country that the by-law must be set forth in the pleading when sought to be enforced by action, or when set up as a protection on the record. The rule is enforced in those courts which, under the law, do not take judicial notice of by-laws and ordinances of municipal corporations, as state courts, justices of the peace, and other local state courts, created directly by state authority and which are not necessarily a part of the municipal government.6 Judicial notice being taken of ordinances by the courts of the municipal corporation, the complaint or statement in such case need not plead the ordinance violated with the same degree of particularity as required in proceedings founded on such ordinance in the state courts where judicial notice of them is not taken. The usual rule of procedure that, neither presumptions of law, nor matters of which judicial notice is taken, need be set forth in an indictment or information is applied properly to a statement or complaint for violation of municipal ordinances.7

4 Faribault v. Wilson, 34 Minn., 254; 25 N. W. Rep., 449.

5 Willcock, Mun. Corp., 173.

COMMON LAW RULE—FORM. In an action of debt, for the penalty of a by-law, the time when it was made, the parties by whom it was made, their authority to make it, the custom on which it is founded, if it be founded on a custom, the by-law itself, and the breach of it by defendant, must be set forth; that the court may judge both whether the by-law be good, and

whether the defendant be a proper object of the action. 2 Kyd, Corp., p. 167. Form adopted and approved in Coates v. New York, 7 Cow. (N. Y.), 585.

⁶ When a justice of the peace does not take judicial notice the ordinance must be pleaded and proved. Harker v. New York, 17 Wend. (N. Y.), 199, per Cowen, J.; Winona v. Burke, 23 Minn., 254. See next sections.

⁷ Smith v. Emporia, 27 Kan., 528, 530.

In a Kansas case the ordinance was not set forth in full, or even in part, in the complaint, but the wrongful acts of defendant were alleged with sufficient fullness and precision and the ordinance, of which those acts were charged to be a violation. was referred to by number. Respecting the sufficiency of this complaint, Brewer, J., said: "Whatever may be the rule where proceedings are had in courts other than those of the municipality itself, we think that a complaint in the police court of a city for a violation of one of the ordinances of the city is sufficient, although no part of the ordinance is copied into it, and no express reference is made thereto by date, number, or otherwise, providing the acts or conduct of the defendant in violation of the ordinance are fully and clearly charged. There is no more need of express reference to the ordinance in such a complaint, than there is in an information for a felony in the district court, to the particular section of the statute under which the information is filed. The only question is, Do the acts charged constitute a violation? The police court takes judicial notice of the ordinances, as the district court the statute; and the defendant in each case is bound to know the law."5

§ 316. Same—Reference to ordinance violated required. Following the common law rule applicable to the action of debt, as already indicated, some courts have held that the ordinance

"What did not need to be proved did not need to be alleged." Soloman v. Hughes, 24 Kan., 211, 212, per Valentine, J.

s Per Brewer, J., in West v. Columbus, 20 Kan., 633, 635, quoting from 1 Dillon, Mun. Corp., sec. 346, that "the liberal rules of pleading and practice which characterize modern judicial proceedings should extend to, and doubtless would be held to embrace suits and prosecutions to enforce the by-laws or ordinances of municipal corporations."

An allegation in an indictment for keeping a troublesome dog to the effect that the acts charged are contrary to the form of the ordinance is sufficient to allow the proof of the ordinance in any competent manner, and it is immaterial that the bound volume in which the ordinance appears was not referred to in the indictment. Commonwealth v. Odenweler, 156 Mass., 234; 30 N. E. Rep., 1022.

COMMON LAW RULE. When an action on a by-law founded on a custom is brought in the court of the municipality, the custom should not be set forth in the declaration; for the court must take judicial notice of the custom, for they are the *lex loci*. Willcock, Mun. Corp., 166.

But on a by-law founded on a special custom or one founded on a private act of parliament confined to the city or to any trade in it, a bare recital is not sufficient, but the special custom and by-law violated must be set forth in the complaint.9 Many charters and legislative acts provide that it shall not be necessary to set forth the ordinance at large in the complaint or information.10 But in the absence of such provision the prevailing judicial view is that it is sufficient to set out the substance of the ordinance or the section thereof alleged to have been violated. This rule is reasonable.11

Reference in the complaint or statement to the particular ordinance or part thereof infringed is often required. 12 or the act of parliament must be set out. Willcock, Mun. Corp., 169, 170.

9 State v. Edens, 85 N. C., 522; Hendersonville v. McMinn, 82 N. C., 532; Greensboro v. Shields, 78 N. C., 417; Nodine v. Union, 13 Oreg., 587; 11 Pac. Rep., 298.

Complaint is sufficient where copy of ordinance violated is set out therein. Eberlin v. Mobile, 30 Ala., 548.

By statute in Indiana it is sufficient to set out a copy of the ordinance and recite the number of the section and the date of its adoption. Huntington v. Pease, 56 Ind., 305.

10 Commonwealth v. Worcester, 3 Pick. (Mass.), 461.

11 Faribault v. Wilson, 34 Minn., 254; 25 N. W. Rep., 449; Green v. Indianapolis, 25 Ind., 490; Kip v. Paterson, 26 N. J. L., 298; Nicoulin v. Lowery, 49 N. J. L., 391; 8 Atl. Rep., 513.

Section of ordinance violated need not be set out. Meyer v. Bridgeton, 37 N. J. L., 160.

Ordinance need not be set out; it is sufficient to state its date and purpose, so as to identify it, and allege a violation of it. "Both in forms and principles, our system of pleading is very different from those established at common law. For this reason, common law authorities are of little force upon such subjects in our courts." Goldthwaite v. Montgomery, 50 Ala., 486, distinguishing Case v. Mobile, 30 Ala., 538, where complaint did not show what ordinance had been violated.

"The great weight of authority holds that it is sufficient to refer to an ordinance by its date and purpose, or by its title and the number of the section violated, or by its substance, or, in a general way, with a degree of precision sufficiently direct to identify it." Fairmount v. Meyer, 83 Minn., 456, 458, 459; 86 N. W. Rep., 457.

12 Case v. Mobile, 30 Ala., 538; Lewiston v. Fairfield, 47 Me., 481; Keeler v. Milledge, 24 N. J. L., 142. Method of reference to ordi-Rochester v. Upman, 19 nance. Minn., 108; State v. Reckards, 21 Minn., 47.

Title and section of ordinance violated set forth in complaint is sufficient. Fink v. Milwaukee, 17 Wis., 26.

Complaint, title and substance of ordinance sufficient. Janesville v. Railroad Co., 7 Wis., 484.

Ordinance described by section and date of passage sufficient. Goshen v. Kern, 63 Ind., 468; 30 Am. Rep., 234; Elkhart v. Calvert, 126 Ind., 6; 25 N. E. Rep., 807; Whitson v. Franklin, 34 Ind., 392.

Complaint sufficient where it refers to the ordinance by title or date of approval and the date and paper of its publication and reformation charged the violation of an ordinance entitled "Revision of the ordinances of the city of Kansas, Mo., of May 12, 1888," is bad, since it refers to the whole book of the ordinances and not to the special ordinance violated.¹³ A reference to the section violated was held insufficient where the section mentioned defined several distinct offenses. A law providing that the complaint need only state the number and section number of the ordinance violated was held not to apply, since such general reference was not sufficient to notify defendant of the particular charge against him.14 Where one section of the ordinance made it unlawful for any railroad company to run any locomotive or cars over any railroad track within the corporate limits at a faster rate of speed than four miles an hour and another section imposed a penalty upon any engineer or person having control of any engine, car, etc., who should violate any of the provisions of the ordinance, the complaint should refer to both sections, the one creating the offense, and the other imposing the penalty.15

§ 317. **Negativing exceptions.** In an action to recovery the penalty of an ordinance forbidding the sale of liquor, without a license, "except such as shall be compounded and intended to be used as a medicine," the complaint must negative the exception. "Every allegation in the complaint may be true, and yet the party charged may not have violated the law, for the facts stated do not necessarily constitute an offense against the ordinance." The rule of law is that when the exception is in the body of the law which enacts the offense and enters into it as a part of its description it becomes necessary to state all the facts which constitute the offense; and to do this the exception in such case must be negatived. So where there is an exception in the enacting clause the party pleading it must show that his adversary is not within the exception. But if the exception is

cites the several specific sections alleged to have been violated. Emporia v. Volmer, 12 Kan., 622.

The averment that the act was done contrary to and in violation of an ordinance, setting out the title thereof, is a sufficient averment of the existence of the ordinance at the time of the violation complained of. Meyer v. Bridgeton, 37 N. J. L., 160.

¹³ Kansas City v. Whitman, 70 Mo. App., 630.

¹⁴ Fink v. Milwaukee, 17 Wis., 26.

¹⁵ Complaint held insufficient for failure to refer to the section imposing the penalty. Whitson v. Franklin, 34 Ind., 392.

¹⁶ Roberson v. Lambertville, 38 N. J. L., 69, 73.

distinct from the enacting clause, as where it is in a subsequent clause or a subsequent law, it then becomes matter of defense and need not be negatived.¹⁷ Thus a complaint for the violation of an ordinance forbidding the keeping open of a saloon on Sunday, but which permitted the furnishing of meals, etc., and allowed saloons to do business between the hours of 2 P. M. and 10 P. M. under certain restrictions, it is not necessary to negative the exceptions.¹⁸

In a New Jersey case the ordinance required that no person should be allowed to place any box or other obstruction in any street in front of his residence or place of business, or suffer the same to remain there. It contained a proviso that if public transit be not thereby interrupted, seven days shall be allowed for removing said obstruction. A declaration to recover the penalty for a violation of this ordinance which set out the offense or thing prohibited was held good.¹⁹

§ 318. Several offenses—Joinder. Each successive violation of the ordinance may be treated as a distinct cause of action, but the complaint need not consolidate the several causes so that the combined penalties will exceed the court's jurisdiction.²⁰ Where the aggregate sum claimed does not exceed the court's jurisdiction several violations may be united in one com-

17 Elkins v. State, 13 Ga., 435, 439; Com. v. Maxwell, 2 Pick. (Mass.), 138; Com. v. Hart, 11 Cush. (Mass.), 130; per Cooley, J., in Lynch v. People, 16 Mich., 472, 476; Myers v. Carr, 12 Mich., 63, 71, per Manning, J.; Attorney-General v. Oakland Bank, Walker Ch. (Mich.), 90, 93; Tell v. Fonda, 4 Johns (N. Y.), 304; State v. Barker, 18 Vt., 195, 197; State v. Butler, 17 Vt., 145, 149.

¹⁸ Lynch v. People, 16 Mich., 472, per Cooley, J.

19 "In this case the placing or leaving a box, etc., in the street, is the offense or thing prohibited. The subsequent clause contains mere matter of excuse which the defendant must avail himself of as a matter of defense." McGear v. Woodruff, 33 N. J. L., 213, 215.

If the by-law excepts certain classes of persons from its operation, and the exception be material, it is necessary to aver that defendant is not within it. Willcock, Mun. Corp., 174; Rex v. Abingdon, 1 Salk., 432; Rex v. Coopers of Newcastle, 7 Term Rep., 547.

Affidavit for complaint held defective for failure to allege that defendant was not within exceptions of the ordinance. Martinsville v. Frieze, 33 Ind., 507.

On charge of selling liquor it is not necessary to aver that it was not sold for medicinal, etc., purposes. State v. Beneke, 9 Iowa, 203.

Whitehall v. Meaux, 8 Ill.
 App., 182; Lancaster v. R. R. Co.,
 Lanc. Bar. (Pa.), 99.

plaint.21 This is the common law rule and it prevails in the absence of charter or statutory change.22 Where the law authorizing the ordinance provides that any number of violations may be included in one information any number of offenses may be charged and a fine imposed for each.23 An information charging that defendant "did unlawfully sell beer to persons unknown," was held to charge, in effect, one sale to several persons jointly, and hence, not bad for duplicity under an ordinance constituting each separate act of selling an offense.24 A complaint which charges more than one offense in the same count is bad.²⁵ In a charge of swearing the same profane oath several times, on the same day, each oath need not be complained of, separately.26 An information under an ordinance making it unlawful to let or try to let jacks, stallions, or bulls serve mares or cows in public places, which alleges that defendant did "let or try to let a stallion serve a mare," was held good against the contention that it charged two distinct offenses.²⁷

Separate suits must be brought for the enforcement of each ordinance which presents a distinct and substantive cause of action and which has been the subject of distinct legislation. Thus one suit cannot be brought for the violation of ordinances, though relating to the same general subject, which are entirely different in the specification of offenses to which they affixed penalties and where the penalties differ in amounts.²⁸

§ 319. Same—Joint liability. Where the ordinance has been violated by two or more individuals, as one forbidding the

²¹ Hensoldt v. Petersburg, 63 Ill., 111.

²² Brooklyn v. Cleves, Hill and Denio Supp. (N. Y.), 231, 233, per Nelson. C. J.

23 Eldora v. Burlingame, 62
 Iowa, 32; 17 N. W. Rep., 148;
 Jackson v. Boyd, 53 Iowa, 536; 5
 N. W. Rep., 734.

24 State v. King, 37 Iowa, 462.

Illustration of one offense charged in an indictment. Stevens v. Commonwealth, 6 Met. (Mass.), 241, per Shaw, C. J.

Charge of violation on divers days. Motion to quash on the ground that several offenses were charged made after plea of defendant denied. Lead v. Klatt, 13 S. D., 140; 82 N. W. Rep., 391.

Where the complaint includes a charge punishable only by state statutes, held not bad for duplicity as the statutory charge may be eliminated as a surplusage. Eldora v. Burlingame, 62 Iowa, 32; 17 N. W. Rep., 148.

25 Tiedke v. Saginaw, 43 Mich.,64; 4 N. W. Rep., 627.

²⁶ Johnson v. Barclay, 16 N. J. L., 1.

²⁷ Bayard v. Baker, 76 Iowa, 220;40 N. W. Rep., 818.

28 Kensington v. Glenat, 1 Phila. (Pa.), 393.

sale of liquor, the action may be against one or more.²⁹ But a joint action against three persons for offenses individually separate and distinct cannot be maintained.³⁰

- § 320. Statement or information for penalty for second offense. The rule of criminal pleading is that, where the offense is the first, or is prosecuted as such, the indictment need not charge it to be the first, for this is presumed. But if it be the second or third, and the sentence is to be heavier by reason of its being such, the fact thus relied on must be averred in the indictment; because, by the rules of criminal pleading, the indictment must always contain an averment of every fact essential to the punishment to be inflicted.³¹ This rule has been applied to informations charging the violations of ordinances. Thus, where a greater punishment may be inflicted on a conviction for a second or subsequent violation of an ordinance than for the first, the fact that the offense charged is a second offense must be averred in the information or statement, in order to justify the increased punishment.³²
- Sufficient of complaint or statement-Illustrative Drunkenness-Intoxication. Complaint must state that the intoxication resulted in the disturbance good order and quiet of the corporation, where this is an ingredient of the offense.33 But where it is made an offense merely to appear in such condition on the streets and public places, the statement that defendant appeared in such condition, specifying the time and place, will be sufficient, since the gist of the action is being drunk in a public place.34

DISOBEYING ORDER. An averment that defendant did disobey an order "after the same was duly served on him" is bad, since it is not a charge that the order was duly served.

²⁹ The liquor was owned by three persons. An action against only two was sustained. It was considered in the nature of a tort for which one or more may be sued. Jacksonville v. Holland, 19 Ill., 271.

Action against one of two partners. Smith v. Adrian, 1 Mich., 495.

30 Handlin v. State, 16 N. J. L.,

96; Westgate v. Carr, 43 Ill., 450,

³¹ 1 Bishop, Crim. Law (6th Ed.), sec. 961.

32 Larney v. Cleveland, 34 Ohio St., 599.

33 Jeffreys v. Defiance, 11 Ohio Dec., 144.

³⁴ Gallatin v. Tarwater, 143 Mo., 40; 44 S. W. Rep., 750, in effect overruling St. Joseph v. Harris, 59 There must be an allegation of the fact of legal service.³⁵ So the charge that defendant "did disobey the lawful order of the health officer," etc., without alleging the act of neglect, or in what it consisted, is insufficient.³⁶

DISORDERLY CONDUCT forbidden "in any street, house or place within the city." The complaint must show that the act was committed in a street or house or other designated locality within the city.³⁷

Selling Liquor Without License. Merely charging sale to named person is not sufficient, but the complaint must allege that the sale was made without a license, having first been procured, as required by ordinance. So in such case a complaint which fails to state to whom the liquor was sold, without alleging that it was sold to a person unknown, is fatally defective. Here the allegation was that liquor was sold to "each of various and divers person." So

Just Cause to Suspect. Ordinarily, a complaint which merely charges that the complainant has just cause to suspect, and does suspect that the defendant is guilty of violating a city ordinance, as selling liquor without a license, without avering that he is guilty, will be held bad. It is not made with such reasonable certainty as to be the ground of a judicial determination, conviction and sentence. As stated by Van Syckel, J.: "This is not a proceeding to obtain a warrant for the purpose of arresting an offender, to answer to a mere formal complaint, by indictment or information in another court, but is the basis of a substantive criminal charge, upon which the alleged offender is to be tried in a court of competent jurisdiction, and his guilt or innocence determined." "The salutary rule of the common law that no one shall be compelled to answer a

Mo. App., 122; Green City v. Holsinger, 76 Mo. App., 567.

Public drunkenness. Fairmont v. Meyer, 83 Minn., 456; 86 N. W. Rep., 457.

35 State v. Soragan, 40 Vt., 450.

36 State v. Soragan, 40 Vt., 450.

87 Barton v. La Grande, 17 Oreg.,
 577; 22 Pac. Rep., 111.

Disorderly conduct. Chicago v. Kenney, 35 Ill. App., 57.

38 Cunningham v. Berry, 17 Oreg., 622; 22 Pac. Rep., 115.

39 Roberson v. Lambertville, 38 N. J. L., 69, 72, per Van Syckel, J.; State (Flanagan) v. Plainfield, 44 N. J. L., 118; Greely v. Passaic, 42 N. J. L., 87, 93; Com. v. Dean, 21 Pick. (Mass.), 334.

Contra. Information held good which did not state to whom liquor was sold. Hill v. Dalton, 72 Ga., 314.

40 Roberson v. Lambertville, 38 N. J. L., 69, 72. criminal charge unless it is expressed with reasonable precision, directness and fullness, so that he may be prepared to meet and repel it, extends to every mode in which a citizen of this state can be put upon his defense to a charge of violating the criminal law and must be recognized and enforced in this case." ⁴¹

UNSAFE BUILDING. Where the law requires inspection and notice to owner before liability to prosecution will lie, the complaint must allege personal inspection and notice, otherwise it will be insufficient.⁴²

RESISTING ARREST. In charging resistance of a night watchman in making an arrest, the complaint will be held bad if it does not allege that the night watchman was authorized to make arrests.⁴³ In such case the complaint must set out facts showing what ordinance was violated. A mere allegation "contrary to the form of the ordinance of such city" is insufficient.⁴⁴ So the statement must set forth the nature of the offense for which the arrest was being made when the resistance or interference occurred.⁴⁵

Refusing to Supply Water. Complaint to supply water by an agent of a water company must allege the legal obligation to supply and offer or tender to pay the amount required for such water.⁴⁶

CUTTING DOWN AND MAKING USE OF TREES. Under an ordinance which makes it unlawful "to cut down and make use of cedar or other trees," growing at a designated place within the corporate limits, the charge must state not only that the trees were cut down, but that they were made use of, etc., the offense being the cutting and making use of the trees. ⁴⁷

Taking Animals From Pound. Where the complaint alleges that defendant did break open the inclosure established by the city as a pound and did take therefrom animals therein lawfully impounded contrary to an ordinance duly passed, etc., referring to the same, the complaint is sufficient.⁴⁸

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41 Adapted from Shaw, C. J., in
Commonwealth v. Phillips, 16
Pick. (Mass.), 211, 213.
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 ⁴² Schafer v. Atlantic City, 58 N.
 J. L., 131; 32 Atl. Rep., 133.

⁴³ Lamar v. Hewitt, 60 Mo. App., 314.

⁴⁴ Marshall v. Standard, 24 Mo. App., 192.

⁴⁵ Marshall v. Standard, 24 Mo. App., 192, 196.

⁴⁶ Johnson v. Winfield, 48 Kan., 129; 29 Pac. Rep., 559.

 $^{^{47}}$ State v. Moultrieville, 1 Rice (S. C.), 158.

⁴⁸ Smith v. Emporia, 27 Kan., 528, 529.

BURNING TAN TO THE ANNOYANCE OF PERSONS, etc. In a complaint for violation of an ordinance which declares it shall be unlawful to burn tan to the annoyance and discomfort of any person or persons residing within the vicinity; and that if one does, and shall not at once desist, upon the request of any citizen annoyed thereby, or shall be guilty of any subsequent violation of such ordinance, he shall be subject to fine, etc., it is necessary to aver a burning after a request to desist, and the names of the persons who were annoyed.⁴⁹

DESCRIPTION OF PLACE. In a complaint charging the sale of intoxicating liquor contrary to an ordinance, where the place is described as a "certain one story frame building, known as West's Drug Store, and being within the corporate limits of the city of C.," it is sufficient.⁵⁰

PAWN BROKER REFUSING OFFICIAL INSPECTION OF BOOKS. The complaint of the violation of the ordinance in not permitting the inspection by a police officer of the book required by the ordinances to be kept by defendant as pawn-broker, is good, although it only inferentially charged that defendant kept said book.⁵¹

NUISANCE. Under an ordinance forbidding the maintenance of injurious trades which constitute annoyance to persons and property within the city, the complaint must state facts showing that a nuisance in fact has been maintained. It is not enough to allege that defendant violated a specified ordinance

49 "Now the defendant had a right to contest several matters under this ordinance, which he could not do unless the persons annoyed were named. He had a right to show that the persons complaining were not annoyed; that no smell issued from his premises, or that if it did it did not reach complainants, or that it was not annoying to them, or that the persons complaining were not in his vicinity, or were without the limits of the corporation, or that no request had been made to him to desist. How was it possible for him to prove any of these things, unless the names of the citizens annoyed, or some of them, were given? A grand jury might as well indict a man for murder without saying who was dead." Per Vredenburgh, J., in Tyler v. Lawson, 30 N. J. L., 120, 121, 122.

50 "If the testimony showed that there was such building within the city, and thus known, the identification would be complete. A specification of the lot and block upon which the building was situated, would under those circumstances be unnecessary." West v. Columbus, 20 Kan., 633, 634, per Brewer, J.

51 St. Joseph v. Levin, 128 Mo.,588; 31 S. W. Rep., 101.

"by maintaining a nuisance within the limits of said city." This is only stating a conclusion of law. So a specification of the act "that said defendant kept a large quantity of hides, tallow and other substances which emitted a disagreeable odor," is insufficient. The facts stated do not constitute a nuisance, either public or private. It must be averred that the keeping, etc., was offensive or disagreeable to some person other than the defendant, or to some portion of the community. 52

Animals Running at Large. Under an ordinance providing that it shall not be lawful to suffer any swine to run at large, a charge that the hogs were at large contrary to the ordinance is not sufficient. This is not equivalent to an allegation that the owner suffered them to run at large. "This knowledge and sufference is the gist of the offense. The penalty is not to be enforced because the hogs were running at large, but because the owner suffered them to run at large."53

Selling Beer. Where the ordinance does not make the offense depend upon the selling of any particular quantity of beer, the information need not charge as to the quantity sold.⁵⁴

Selling Liquor on Sunday. Where the selling of whiskey on Sunday within the city limits constitutes the offense, the quantity sold, as well as the place where it was drunk, need not be averred.⁵⁵

PERMITTING SWINE TO GO UPON SIDEWALK. Under an ordinance making it unlawful for any person to permit swine under his care, to go upon any sidewalk, or otherwise occupy, obstruct, injure or incumber any such sidewalk, so as to interfere with the convenient use of the same by pedestrians, a complaint which alleges that the defendant, on a day named, "unlawfully did permit a large number of swine, towit, thirty swine, then and there under the care of him, the said defendant—to go upon and injure the sidewalks on certain public streets in the city of C——, to-wit, the sidewalks in Harvard Square and North Avenue," was held good. It contains a sufficient averment that the sidewalks mentioned are part of

⁵² Lippman v. South Bend, 84 Ind., 276.

⁵³ Case v. Hall, 21 Ill., 632, 636, per Breese, J.

⁵⁴ State v. King, 37 Iowa, 462.

So as to price at which liquors were unlawfully sold. Clare v. State, 5 Iowa, 509.

⁵⁵ Megowan v. Com., 2 Metc. (Ky.), 3.

a highway It is not bad for duplicity on the ground that it charges more than one offense, or that the offense is alleged to have been committed on more than one street, if it appears that the streets named were one continuous street.⁵⁶

PROFANE SWEARING. Charge in the precise words spoken is sufficiently specific.⁵⁷

DISTURBING PEACE. In a complaint for disturbing the peace it is sufficient to set out that the defendant did break the peace and quiet of said village contrary to the provisions of a specified ordinance entitled "An ordinance relative to disturbance and breaches of the peace," giving the date of its adoption.⁵⁸

KEEPING HOUSE OF ILL-FAME. An averment that defendant did, on (a certain day and at a specified place), 'Leep a house of ill-fame and prostitution, within said city,' etc., sufficiently describes the offense.⁵⁹

TRESPASS. In a prosecution for trespass on private premises where the complaint contains no description of the *locus in quo*, and the name of the owners are not given in it, it is not sufficient as there is not such statement of facts as will render judgment in the action a bar to another.⁶⁰

Various Offenses and the insufficiency of the complaints therein are referred to in the note 61

§ 322. Sufficiency of report of police. In some jurisdictions trials for the violations of ordinances and local police regulations are allowable upon the report of certain officers, as police officers, eity marshal or chief of police. Sometimes an infor-

⁵⁶ Com. v. Curtis, 9 Allen
 (Mass.), 266, 269, per Metcalf, J.
 ⁵⁷ Johnson v. Barclay, 16 N. J.
 L., 1.

58 Vicksburg v. Briggs, 85 Mich.,
502; In re Bushey, 105 Mich., 64;
62 N. W. Rep., 1036.

⁵⁹ Greensburgh v. Corwin, 58 Ind., 518, 520.

60 St. Louis v. Babcock, 156 Mo., 148; 56 S. W. Rep., 732.

61 VARIOUS OFFENSES.

Suffering filth to remain on passage way abutting land of defendant. Com. v. Cutter, 156 Mass., 52; 29 N. E. Rep., 1146.

Keeping open saloon. Lynch v. People, 16 Mich., 472, 473; Jordan v. Nicolin, 84 Minn., 367, 370; 87 N. W. Rep., 915.

Keeping sale stable and stock yard, without a license. St. Louis v. Knox, 74 Mo., 79, 80.

Carrying on fertilizing business without a license under special provision. Charleston v. Ashley Phosphate Co., 34 S. C., 541; 13 S. E. Rep., 845.

Keeping assignation house. State v. Baker, 44 La. Ann., 79; 10 So. Rep., 405.

Erecting building with wall less

mation is filed founded on such report.⁶² Where the report is required to be made by the chief of police it has been held that he need not sign the report in person, but his name may be affixed by a subordinate in charge of the office where such reports are usually prepared.⁶³ Where the ordinance fixes the maxi-

thick than required. Com. v. Cutler, Thacker Cr. Cas. (Mass.), 137.

Relative to market stand. Com. v. Rice, 9 Metc. (50 Mass.), 253.

Permitting animals to stop to feed on highway. Com. v. Bean, 14 Gray (80 Mass.), 52.

Obstructing water way. State v. Wilson, 106 N. C., 718; 11 S. E. Rep., 254.

Obstructing street. Kingman v. Berry, 40 Kan., 625; 20 Pac. Rep., 527.

Stopping vehicles on street more than twenty minutes. Com. v. Rowe, 141 Mass., 79; 6 N. E. Rep., 545; Com. v. Fenton, 139 Mass., 195; 29 N. E. Rep., 653.

Maintaining slaughter house. Spokane v. Robison, 6 Wash., 547; 33 Pac. Rep., 960.

Sale of meat without a license. St. Joseph v. Dye, 72 Mo. App., 214.

Conducting show without a license. Brookville v. Gagle, 73 Ind., 117.

Information for carrying concealed weapons. Columbia v. Johnson, 72 Mo. App., 232.

Associating with thieves, pick-pockets, etc. St. Louis v. Fitz, 53 Mo., 582.

Vagrancy. State v. Preston (Idaho, 1894), 38 Pac. Rep., 694; Ex parte McCarthy, 72 Cal., 384; 14 Pac. Rep., 96.

Where the offense can only be committed in a certain relation, as an "omnibus agent," the complaint must aver that, at the time of the commission of the offense the defendant was then acting in such capacity. Napman v. People, 19 Mich., 250.

Keeping disorderly place. State v. Reckards, 21 Minn., 47.

Forbidding minors "to participate in any game of any kind whatever" at place where liquor is sold. Complaint must allege that game played by the minor was one upon the result of which a wager was made. Game construed to mean gambling or game of chance. Williams v. Warsaw, 60 Ind., 457.

Riding bicycle on sidewalk. Whiting v. Doob, 152 Ind., 157; 52 N. E. Rep., 759.

Keeping place for carrying on the game of policy. State v. Flint, 63 Conn., 248; 28 Atl. Rep., 28.

Selling ice on street without permit. Com. v. Reid, 175 Mass., 325; 56 N. E. Rep., 617.

Being inmate of bawdy house. Perry v. State, 37 Neb., 623; 56 N. W. Rep., 315.

Keeping unlicensed dog more than eight weeks old. State v. Brown, 72 Vt., 410; 48 Atl. Rep., 652.

Selling milk without a license. State v. Tyrrell, 73 Conn., 407; 47 Atl. Rep., 686; State v. Gallagher, 72 Conn., 604; 45 Atl. Rep., 430.

G2 Report held insufficient. St. Joseph v. Harris, 59 Mo. App., 122.
G3 St. Louis v. Vert, 84 Mo., 204;
Ex parte Hollwedell, 74 Mo., 395;
Missouri City v. Hutchinson, 71
Mo., 46; Kansas City v. Flanagan,
G9 Mo., 22; Ex parte George Washington, 10 Mo. App., 495.

Oral charge sufficient. Hobbs v.

mum and minimum penalties the trial can be had on such report, although it does not ask for any sum. 64

§ 323. Amendment of statement or information. The law is liberal in permitting amendments of statements or informations, especially where the defect relates to form and not to substance. Such amendments are allowable by the general law of the state or charter or ordinances of the local corporation, 65 or the rules of practice which obtain in the particular court. 65½ Usually the action will not be dismissed for any formal defect in the statement if it substantially sets forth the nature of the violation alleged. 66 The rule is generally enforced that an information charging an offense of a criminal nature, originating in an inferior court, cannot be amended in the appellate court. 67

§ 324. How defective statement or information cured. Although the statement or information is defective and advantage of such defective is not taken by the defendant, and the trial proceeds and verdict and judgment rendered, it does not follow that such proceeding should be treated as nugatory. All defects pertaining to form are regarded as waived if advantage is not taken in the manner permitted. They are cured by the doctrine of waiver. Defective statements are also cured by the doctrine of aider, that is, certain defects of which advantage is not taken by the defendant are cured by subsequent proceedings, by verdict or judgment or by statute. Thus if a defendant goes to trial on the plea of not guilty he will be held to have waived a defective statement relating to form. ⁶⁸ But the

Hill, 157 Mass., 556; 32 N. E. Rep., 862.

64 St. Louis v. Vert, 84 Mo., 204. 65 The Municipal Code of St. Louis, sec. 1202, p. 687.

65½ An amended information may be filed before the police justice of the City of St. Louis without being noted on the docket; and on appeal the minute entry by the clerk on the back of the information together with his certificate sent up with the other papers in the case sufficiently shows that the amended information was filed and when. St. Louis v. Lee, 8 Mo. App., 598.

THE REPORT OF THE CHIEF OF POLICE may be amended. St. Louis v. Vert, 84 Mo., 204.

66 The Municipal Code of St. Louis, sec. 1201, p. 687.

67 State v. Russell, 88 Mo., 648; State v. Kemple, 27 Mo. App., 392.

The ordinances of Kansas City provide that the procedure in cases for the infraction of its ordinances shall be as in misdemeanors before justices of the peace; held an amendment of the information cannot be allowed on appeal in the criminal court. Kansas City v. Whitman. 70 Mo. App., 630.

68 State v. Welch, 21 Minn., 22.

doctrine of waiver and aider is clearly defined. It is confined to formal defects. It does not apply to those which are radical in their character, therefore, neither (1) the objection of the jurisdiction of the court over the subject-matter of the action, nor (2) that the statement or information does not state facts sufficient to constitute a cause of action are waived. They may be raised at any stage of the proceeding for they are defects of substance. Where the law expressly forbids jurisdiction a party cannot confer it by failure to present the objection. So where the statement is wholly wanting in material averment, that is, where it fails to show on its face a cause of action it will be insufficient even after verdict and judgment. 69 The doctrine of aider after verdict and judgment relates solely to formal defects, such as inartistic, bungling, indefinite, uncertain and imperfect statements.

4. THE TRIAL—SUMMARY OR JURY—PROCEEDINGS.

§ 325. Arraignment and plea. In proceedings by indictment arraignment of defendant and a formal entry of his plea are conditions precedent to other proceedings. The record must show that such steps have been taken. This course is also adopted in proceedings by information in case of misdemeanors, under statutes, or, the rules of the common law. However, it is not usually extended or deemed necessary to a prosecution for the violation of a local police regulation, especially where the offense is not regarded as a crime against the law of the state. In Missouri these steps are held unnecessary, notwithstanding the charge may be viewed as quasi criminal, as keeping a bawdy house. The state of the state of the state of the charge may be viewed as quasi criminal, as keeping a bawdy house.

§ 326. Mode of conducting trial—Civil or criminal. The mode of conducting the trial prescribed by charter, of course, is to be pursued.⁷² The procedure in case of misdemeanor is

69 Lang v. Brookston, 79 Ind.,183; Com. v. Bean, 14 Gray (80 Mass.), 52.

Formal defect apparent on the face of complaint cannot be taken for first time in the Superior Court on appeal. Statutory rule applied. Com. v. Lagorio, 141 Mass., 81; 6 N. E. Rep., 546; Com. v. Reid, 175 Mass., 325; 56 N. E. Rep., 617.

70 Thomas v. State, 6 Mo., 457.

71 Lexington v. Curtin, 69 Mo., 626.

The same rule applied to charge of keeping sale stable without a license in violation of an ordinance. St. Louis v. Knox, 74 Mo., 79; 6 Mo. App., 247.

Disturbing the peace and public drunkenness. Delaney v. Kansas City Police Court, 167 Mo., 667, 678; 67 S. W. Rep., 589.

72 State v. Zeigler, 32 N. J. L.,

often made applicable by charter or statute.⁷⁸ Where the power to enforce ordinances is conferred upon justices of the peace, in the absence of legal direction, he is authorized to proceed as in other cases tried before him.⁷⁴ So when police justices or municipal judges are invested with the same jurisdiction as justices of the peace or trial justices, the rules of procedure in ordinance cases is the same, unless provision is otherwise made by law.⁷⁵ Where the proceeding is regarded as civil and the mode is not provided, the trial is to be conducted according to the rules applicable to civil cases,⁷⁶ but, in such case where the action is viewed as criminal or quasi criminal it is governed by stricter rules of investigation. In some jurisdictions the rules applicable to criminal procedure are adopted.⁷⁷

§ 327. **Pleading the defense.** The method of raising or pleading the defense will depend upon local practice. Usually formal pleading upon the part of the defendant is not required.⁷⁸ Ordinarily all questions as to the legal sufficiency of

262; State (Hankinson) v. Trenton, 51 N. J. L., 495; 17 Atl. Rep., 1083.

⁷³ Delaney v. Kansas City Police Court, 167 Mo., 667; 67 S. W. Rep., 589; Cassville v. Jimerson, 75 Mo. App., 426; Golden City v. Hall, 68 Mo. App., 627.

74 Ewbanks v. Ashley, 36 Ill., 177, 180.

75 People *ex rel*. v. Cox, 76 N. Y., 47; Beaufort v. Ohlandt, 24 S. C., 158; Lexington v. Wise, 24 S. C., 163.

76 Chicago v. Kenney, 35 Ill. App., 57; Greensburgh v. Corwin, 58 Ind., 518; Green v. Indianapolis, 25 Ind., 490; Lemon v. Reidel, 1 Lanc. Law Rev. (Pa.), 3; Huron v. Carter, 5 S. D., 4, 7; 57 N. W. Rep., 947.

TROWN V. Mobile, 28 Ala., 722. CRIMINAL PROCEDURE. Remark of presiding judge to jury: That proceeding was a "civil suit, but if jury considered the evidence they would find it decidedly criminal." held obnoxious. Furhman v. Huntsville, 54 Ala., 263, 265.

When proceedings are instituted, "they imply the commission of a crime, and their end is the punishment of that crime," and the trial should be conducted according to rules applicable to indictments for misdemeanors. Brown v. Mobile, 23 Ala., 722, 724.

"A trial before the mayor for a breach of city ordinances, may often involve much more serious consequences to the accused than a prosecution by indictment in the circuit court." Withers v. State ex rel., 36 Ala., 252, 264.

"Ordinances are punitive regulations; and the object of a proceeding for the violation of them is not redress for a civil injury, but the punishment of an offender against the peace and good order of society. Hence, they are termed quasi criminal proceedings." Wither v. State ex rel. Posey, 36 Ala., 252, 262; Mobile v. Rouse, 8 Ala., 515.

78 Moundsville v. Velton, 35 W. Va., 217; 13 S. E. Rep., 373.

If defendant claims that the

the statement or complaint, or objection to jurisdiction of the subject-matter can be raised by demurrer. 79 Where the defense is that the ordinance, e.g., imposing a license tax for the sale of liquor, is oppressive and unequal the plea must set forth facts showing its oppressiveness and inequality, or the facts from which this may be determined.80 So the defense of unreasonableness of the ordinance must be specific, as the legal presumption is in favor of the validity of the ordinance. Ordinarily the defendant will be required to point out specifically wherein the ordinance is unreasonable as applied to the facts of the particular case and usually the burden is upon him, to demonstrate the invalidity of the ordinance.81

Summary trial-Origin. In England, notwithstanding the provision of Magna Charta that no freeman shall be taken, imprisoned or condemned, but by lawful judgment of his peers, or by the law of the land, it has been the constant course of legislation in that country, for centuries past, to confer summary jurisdiction upon local magistrates and justices of the peace for the trial and conviction of parties for minor police offenses, such as petty assaults and batteries, roguery and vagabondism, public drunkenness, family abandonment, etc. Workhouses and houses of correction, principally occupied by quest for trial by jury. Bedford v. ordinance is void he must present such defense. Frankfort v. Aughe,

114 Ind., 77; 15 N. E. Rep., 802. 79 Selma v. Stewart, 67 Ala.,

338; Williams v. Hinton, 1 Ala., 297.

Objection to the joinder of several offenses under the Code of South Dakota can only be taken advantage of by demurrer; it cannot be by motion to quash after plea of defendant or by motion in arrest. Lead v. Klatt, 13 S. D., 140; 82 N. W. Rep., 391.

Where the defendant demurs to the complaint, but before the court takes action thereon, pleads not guilty, the demurrer will be held waived. Pitts v. District of Opelika, 79 Ala., 527.

A plea to the jurisdiction cannot be filed after the case is transferred to another court upon reRice, 58 N. H., 227.

Where the declaration alleges that the meeting at which the bywas passed was "legally warned and held," and defendant demurs, because declaration fails to set out the warning, held demurrer admitted the meeting was legally warned and hence defendant could not question the legality of the warning. Winooski v. Gokey, 49 Vt., 282, 286.

80 Columbia v. Beasly, 1 Humph. (Tenn.), 232; 34 Am. Dec., 646.

81 Lancaster v. Edison Electric Illuminating Co., 8 Pa. Co. Ct. Rep., 178.

A general assertion in brief that the ordinance involved is in violation of the federal and state constitutions, held not to raise the question. Standard Oil Co. v. those so convicted have been maintained, certainly from the days of Queen Elizabeth to the present time, as a part of the police system. Both the jurisdiction and the means of punishment have been deemed essential to the good government and well being of society:⁸² In this country there has been no time since the earliest days of the colonies that like summary jurisdiction has not been exercised; sometimes under British Statutes, but more generally by virtue of laws passed by the colonial and state legislatures. The justice of the peace has always been regarded as an important functionary, and a large portion of the police power of the state has been enforced through his instrumentality.⁸³

It is thus apparent that infractions of such local police regulations have ever been looked upon as trivial offenses, not in their essence crimes or misdemeanors, as those terms are employed in our criminal jurisprudence. In all such cases, therefore, it is entirely competent, unless the constitution forbids, to provide for summary trial without a jury, either in the municipal charter or by act of the legislature of the state. The necessity of summary trial of such offenses is obvious. To insure the prompt and efficient exercise of the police authority, with which municipal corporations are ordinarily clothed, the trial of offenders must be speedy and the punishment summary, which are impossible of attainment under the slow and formal methods of prosecuting by indictment or information and trial by jury. In the large cities, especially because of the vast number of such hearings daily, jury trial would be utterly impracticable.84

§ 329. Summary jurisdiction of municipal offenses—Enumeration. Summary jurisdiction is constantly exercised in the

Danville, 199 Ill., 50; 64 N. E. Rep., 1110.

82 Summary proceedings in England, 4 Bl. Com., 280, 281.

ss Per Alvey, J., in State v. Glenn, 54 Md., 572, 602, et seq., from whose able and exhaustive opinion the substance of the text is taken.

"It has always been understood that, under the police power, persons disturbing the public peace, persons guilty of a nuisance, or obstructing the public highway, and the like offenses, may be summarily arrested and fined, without any infraction of that part of the constitution which apportions the administration of judicial powers, strictly as such." Per Le Grand, C. J., in Shafer v. Mumma, 17 Md., 331, 336; Proffatt, Jury Trial, sec. 95.

84 Monroe v. Meuer, 35 La. Ann., 1192; Hill v. Dalton, 72 Ga., 314; Shafer v. Mumma, 17 Md., 331, 336; United States v. Green, 19 D. C., 230. trial of violations of the usual municipal police regulations, enacted to preserve the peace, good order, health, safety, convenience and comfort of the inhabitants of the local community; so and has been expressly held to include infractions of ordinances forbidding disorderly conduct, so disturbing the peace, molesting religious societies, profane swearing, so public drunkenness, "riotous" conduct, corner lounging, carrying concealed weapons, assault and battery, et al. tarceny, fit not a felony), selling lottery tickets, keeping gambling house, nuisance, so obstructing sidewalk, or har-

85 Kansas — In re Kinsel, 64 Kan., 1; 67 Pac. Rep., 634; 56 L. R. A., 475; State ex rel. v. Topeka, 36 Kan., 76; 59 Am. Rep., 529; 12 Pac. Rep., 310.

Louisiana—Monroe v. Hardy, 46 La. Ann., 1232; 15 So. Rep., 696.

Minn., 460; 86 N. W. Rep., 449; Mankato v. Arnold, 36 Minn., 62; 30 N. W. Rep., 305.

Missouri—Vaughn v. Scade, 30 Mo., 600.

Nevada—State ex rel. v. Ruhe, 24 Nevada, 251, 262; 52 Pac. Rep., 274.

New Jersey—State (Greely) v. Passaic, 42 N. J. L., 87.

Ohio—Fletcher v. State, 7 Ohio Dec., 316.

Virginia—Ex parte Marx, 86 Va., 40; 9 S. E. Rep., 475.

Washington—State ex rel. v. Kennan, 25 Wash., 621; 66 Pac. Rep., 62.

86 Ex parte Schmidt, 24 S. C., 363.

87 Hunt v. Jacksonville, 34 Fla.,
 504; 43 Am. St. Rep., 214; 16 So.
 Rep., 398; Ex parte Holwedell, 74
 Mo., 395.

88 Inwood v. State, 42 Ohio St.,

89 Johnson v. Barclay, 16 N. J. L., 1.

90 Delaney v. Kansas City Police Court, 167 Mo., 667; 67 S. W. Rep., 589.

91 "Riotous," as used in ordinance, held to mean wanton and boisterous—its popular meaning—and not the technical crime of "riot." State ex rel. Kennan, 25 Wash., 621; 66 Pac. Rep., 62.

⁹² Commonwealth v. Lynch, 6 Pa. Co. Ct. Rep., 536.

93 Opelousas v. Giron, 46 La.Ann., 1364; 16 So. Rep., 190.

94 People ex rel. v. Justices, 74
N. Y., 406; 18 Alb. L. J., 254;
Contra State v. Moss, 2 Jones Law
(N. C.), 66.

95 People ex rel. v. Dutcher, 83
N. Y., 240; People v. Stein, 80
N. Suppl., 847; Murphy v. People,
2 Cow. (N. Y.), 815.

⁹⁶ If punishment may be confinement in jail or penitentiary, jury trial cannot be denied by legislative act or otherwise, under the constitution of Maryland. Danner v. State, 89 Md., 220; 42 Atl. Rep., 965.

97 Ex parte Kiburg, 10 Mo. App., 442.

State v. Grimes, 83 Minn., 460;
 N. W. Rep., 449, following
 Mankato v. Arnold, 36 Minn., 62;
 N. W. Rep., 305.

99 Jury is not necessary in ascertaining the existence of a nui-

bor,² dogs running at large,³ violating Sunday regulations,⁴ selling watered or adulterated milk,⁵ violating market regulations,⁶ resisting an officer,⁷ lewd women on street,⁸ keeping bawdy house,⁹ vagrancy,¹⁰ vagrancy and disorderly conduct, under habitual criminal act,¹¹ professional thieves, pickpockets, etc., in and about Central railroad station in Philadelphia,¹² selling intoxicating liquor,¹³ and selling liquor on Sunday,¹⁴

Many other illustrations of offenses triable summarily ap-

sance. St. Louis v. Stern, 3 Mo. App., 48.

- ¹ People v. Van Houten, 69 N. Y. St., 265.
- ² Hart v. Albany, 9 Wend. (N. Y.), 571.
- ³ State v. Topeka, 36 Kan., 76; 12 Pac. Rep., 310; 59 Am. Rep., 529.
- ⁴ Liberman v. State, 26 Neb., 464; 42 N. W. Rep., 419; Theisen v. McDavid, 34 Fla., 440; 26 L. R. A., 234; 16 So. Rep., 321.
- State v. Fourcade, 45 La. Ann.
 (Pt. 2), 717; 40 Am. St. Rep., 249;
 13 So. Rep., 187.
- 6 Natal v. Louisiana, 139 U. S., 621; 11 Sup. Ct. Rep., 636; 35 L. Ed., 288, affirming State v. Natal, 39 La. Ann., 439; 1 So. Rep., 923.
- ⁷ Marshall v. Standard, 24 Mo. App., 192.
- Shafer v. Mumma, 17 Md., 331.
 Ogden v. Madison, 111 Wis., 413; 55 L. R. A., 506; 87 N. W. Rep., 568; Wong v. Astoria, 13 Oreg., 538; 11 Pac. Rep., 295.

Keeping a house "for the resort of prostitutes, drunkards, tipplers, gamesters, or other disorderly persons." People v. Iverson, 14 N. Y. Crim. Rep., 155; 61 N. Y. Suppl., 220; 46 App. Div., 301.

- 10 State v. Noble, 20 La. Ann., 325.
- ¹¹ People v. McCarthy, 45 How. Pr. N. Y., 97, 98, where it is said: "Both in England and in this state, long prior to the earliest of

our state constitutions, vagrants and disorderly persons, as defined by statute, were made subject to summary trials without jury, and frequently from time to time in both countries, additions have been made by statute to the classes known as disorderly persons, with provisions subjecting them to arrest and trial in the same form," per Davis, J.

12 Byers v. Com., 42 Pa. St., 89.
 13 Iowa—Zelle v. McHenry, 51
 Iowa, 572; 2 N. W. Rep., 264.

Louisiana—Amite City v. Holly, 50 La. Ann., 627; 23 So. Rep., 746; State v. Gutierrez, 15 La. Ann., 190.

Minnesota—Mankato v. Arnold, 36 Minn., 62; 30 N. W. Rep., 305.

New Jersey—Howe v. Plainfield, 37 N. J. L., 145.

Ohio—Markle v. Akron, 14 Ohio, 586; Wightman v. State, 10 Ohio, 452.

South Carolina — Anderson v. O'Donnell, 29 S. C., 355; 13 Am. St. Rep., 728; 1 L. R. A., 632; 7 S. E. Rep., 523.

Vermont—State v. Conlin, 27 Vt., 318.

West Virginia—Moundsville v. Fountain, 27 W. Va., 182.

14 State (Riley) v. Trenton, 51
N. J. L., 498; 5 L. R. A., 352; 18
Atl. Rep., 116; State v. Harris, 50
Minn., 128; 52 N. W. Rep., 387;
Van Swartow v. Com., 24 Pa. St.,
131.

pear in subsequent sections, and also in the Chapter relating to Municipal Control of Offenses Against the State. 15

§ 330. Constitutional right of trial by jury does not apply to municipal offenses. The right of trial by jury existed in England and was formally declared as a right by Magna Charta, 16 but, as we have seen, municipal corporations in that country, prior and subsequent to that declaration, enforced their bylaws by pecuniary penalties in a summary manner; and like summary jurisdiction was constantly exercised in this country; therefore, it has become an established doctrine that, the right of trial by jury is understood to apply alone to those cases or class of cases wherein the right existed under the prevailing rules of the common law, usually embracing only offenses against public laws general in their nature—in England, made penal throughout the realm, and in this country, penal throughout the state—because of their intrinsically criminal character, or because made criminal by statute. 17 Under the prevailing

15 Chapter XV.

16 MAGNA CHARTA. While the Great Charter is usually regarded as the basis of English liberty, it in itself was no novelty, nor did it claim to establish any new constitutional principles or municipal privileges. The charter of Henry the First formed the basis for the whole, but the vague expressions of the older charter were now exchanged for precise and elaborate provisions. As justly remarked by Green: "The Great Charter marks the transition from the age of traditional rights, preserved in the nation's memory and officially declared by the primate, to the age of written legislation, of parliament and statutes, which was soon to come." Green's Short Hist. of the English People, sec. 3, ch. 3.

"Magna Charter remains to-day one of the main foundations of English liberty." 1 Dillon, Mun. Corp. (4th Ed.), sec. 8d.

It "is the keystone of English Liberty." Hallam's Middle Ages, vol. II. ch. 8. "The whole of the constitutional history of England is a little more than a commentary on Magna Charta." Stubb's Const. History, vol. I, ch. 12.

"It is impossible to gaze without reverence on the earliest monument of English freedom which we can see with our own eyes and touch with our own hands, the Great Charter to which from age to age patriots have looked as the basis of English liberty." Green's Short Hist. of Eng. People, ch. 2, sec. 3.

¹⁷ Williams v. Augusta, 4 Ga., 509, 516; Floyd v. Eatonton, 14 Ga. 354; 58 Am. Dec., 559; Hill v. Dalton, 72 Ga., 314; Vason v. Augusta, 38 Ga., 542.

"The framers of all our constitutions were well acquainted with the history of legislation in regard to the exercise of summary jurisdiction, both in England and in this state, and of the needs of society for summary protection against the vicious, idle, vagrant and disorderly portion of its memjudicial view the usual constitutional provisions relating to this subject are not considered as designed to extend the right of trial by jury, but are regarded as confirming and securing it as it was understood at common law.18 Generally, such provisions have no reference whatever to the violation of local by-laws and ordinances made for the internal police and good government of the locality. The penalties permitted to be inflicted are nearly always trivial in character; "and the reason advanced as to why the trials under ordinances can be conducted without a jury, and without violating the constitutional guaranty is, that the constitutional provision does not extend the right, but merely secures it in the cases in which it was a matter of right before the adoption of the constitution. Such trials were conducted generally without juries prior to the adoption of our constitution, and, consequently, do not fall within the constitutional guaranty."19

The Supreme Court of the United States has declared that, within the federal constitution "is to be interpreted in the light of the principles, which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by

bers; and it is difficult to suppose that, by any provision incorporated in those instruments, it was intended to nullify previous legislation, altogether interdict the use of a long and well-established summary jurisdiction for the protection of society, and thus radically change and seriously impair the whole police system of the state." Per Alvey, J., in State v. Glenn, 54 Md., 572, 604, 605.

Right to jury trial applies only to crimes and misdemeanors created and defined by the state penal code. People v. Van Houten, 35 N. Y. Supp., 186; 13 Misc. Rep. (N. Y.), 603.

18 State ex rel. v. Ruhe, 24 Nev.,251, 262; 52 Pac. Rep., 274.

Jury trial elaborately discussed by Bennett, J., in Lincoln v. Smith, 27 Vt., 328, and Redfield, C. J., in State v. Prescott, 27 Vt., 194.

19 Florida-Hunt v. Jacksonville,

34 Fla., 504, 507; 43 Am. St. Rep., 214; 16 So. Rep., 398.

Maryland—State v. Glenn, 54 Md., 572.

New York—People ex rel. v. Justices, 74 N. Y., 406; 18 Alb. L. J., 254.

Ohio-Inwood v. State, 42 Ohio St., 186; Work v. State, 2 Ohio St., 296

Pennsylvania—Byers v. Com., 42 Pa. St., 89.

South Carolina—State v. Williams, 40 S. C., 373; 19 S. E. Rep., 5.

Refers to criminal cases, as they were known when constitution adopted. Greeley v. Hamman. 12 Colo., 94; 20 Pac. Rep., 1.

"It was not intended to introduce trial by jury in cases where it did not exist before, but merely to preserve it inviolate in cases where it existed at the time of the adoption of the constitution." Mcjury.''²⁰ Some cases have held that the right does not apply to new offenses or to cases arising since the adoption of the constitution.²¹ However, the better opinion is that the right applies to that class of cases, which, under the principles of the common law, were triable by jury.²² Therefore, notwithstanding the particular offense was unknown to the common law, if it naturally falls within a class of offenses wherein such right was secured by that law the right of trial by jury is thus guaranteed.²³ The usual constitutional provision that, trial by jury shall "extend to all cases in which it has been hitherto used," is broad enough to embrace statutory offenses thereafter created, if such offenses are of the class of cases in which such trial was in use at the time of the adoption of the constitution.

Gear v. Woodruff, 38 N. J. L., 213, 216.

"All prosecutions," used in the bill of rights of the constitution of Kansas, applies only to prosecutions for violations of laws of state. State *ex rel.* v. Topeka, 36 Kan., 76; 59 Am. Rep., 529; 12 Pac. Rep., 310.

"The right of trial by jury provided for in the constitution of the United States, and of the various states, is understood to mean the common law trial by jury." Wong v. Astoria, 13 Oreg., 538, 545; 11 Pac. Rep., 295.

Constitution securing trial by jury does not apply if offense is of class, which prior to adoption of constitution, were usually regarded as triable in a summary manner. Trigally v. Memphis, 6 Coldw. (46 Tenn.), 382.

²⁰ Per Mr. Justice Harlan, in Callan v. Wilson, 127 U. S., 540.

²¹ Van Swartow v. Com., 24 Pa.
St., 131; Rhines v. Clark, 51 Pa.
St., 96; Ewing v. Filley, 43 Pa. St., 384; Tims v. State, 26 Ala., 165;
Kimball v. Connor, 3 Kan., 414;
State Board of Health v. Roy, 22
R. I., 538; 48 Atl. Rep., 802.

"Trial by jury is a well known

kind of trial. The right of trial by jury, as secured by the constitution, is in our opinion, simply the right to that kind of trial. And the right remains inviolate so long as the jury continues to be constituted as the jury was constituted when the constitution was adopted, and so long as all such cases as were then triable by jury continue to be so triable without restrictions orconditions which materially hamper or burden the right." Per Durfee, C. J., in Mathews v. Tripp, 12 R. I., 256. 258.

Constitution declaring trial by jury in all cases in which it has been heretofore used shall remain inviolate, does not apply to an offense thereafter created and tried in a court not then existing. People v. Van Houten, 35 N. Y. Supp., 186; 13 Misc. Rep. (N. Y.), 603.

²² Plimpton v. Somerset, 33 Vt., 283.

²³ This appears to be the view of the Supreme Court of the United States as expressed in Callan v. Wilson, 127 U. S., 540.

Keeping open dram shop on Sunday. The case is triable by

In other words, the right extends to such new and like cases as thereafter arise.²⁴

The exercise of summary jurisdiction does not contravene the fourteenth amendment of the constitution of the United States.²⁵ Jury trial is neither guaranteed nor involved in that provision.²⁶ The term "due process of law," as therein employed, simply means a day in court, according to the practice provided for such cases, involving, of course, notice and an opportunity to be heard before judgment is pronounced.²⁷

§ 331. When jury trial allowed. Unless the case is triable

by jury such trial cannot be granted without authority by charter or statute.²⁸ The right cannot be conferred by ordinance.²⁹ Sometimes the trial by jury for violations of orjury according to its status. Mcoverseers of the poor, and commerney v. Denver, 17 Colo., 302; mittal of one to the work-house, as a vagrant, violates the 14th

24 Fire Department v. Harrison,2 Hilt. (N. Y.), 455; Wynehamerv. People, 13 N. Y., 378.

25 Summary trial held valid to recover the penalty of \$25.00 or imprisonment not more than 30 days on conviction for violating an ordinance prohibiting the keeping of a private market within six squares of a public market. breach of such ordinance is one of those petty offenses against municipal regulations of police, which in Louisiana, as elsewhere, may be punished by summary proceedings before a magistrate, without trial by jury." Per Mr. Justice Gray in Natal v. Louisiana, 139 U. S., 621, 624; 11 Sup. Ct. Rep., 636; affirming State v. Natal, 39 La. Ann., 439; 1 So. Rep., 923, and citing State v. Gutierrez, 15 La. Ann., 190; Monroe v. Meuer, 35 La. Ann., 1192; Callan v. Wilson, 127 U.S., 540, 553, 555. 28 Walker v. Sauvinet, 92 U. S., 90.

²⁷ Delaney v. Kansas City Pol. Ct., 167 Mo., 667, 678; 67 S. W. Rep., 589.

Ex parte determination by two

overseers of the poor, and committal of one to the work-house, as a vagrant, violates the 14th Amendment of the United States Constitution. Portland v. Bangor, 65 Me., 120; 20 Am. Rep., 681, overruling Nott's case, 11 Me., 208, and Portland v. Bangor, 42 Me., 403, and approving Dunn v. Burleigh, 62 Me., 24, a case of summary proceeding in trespass, which resulted in depriving of property "without due process of law."

²⁸ "This creature of the statute, the recorder can have no power or authority, except such as is thereby expressly, or by necessary implication given," in denying right of recorder to summon a jury. Per Ripley, C. J., in St. Peters v. Bauer, 19 Minn., 327, 333.

Where law provides that police justice shall proceed "forthwith" to try and "determine," the violation of an ordinance by one brought before him by arrest without a warrant, it implies that trial is to be without a jury. People v. Van Houten, 35 N. Y. Supp., 186; 13 Misc. Rep. (N. Y.), 603; 69 N. Y. St., 265; 91 Hun. (N. Y.), 638; 36 N. Y. Supp., 1130.

²⁹ Zelle v. McHenry, 51 Iowa,
 572; 2 N. W. Rep., 264.

dinances is expressly provided.³⁰ And sometimes in the absence of express provision in the charter as to the mode of trial a jury trial is permitted.³¹ Where the constitution thorizes a trial by jury, of course, it cannot be denied by Thus, under the constitution of Texas, which provided that, "in all cases where justices of the peace or other judicial officers of inferior tribunals shall have jurisdiction in the trial of causes, where the penalty for the violation of the law is fine or imprisonment (except in cases of contempt) the accused shall have the right of trial by jury," an ordinance authorizing a summary trial is unconstitutional.32 So it has been held in South Dakota that a charter authorizing the trial of certain cases without a jury, and allowing an appeal in such cases only when imprisonment exceeds ten days or a fine exceeding twenty dollars is imposed, violates a constitutional provision declaring that, "the right of trial by jury shall remain inviolate and shall extend to all cases at law, without regard to the amount in controversy." 33

In South Carolina it has been held that, under a charter providing that "the intendant of said town is hereby vested with all the power and jurisdiction given to trial justices of this state and may punish by fine or imprisonment in his discretion, or both," one charged with the violation of a town ordinance is entitled to a trial by jury, in like manner as in a trial justice's court. But in Missouri it has been held that, a charter provision that, "all cases triable before the police judge shall be proceeded with in the same manner as trials before justices of the peace for misdemeanors," does not entitle the

30 State (Greely) v. Passaic, 42 N. J. L., 429.

Where fine may be more than twenty dollars. Mt. Sterling v. Holly, 22 Ky. Law Rep., 358; 57 S. W. Rep., 491.

Keeping bawdy house. People v. Hanrahan, 75 Mich., 611; 42 N. W. Rep., 1124.

In a proper case the right of trial by jury extends to the people of the District of Columbia and the territories of the United States. Callan v. Wilson, 127 U. S., 540; Reynolds v. U. S., 98 U. S., 145,

154; Webster v. Reid, 11 How. (52 U. S.), 437, 460.

³¹ People v. James, 16 Hun. (N. Y.), 426.

32 Smith v. San Antonio, 17 Tex., 643; Burns v. LaGrange, 17 Tex., 415.

33 Belatti v. Pierce, 8 S. D., 456;66 N. W. Rep., 1088.

34 Lexington v. Wise, 24 S. C., 163; Beaufort v. Ohlandt, 24 S. C., 158. approving State ex rel. v. Williams, 11 S. C., 288; State v. Larkins, 44 S. C., 362; 22 S. E. Rep., 409; State v. Williams, 40 S. C., 373; 19 S. E. Rep., 5.

accused violator of a municipal ordinance to a jury trial.35

The usual rule of construction is that, when a new power or jurisdiction is conferred upon a judicial officer, without specification as to the manner in which it is to be exercised, e. g., to hear and determine a class of cases not before permitted, the power must be exercised in the form and manner provided for all other cases. It must be exercised according to the practice of the court and law applicable to the same. Thus under a charter giving the police justice the jurisdiction, powers and authority of the justices of the peace of the town, with "jurisdiction to hear and determine all cases arising under the charter, by-laws or ordinances," the jurisdiction in the class of cases specified is to be exercised in like manner as in cases before justices of the peace. The rule, of course, applies to trials by jury.³⁶

§ 332. Same—Crimes—Criminal prosecution. A distinction is usually taken between offenses against mere municipal police regulations, and those which, in their nature, are public crimes, or made so by the laws of the state; in the former, as we have seen, the trial may be summary, but in the latter the constitutional guaranty of trial by jury is generally held to apply.³⁷ Although the act constituting a violation of the ordinance is also made penal by state statutes, the prevailing rule is that summary jurisdiction may be exercised; the reason advanced is that the offense is not against the state but against the peace

35 Delaney v. Kansas City Police Court, 167 Mo., 667; 67 S. W. Rep., 589

³⁶ Per Church, C. J., in People ex rel. v. Cox, 76 N. Y., 47, 49.

Where the law makes no provision for jury trial an offense triable by jury under the constitution cannot be tried summarily before the mayor. Thomas v. Ashland, 12 Ohio St., 124.

³⁷ In re Jahn, 55 Kan., 694; 41 Pac. Rep., 956.

ASSAULT AND BATTERY is a breach of the peace and is therefore criminal. State v. Moss, 2 Jones Law (N. C.), 66.

KEEPING BILLIARD TABLES for use

by others, where imprisonment on conviction is 30 days, held summary conviction illegal. Thomas v. Ashland, 12 Ohio St., 124. But if the penalty is a fine only and imprisonment for non-payment, the trial may be summary. Inwood v. State, 42 Ohio St., 186, 189. In referring to Thomas v. Ashland, 12 Ohio St., 124, it is said: "We think the discrimination between imprisonment as part of the penalty, and as a means of enforcing the penalty, is well made."

THE OFFENSE OF LIBEL was always triable and tried by jury. Per Mr. Justice Blatchford In re Dana, 7 Ben., 1.

and quiet of the city and is to be regarded in the light of a minor or trivial offense.38

But in California it is held that although the legislature may authorize summary trials without a jury of violations of municipal police regulations, not embraced in the general criminal legislation of the state, yet where the offense falls within the legal or common law notion of a crime or misdemeanor, and is included in the criminal code of the state, the constitutional right of trial by jury cannot be evaded, because in such case the state code expressly gives the right.39

§ 333. Same—Crime, misdemeanor and municipal offense distinguished. The word "crime" in its more extended sense comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. term as used in our constitution and statutes is to be interpreted in the light of the principles, which at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. In the opinion of the United States Supreme Court, the word "crime," as used in the fed-

38 Colorado-McInerney v. Denver, 17 Colo., 302; 29 Pac. Rep., 516.

Florida-Theisen v. McDavid, 34 Fla., 440; 26 L. R. A., 234; 16 So. Rep., 321; Hunt v. Jacksonville, 34 Fla., 504; 43 Am. St. Rep., 214; 16 So. Rep., 398.

Louisiana-Selling liquor without license. Amite City v. Holly, 50 La. Ann., 627; 23 So. Rep., 746. Carrying concealed weapons. Opelousas v. Giron, 46 La. Ann. (Pt. 2), 1364; 16 So. Rep., 190.

Gambling, playing "craps." Monroe v. Hardy, 46 La. Ann., 1232; 15 So. Rep., 696.

Missouri-Selling lottery tickets. Ex parte Kiburg, 10 Mo. App., 442. New Jersey-Selling liquor on Sunday. State (Riley) v. Trenton, 51 N. J. L., 498; 5 L. R. A., 352; 18 Atl. Rep., 116.

Oregon-Wong v. Astoria, 13 Oreg., 538; 11 Pac. Rep., 295.

Reviewing many fame. Ogden v. Madison, 111 Wis., 413; 55 L. R. A., 506; 87 N. W. Rep., 568. Compare State ex rel. v. Newman, 96 Wis., 258; 71 N. W. Rep., 438; State ex rel. v. Municipal Court, 89 Wis., 358; 61 N. W. Rep., 1100.

39 The offender was convicted in a justice's court for obstructing a sidewalk. He appealed to the superior court of the county, and was denied a jury. It appears that the offense was, under the law of the state, a public nuisance, and made a misdemeanor under the Penal Code of California, and in such case the Code required a jury trial unless waived. Taylor v. Reynolds, 92 Cal., 573; 28 Pac. Rep., 688.

When an ordinance defines an offense the same as defined in the state statute, and when under such state statute defendant is entitled Wisconsin-Keeping house of ill- to trial by jury, he is likewise eneral constitution, is not to be construed as relating only to felonies or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors the punishment of which involves, or may involve, the deprivation of the liberty of the citizen.⁴⁰

It is only where the peace, Crown and dignity of the Sovereign is affected, as distinct from his pocket, that an act can, in English law, be described as criminal, and the procedure in such case is to vindicate and punish by retributive justice. In that Kingdom, apart from legislation, crime and indictable offense are synonymous. But treason and felony have always stood apart (like "high crimes and offenses" in Scots Law) from misdemeanor, or (as it was also styled) trespass against the peace, because of the difference in the consequences of conviction and in the procedure before and during the trial. When legislation began to add to the common law category of offenses every new offense, unless otherwise qualified by statute, was held to be a misdemeanor (transgressio).

titled to such trial under the ordinance. Hoffner v. Oberlin, 8 Ohio Dec., 710; 9 Wkly. Law Bul., 239. 40 "It would be a narrow construction of the constitution to hold that no prosecution for a misdemeanor is a prosecution for a crime within the meaning of the third article, or a criminal prosecution within the meaning of the sixth amendment. And we did not think that the amendment was intended to supplant that part of the third article which relates to trial There is no necessary conflict between them." Per Mr. Justice Harlan, in Callan v. Wilson, 127 U. S., 540.

In referring to the amendment of the constitution of the United States, Mr. Justice Story says, that the amendment "in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state or district wherein the crime shall have been committed (which district shall be previously ascertained by law), and to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crimes." Story, Constitutional Law, sec. 1791.

41 4 Encyc. of the Laws of Eng., tit. "Crime."

⁴² The public remedy for breach of a statute, in the absence of other provision, is by indictment for misdemeanor (Rex v. Hall, 1 Q. B., 713), and all breaches of statute or by-law from which a remedy by information before justices is given, are still technically regarded as petty misdemeanors, though they in no sense fall within the popular notion of crime or even delict, and correspond rather to what in France are styled contraventions. 4 Encyc. of the Laws of England, tit. "Criminal Law."

The term felony at common law was indefinite. An offense may be indictable and not a felony. At common law many misdemeanors were prosecuted by indictment, as those mala in se. So under statutes specified misdemeanors are likewise prosecuted. But where an indictment will lie for a misdemeanor a jury trial is usually allowed, sand must be granted under most of the state constitutions. The word crime is often applied to both a felony and a misdemeanor. It sometimes includes every offense known to the laws of the state. It is an act prohibited by law and made punishable by fine, penalty, forfeiture or imprisonment. Crime and offense are sometimes synonymous, as where the terms are applied to convictions for violations of statutes of a public nature. In our law the term felony is usually applied to offenses involving punishment in the penitentiary.

Violations of municipal police regulations are not usually regarded as crimes as that term is used in our law,⁵¹ although

- ⁴³ Klock v. People, 2 Park Cr. Rep. (N. Y.), 676.
- 44 1 Hawk. P. C. C. 5, sec. 1; 1 Russell on Crimes, 46.
- ⁴⁵ Jones v. Robbins, 8 Gray (Mass.), 329, per Shaw, C. J.; People v. Johnson, 2 Parker Cr. Rep. (N. Y.), 322; Wynehamer v. People, 13 N. Y., 378.
- 46 People v. Hanrahan, 75 Mich.,611; 42 N. W. Rep., 1124.
- ⁴⁷ Com. v. Dennison, 24 How. (U. S.), 66, 102.

Breach of a public law. 4 Bl. Com. 5; 1 Bishop Crim. Law sec. 43; In re Bergin, 31 Wis., 383.

Crime means an indictable offense. Lehigh County v. Schock, 113 Pa. St., 373, 380; 7 Atl. Rep., 52; In re Voorhees, 32 N. J. L., 141, 144; In re Clark, 9 Wend. (N. Y.), 212.

"Offense of intoxication" is a crime. People ex rel. v. French, 102 N. Y., 583, 586.

Crime includes misdemeanor. Van Meter v. People, 60 Ill., 168, 170; In re Bergin, 31 Wis., 383, 386. "Crime" is not a synonym of felony. Lehigh County v. Schock. 113 Pa. St., 373, 379; 7 Atl. Rep., 52.

The test whether or not a certain act is a crime at common law is not whether precedents for so treating it can be found in the books, but whether it injuriously affects the public policy and economy. Com. v. McHale, 97 Pa. St., 397; Com. v. Randolph, 146 Pa. St., 83; 23 Atl. Rep., 388.

- 48 People v. Hanrahan, 75 Mich., 611; 42 N. W. Rep., 1124.
- 49 People v. Hanrahan, 75 Mich.,
 611; 42 N. W. Rep., 1124.
- ⁵⁰ Johnston v. State, 7 Mo., 183; State v. Smith, 8 Blackf. (Ind.), 489.
- 51 Violation of ordinance is not a criminal offense in the sense as used in the bill of rights in Missouri constitution. Ex parte Hollwedell, 74 Mo., 395; Marshall v. Standard, 24 Mo. App., 192; Stevens v. Kansas City, 146 Mo., 460; 48 S. W. Rep., 658; State ex rel. v. Renick, 157 Mo., 292; 57 S. W.

certain of such offenses are so regarded in some jurisdictions, as assault and battery,⁵² keeping house of ill fame,⁵³ unlawful sale of intoxicating liquor,⁵⁴ keeping gaming house,⁵⁵ petit larceny, where punishment may be by jail or penitentiary sentence;⁵⁶ however, this offense though a felony at common law, was punishable without a jury trial, and,hence, it has been held in New York that a summary trial may be authorized by statute.⁵⁷ The Supreme Court of the United States has held that the offense of conspiracy, defined by ordinance, does not belong to that class or grade of offenses triable summarily without a jury; that it is an offense of a grave character, affecting the public at large and was so regarded at common law.⁵⁸

§ 334. Same—Misdemeanor.

Rep., 713; Delaney v. Kansas City Pol. Ct., 167 Mo., 667, 678; 67 S. W. Rep., 589.

Keeping disorderly house is not a crime or criminal offense, within constitution of Louisiana. Monroe v. Meuer, 35 La. Ann., 1192.

Complaint for breach of Sabbath to a justice of the peace, held not intended to be included in the terms indictment or information as used in constitution of Connecticut. Goddard v. State, 12 Conn., 448.

Municipal offenses relating to acts not included in the criminal statute of state, are not "crimes" in Georgia. Floyd v. Eatonton, 14 Ga., 354; 58 Am. Dec., 559.

Crime or misdemeanor defined to be the wilful or criminally negligent violation of a public law. Municipal ordinance is not such law. Greeley v. Hamman, 12 Colo., 94; 20 Pac. Rep., 1.

52 In Arkansas assault and battery is a criminal offense and cannot be punished by summary trial; it must be by presentment or indictment. Rector v. State. 6 Ark., 187; Durr v. Howard, 6 Ark., 461.

53 Indictable at common law, must be tried by jury. Slaughter v. People, 2 Doug. (Mich.), 334;

The term misdemeanor is not

Warren v. People, 3 Parker Cr. Rep. (N. Y.), 544; Miller v. Com., 88 Va., 618; 14 S. E. Rep., 161, 342, 979.

54 In re Jahn, 55 Kan., 694; 41 Pac. Rep., 956; Neitzel v. Concordia, 14 Kan., 446.

within the jurisdiction of the state courts. State v. Savannah, 1 T. U. P. Charl. (Ga.), 235; 4 Am. Dec., 708.

56 Danner v. State, 89 Md., 220;42 Atl. Rep., 965.

57 Murphy v. People, 2 Cow. (N. Y.), 815; People v. Stein, 80 N. Y. Suppl., 847; People ex rel. v. Dutcher, 83 N. Y., 240.

Petit larceny is not an infamous crime. Carpenter v. Nixon, 5 Hill (N. Y.), 260.

⁵⁸ Per Mr. Justice Harlan in Callan v. Wilson, 127 U. S., 540.

CONSPIRACY DEFINED. A combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlaw-

always accurately defined. Its meaning will depend upon the law and particular relation in which it is used. Sometimes it is limited to petty offenses; sometimes it embraces indictable offenses; but generally speaking, it includes all offenses less than felony.⁵⁹ Violations of ordinances are often referred to as misdemeanors; but the term is sometimes confined to acts or omissions condemned by state statute.⁶⁰ But whether the act is technically a misdemeanor or not, if it is of a trivial nature it is such petty offense as may be tried summarily.⁶¹

In the English law, it seems that the term was not always used in a definite sense; sometimes it was applied to the graver offenses as perjury and other felonies, and sometimes it included all offenses of a public nature, whether of omission or commission, which did not amount to treason or felony. Violations of by-laws and other trivial offenses were generally classified as misdemeanors. Whether a prosecution for misdemeanor was to be brought by presentment or indictment, and tried by jury or summarily, seemed to depend more on the statute and practice than its intrinsic character. 62

§ 335. Jury trial on appeal. Although the defendant should be compelled to submit to summary trial before the magistrate

ful means. Com. v. Hunt, 4 Met. (Mass.), 111, 121, per Shaw, C. J.; State v. Burnham, 15 N. H., 396, 401; Pettibone v. U. S., 148 U. S., 197, 203; Breitenberger v. Schmidt, 38 Ill. App., 168; People v. Mather, 4 Wend. (N. Y.), 229; State v. Rowley, 12 Conn., 101, 108; Alderman v. People, 4 Mich., 414, 424; 3 Wharton Cr. Law, sec. 2322; Tomlin, Law Dic., title "Conspiracy." Bouvier's Law Dict. (Rawles Rev.), tit. "Conspiracy."

The crime of conspiracy seems as such to be peculiar to English law. It is triable by indictment. 3 Encyc. of the Laws of Eng., tit. "Conspiracy," p. 299. Regina v. Parnell, 14 Cox Cr. Cas., 508, 514.

59 4 Bl. Com., 5; People v. Fisher, 20 Barb. (N. Y.), 652.

60 "MISDEMEANOR" has been defined in California as an act or omission for which punishment

other than death or imprisonment is denounced by statute; that is, a legislative act. Pillsbury v. Brown, 47 Cal., 477, 480.

⁶¹ Misdemeanors may be tried without a jury. Allen v. State, 51 Ga., 264.

Misdemeanor has been described by Dr. Johnson to Boswell, as "a kind of indefinite crime, not capital but punishable at the discretion of the court." Boswell's Life, Ed. Hill, vol. III, p. 214, quoted in 8 Encyc. of the Laws of England, tit. "Misdemeanour."

62 MISDEMEANOR IN THE ENGLISH LAW. This term does not belong to the earliest stage of the criminal law, which dealt with trespasses (transgressiones), of which felonies were a sub-class. It does not appear at what date the term "misdemeanour" was first used; but probably it was adopted as

or police justice, according to the prevailing judicial view, if he is thereafter allowed a jury trial on appeal where the appeal is granted as of course, or the right thereto is unqualified and unfettered, or without unreasonable restrictions, the constitutional right is sufficiently preserved. In Kansas a provision requiring the recognizance on appeal to be conditioned "for the payment of such fine and costs as shall be imposed" on defendant, if the case shall be determined against him, was held to be an unreasonable restriction on the right of appeal

more appropriate than trespass to a number of violations of law, such as forgery, perjury, and public nuisance, which did not include the technical elements of trespass. Its derivation and original meaning are obscure, and it seems to have been a bastard equivalent for "misbehavior." The term is a nomen collectivum (Rex v. Powell, 2 Barn & Adol., 75), and comprises an enormous variety of offences of very different degrees of gravity, from perjury, with intent to get a man convicted and executed (Rex v. Macdaniell, 19 St. Tri., 746), down to the pettiest contravention of a by-law about dust-The main classes are: Offences which were indictable misdemeanors at common law, e. g., assault and contempts of court. 2. Offences explicitly declared to indictable misdemeanors by 3. Breaches of a public statute. statute, which are regarded as a criminal offence, or of order or regulations validly made under statute, where the statute makes no explicit provision as to the mode of punishment. (Rex v. Walker, L. R. 10 Q. B., 355; Rex v. Hall, 1 Q. B., 767.) 4. Breaches of statutes which are directed to be tried by courts of summary jurisdiction, sometimes called petty misdemeanors. 8 Encyc. of the Laws of England, tit. "Misdemeanour."

The history of the Criminal Law of England up to the 17th century is treated by Sir Matthew Hale in his Pleas of the Crown, and in this century by Sir James Stephen in his History of Criminal Law, and his Digest of Criminal Law and Procedure.

63 Collins v. State, 88 Ala., 212;
7 So. Rep., 260; Emporia v. Volmer, 12 Kan., 622, 631; In re Rolfs, 30 Kan., 758; 1 Pac. Rep., 523; In re Rich, 10 Kan. App., 280; 62 Pac. Rep., 715; Steuart v. Baltimore, 7 Md., 500, 514; State v. Whitaker, 114 N. C., 818; 19 S. E. Rep., 376; State v. Powell, 97 N. C., 417; 1 S. E. Rep., 482. Compare State v. Moss, 2 Jones (47 N. C.), 66, decided under former constitution. Conditions. State v. Beneke, 9 Iowa, 203.

Law providing for jury of six in first instance, with a right to jury of twelve on appeal, held constitutional. Collier v. Territory, 2 Okla., 444; 37 Pac. Rep., 819.

Forfeiting recognizances is waiver of right to jury trial on appeal. Com. v. Whitney, 108 Mass., 5.

Defendant required to procure copies of appeal at his own expense, held a reasonable regulation. *In re* Marron, 60 Vt., 199; 12 Atl. Rep., 523.

Assault and battery, being a breach of the peace, is criminal. There must be a jury trial in the

and in conflict with the constitutional guaranty that, "the right of trial by jury shall be inviolate." And in Colorado, in addition to the above, a requirement that defendant should pay all costs accrued in the police court before the appeal could be perfected was held to be an unreasonable provision respecting the right of appeal. Where in a criminal offense triable by jury but which is tried summarily in the first instance, the condition of appeal being made to depend upon the

first instance. The right to a jury on appeal does not protect the constitutional right. "The right is absolute and unconditional, untrammeled by any restriction whatever." State v. Moss, 2 Jones Law (N. C.), 66, 69, per Nash, C. J.

In speaking of the right given by an act of Congress of appeal where the information must be tried by a jury on a charge of libel, Mr. Justice Blatchford remarked: "But this does not remove the objection. If Congress has the power to deprive the defendant of his right to a trial by jury for one trial, and to put him, if convicted, to an appeal to another court, to secure a trial by jury it is difficult to see why it may not also have the power to provide for several trials, by a court, without a jury, on several successive convictions, before allowing a trial by a jury. In my judgment, the accused is entitled, not to be first convicted by court and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury." In re Dana, 7 Ben., 1.

"Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prose-

cution, conducted either in the name, or by or under the authority, of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is trial for the offense put on In such cases a judgcharged. ment of conviction, not based upon a verdict of guilt by a jury. is void. To accord to the accused a right to be tried by a jury in an appellate court, after he has been once fully tried, otherwise than by a jury in the court of original jurisdiction, and tenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the constitution." Per Mr. Justice Harlan in Callan v. Wilson, 127 U. S., 540.

In Louisiana District court tries appeals from justices of the peace, as an appellate court, without a jury. State *ex rel.* v. Read, 50 La. Ann., 445; 23 So. Rep., 715.

Reduction of verdict by appellate court does not violate right of trial by jury. Texas & N. O. R. R. v. Syfan, 91 Tex., 562; 44 S. W. Rep., 1064.

64 In re Jahn, 55 Kan., 694; 41
 Pac. Rep., 956.

65 McInerney v. Denver, 17 Colo., 302; 29 Pac. Rep., 516.

Requiring bond to pay and satisfy whatever judgment may be rendered in the appeal court, held not to unreasonably obstruct right defendant giving bond with sufficient sureties has been held an unreasonable restriction.⁶⁶ But where the right is subject only to the common liability to give bail for his appearance in the appellate court and to abide the judgment of such court, or in default of such bail being committed to jail, this has been held not unconstitutional as impairing the right of trial by jury.⁶⁷

§ 336. Application for jury—Conditions—Waiver. The method of applying for the jury and its selection are controlled by the local laws. Usually the application for the jury is required to be made before the trial is begun.⁶⁸ The general rule is that a jury may be waived in all civil cases.⁶⁹ The rule is otherwise in criminal cases,⁷⁰ particularly those involving the graver crimes. In misdemeanors the defendant may waive a jury.⁷¹ Hence whether the proceeding under the ordinance be considered criminal or civil a waiver of a jury trial on the

of trial by jury. Civil case. Capital Traction Co. v. Hof, 174 U. S., 1, 11; 19 Sup. Ct. Rep., 580.

Greene v. Briggs, 1 Curtis (U. S. C. C.), 311; Saco v. Wentworth,
Me., 165; 58 Am. Dec., 786;
State v. Gurney, 37 Me., 156; 58
Am. Dec., 782.

"It is manifest that, in many cases, the right would be a mere shadow without the substance, if conditions may be imposed upon its enjoyment with which the defendant may be powerless to comply. If a defendant, upon his conviction by a judge acting without a jury, must suffer the punishment to which he is sentenced on such conviction, unless he can give a bond with two or more sufficient sureties in such penalty as the judge who tried him may prescribe, then his right to a trial by jury is wholly dependent upon his ability to obtain such sureties." Reeves v. State, 96 Ala., 33, 38; 11 So. Rep., 296; State v. Everett, 14 Minn., 439.

⁶⁷ Jones v. Robbins, 8-Gray (Mass.), 329, 341, per Shaw, C. J.

68 Terry v. State, 22 Ohio Cir.Ct., 16; 12 Ohio Cir. Dec., 274.

69 Heacock v. Lubukee, 108 Ill.,
641; Gregory v. Lincoln, 13 Neb.,
352; 14 N. W. Rep., 423; Merrill
v. St. Louis, 83 Mo., 244; Bamberger v. Terry, 103 U. S., 40.

70 State v. Carman, 63 Iowa, 130;
18 N. W. Rep., 691; 50 Am. Rep.,
741; State v. Holt, 90 N. C., 749;
47 Am. Rep., 544; Hill v. People,
16 Mich., 351.

Contra. State v. White, 33 La. Ann., 1218; State v. Askins, 33 La. Ann., 1253.

Compare Com. v. Dailey, 12 Cush. (Mass.), 80, per Shaw, C. J.; State v. Kaufman, 51 Iowa, 578; 2 N. W. Rep., 275.

Statute authorizing waiver in criminal cases unconstitutional. *In re* Staff, 63 Wis., 285; 23 N. W. Rep., 587; 53 Am. Rep., 285.

71 Connelly v. State, 60 Ala., 89; People v. Steele, 94 Mich., 437; 54 N. W. Rep., 171; State v. Bockstruck, 136 Mo., 335; 38 S. W. Rep., 317; State v. Larger, 45 Mo., 510; State v. Moody, 24 Mo., 560; State v. Hale, 15 Mo., 606. part of the defendant is entirely valid.⁷² The waiver may be voluntary,⁷³ or it may result from some act or omission on the part of the defendant, as by failure to give notice that a jury trial is desired when the law so requires,^{7‡} or mere failure to demand a jury,⁷⁵ or offering no objection to proceeding without a jury.⁷⁶ The defendant need not expressly waive his right to jury trial in order to validate a summary conviction.⁷⁷ The court need not inform the defendant of his right to be tried by jury.⁷⁸ Failure to pay the jury fee required will deprive one of a jury.⁷⁹ An ordinance is valid which requires the deposit of a sum sufficient to pay the fees of the jury; unless the defendant complies with the condition it is not improper to deny a jury trial.⁸⁰

§ 337. **Method of conducting jury trial.** The method of conducting the jury trial will depend upon the local laws. Those which pertain to trials before justices of the peace usually apply. Questions of law relating to the validity or reasonableness of the ordinance are generally required to be passed upon by the court. Ordinances are to be interpreted by the court. In this respect they stand on the same footing as

May waive less than required number. Penalty, fine. Murphy v. Com., 1 Met. (Ky.), 365; State v. Mansfield, 41 Mo., 470.

May waive in all misdemeanors. Tyra v. Com., 2 Metc. (Ky.), 1.

The action being civil a jury may be waived by stipulation. Sutton v. McConnell, 46 Wis., 269; 50 N. W. Rep., 414.

Record should show waiver. State v. Van Matre, 49 Mo., 268; Cox v. Moss, 53 Mo., 432.

Record as to waiver by consent. Tower v. Moore, 52 Mo., 118; Bruner v. Marcum, 50 Mo., 405; Chapline v. Robertson, 44 Ark., 202; King v. Burdett, 12 W. Va.,

73 Harris v. Shaffer, 92 N. C., 30;
 Grant v. Reese, 82 N. C., 72;
 Desche v. Gies, 56 Md., 135;
 Gregory v. Lincoln, 13 Neb., 352;
 N. W. Rep., 423.

74 Bailey v. Joy, 132 Mass., 356. 75 Heacock v. Hosmer, 109 Ill., 245. Compare Smith v. San Antonio, 17 Tex., 643.

⁷⁶ Baird v. New York, 74 N. Y., 382.

 77 People v. Goodwin, 5 Wend. (N. Y.), 251.

If a jury is accepted without examination the defendant cannot complain afterwards that a juror was disqualified. Byars v. Mt. Vernon, 77 Ill., 467.

78 People v. Goodwin, 5 Wend. (N. Y.), 251.

79 Venine v. Archibald, 3 Colo., 163,

But this will depend upon law and circumstances. Gallagher v. Goldfrank, 63 Tex., 473; Odell v. Reynolds, 40 Mich., 21.

80 Delaney v. Kansas City Pol. Ct., 167 Mo., 667; 67 S. W. Rep., 589. state statutes.⁸¹ But the question of fact as to whether the offense charged has been committed or whether it was in violation of the ordinance, so within the prohibition of the ordinance, are to be determined by the jury. Sometimes in addition to determining the question of guilt or innocence of violation of the ordinance the jury is also authorized to assess the fine or punishment. Usually local magistrates and justices of the peace are not permitted to instruct the jury as to questions of law, arising at the trial. In such case the judge merely conducts the proceedings, and passes upon the admissibility of the evidence and the jury are to determine whether the violation has been established and whether the acts proved are in effect an offense under the regulation.

§ 338. Technical rules of procedure disregarded—Practice. Chitty, in referring to the rules of construction of summary proceeding before local and inferior judges and magistrates, and how in ancient times superior courts were disposed to be too astute and technical in discovering defects in summary

SELECTING. At common law the jury was required to be taken from the immediate locality where the offense occurred. That is, "the jury must be of the visne or neighborhood." Thomp. & Merriam on Juries, sec. 1.

"A jury of the city * * * is more correctly a jury of the vicinage than one taken from the body of the county." Per Campbell, C. J., in People v. Hurst, 41 Mich., 328, 335; 1 N. W. Rep., 1027.

The court may direct jury trial for violation of an ordinance although defendant is willing to submit question of fact to the judge. Grand Rapids v. Bateman, 93 Mich., 135; 53 N. W. Rep., 6.

81 Instruction submitting its legal effect to jury erroneous. Pennsylvania Co. v. Frana, 13 Ill. App., 91, 97.

Validity of ordinance is for court. Peoria v. Calboun, 29 Ill., 317.

Questions of law to be passed on

by the court. Chamberlain v. Litchfield, 56 Ill. App., 652.

The reasonableness of a by-law is for the court. Commonwealth v. Worcester, 3 Pick. (20 Mass.), 462; Neier v. Mo. Pac. R. R. Co., 12 Mo. App., 25; St. Louis v. Weber, 44 Mo., 547.

Evidence tending to show that the amount of the particular license is unreasonable should not be given to the jury. Elk Point v. Vaughn, 1 Dak., 113; 46 N. W. Rep., 577.

82 Disorderly shouting, etc. Washington v. Frank, 1 Jones (46 N. C.), 436.

83 Distribution of hand bills.Wettengel v. Denver, 20 Colo., 552;39 Pac. Rep., 343.

Questions of fact are for jury. Anna v. Leird, 36 Ill. App., 49.

84 All testimony should be given to the jury. Brown v. Mobile, 23 Ala., 722.

85 Where jury authorized to assess fine it is error for the judge

convictions, observed: "But these absurdities, the indulgence of which might induce a suspicion that the superior courts were formerly jealous of those inferior jurisdictions, have for some time been abandoned; and now the doctrine is, that whether it was expedient that those jurisdictions should have been erected, was matter for the consideration of the legislature; but that, as long as they exist, the courts ought to go all reasonable length to support the decisions of justice, especially as in whatever light they were formerly seen, the country are now convinced that in general they derive considerable advantage from the exercise of the power delegated to justices and therefore, in modern times, they have received proper support from the courts of law."86

Where the defendant is charged and the summons for his appearance specifies the ordinance violated, at the trial the defendant cannot be proceeded against on another ordinance or statute. The cause of action cannot be thus changed.⁸⁷ Objections to the competency of witnesses and evidence are required to be made at the time.⁸⁸ The proceedings being regarded as civil the trial may be had in the absence of defendant.⁸⁹ Changes of venue are sometimes allowed.⁹⁰ A copy of the information or complaint need not be furnished defendant. The criminal law of the state in this respect is generally held not to apply;⁹¹ however, the contrary

to do so. Walton v. Canon City, 13 Colo. App., 77; 56 Pac. Rep., 671.

86 2 Chitty, General Practice, 130, 131, quoted with approval in State v. Glenn, 54 Md., 572, 601.

** Gates v. Aurora, 44 Ill., 121; Columbus v. Arnold, 30 Ga., 517; Lesterjelle v. Columbus, 30 Ga., 936; People v. Miller, 38 Hun. (N. Y.), 82.

88 Deitz v. Central, 1 Colo., 323; Information v. Oliver, 21 S. C., 318, 323.

Where complaint charges the offense in direct and positive terms and is sworn to, jurisdiction is not lost by proof upon the trial that the complainant had no knowledge of the commission of the offense, except upon informa-

tion and belief. State v. Graff-muller, 26 Minn., 6; 46 N. W. Rep., 445; Com. v. Farrell, 8 Gray (Mass.), 463.

When defendant may require testimony to be taken down and subscribed by witnesses. Lexington v. Wise, 24 S. C., 163.

89 In re Miller, 44 Mo. App., 125, 127.

90 In re Ada Jones, 90 Mo. App.,318; Myers v. People, 26 Ill., 173.

Counter affidavits of citizens of town may be used. State v. Wells, 46 Iowa, 662, 664.

A change of venue after appeal to state court, treated as criminal in nature. Emporia v. Volmer, 12 Kan., 622.

⁹¹ O'Brien v. Cleveland, 1 Cleveland Law Rep., 100. rule has been declared.⁹² Court may, if the law does not forbid, consolidate suits to recover penalties of ordinances. This is said to be discretionary.⁹³ A prosecution for the violation of an ordinance abates upon the death of the defendant.⁹⁴ The city attorney can only act when the law confers the authority to do so and then only when he pursues the mode therein prescribed.⁹⁵ An attorney employed by the village attorney to assist him in the trial, without authority of the council, is no ground of objection upon the part of defendant.⁹⁶

§ 339. Costs. Costs as such were unknown to the common law. They are the creatures of statutes. None can be awarded unless expressly provided.⁹⁷ At common law they were not recoverable by either party in any case, civil or criminal.⁹⁸ In Alabama a municipal corporation is in no event liable for costs under the general laws of the state.⁹⁹ Sometimes the costs of the prosecution cannot be imposed as a part of the penalty.¹ It was early held in Massachusetts that costs could not be allowed defendant on acquittal although the prosecu-

92 "In all criminal prosecutions the accused shall enjoy the right to demand the nature and cause of the accusation against him." Constitutional provision applied. Fink v. Milwaukee, 17 Wis., 26.

93 Lancaster v. R. R. Co., 12 Lancaster Bar. (Pa.), 99.

94 Carrollton v. Rhomberg, 78 Mo., 547.

95 St. Joseph v. Harris, 59 Mo. App., 122.

96 People v. Vinton, 82 Mich., 39;46 N. W. Rep., 31.

Deputy city attorney cannot sign the information; it must be signed by the city attorney. Kansas City v. Flanagan, 69 Mo., 22.

City attorney is only entitled to compensation fixed by ordinance. The mayor cannot appoint of his own motion an attorney so as to render the city liable for his services. Carroll v. St. Louis, 12 Mo., 444.

The power to employ extra counsel is controlled by the charter and laws applicable. Curtis v. Gowan, 34 Ill. App., 516; Hugg v. Camden, 29 N. J. Eq., 6; Lyddy v. Long Island City, 104 N. Y., 218; 10 N. E. Rep., 155; Wiley v. Seattle, 7 Wash., 576; 35 Pac. Rep., 415; 38 Am. St. Rep., 905.

State district attorney not entitled to fees for prosecutions for violations of municipal ordinance, under state laws allowing fees for prosecutions for misdemeanors. Pillsbury v. Brown, 47 Cal., 477.

97 Stewart v. Hood, 10 Ala., 600;Lee v. Smyley, 16 Ala., 773; Dent v. State, 42 Ala., 514.

98 State v. Kinne, 41 N. H., 238; Bishop, Crim. Proc., sec. 1313.

99 Selma v. Stewart, 67 Ala., 338, 341; Montgomery v. Foster, 54 Ala., 62; Camden v. Bloch, 65 Ala., 236.

In Illinois it is error to render judgment against the city for costs. Petersburg v. Whitnack, 48 Ill. App., 663.

¹ State v. Cantieny, 34 Minn., 1; 24 N. W. Rep., 458; Bayonne v. Herdt, 40 N. J. L., 264. tion was in the name of the commonwealth.² In Illinois it has been held that the penal statutes of the state relative to security for costs has no application in ordinance cases.³ Where costs are authorized to be imposed as a part of the penalty they include only the costs in the trial for the proceedings for the violation of the ordinance.⁴ Where the law gives the successful party costs it is error to divide them.⁵ In an appeal from a conviction for the violation of an ordinance, in Illinois the defendant is not required to advance the statutory amount required for costs, in order to entitle him to have his case docketed.⁶ In New Hampshire a prosecution for the violation of an ordinance, forbidding the keeping of bowling alleys, was held to be of a criminal character respecting costs on appeal.⁷

5. THE EVIDENCE FOR THE CORPORATION.

§ 340. **Proof of ordinance.** In an action to recover the penalty claimed to be imposed by an ordinance, the existence of the ordinance must be shown. It must appear that the ordinance was in force at the time the act complained of was committed.⁸ The method of proof of ordinances is treated in a subsequent chapter.⁹ It has been declared by a few courts

² In re Goddard, 16 Pick. (Mass.), 504, 507, per Shaw, C. J., approving Com. v. Worcester, 3 Pick. (Mass.), 462.

Costs discussed by Bell, J., in State v. Stearns, 31 N. H., 106.

Costs and attorneys' fees under particular statute. Oshkosh v. Schwartz, 55 Wis., 483; 13 N. W. Rep., 552.

³ Quincy v. Ballance, 30 Ill., 185, 188, per Caton, C. J., approving Lewiston v. Proctor, 23 Ill., 533.

⁴ In re Miller, 44 Mo. App., 125. ⁵ St. Charles v. O'Mailey 18 Ill., 407. 413.

8 Anderson v. Schubert, 158 III.,75; 41 N. E. Rep., 853 (reversing55 III. App., 227).

⁷ State v. Stearns, 31 N. H., 106. Liability for costs on reversal of judgment. Carrollton v. Bazzette, 159 Ill., 284; 31 L. R. A., 522; 42 N. E. Rep., 837. Costs on removal of case to circuit court. Camden v. Bloch, 65 Ala., 336.

8 Woodruff v. Stewart, 63 Ala., 206, 211; Ewbanks v. Ashley, 36 Ill., 177, 182; Stevens v. Chicago, 48 Ill., 498; Raker v. Maquon, 9 Ill. App., 155; Newlan v. Aurora, 14 Ill., 364; Elizabethtown v. Lefler, 23 Ill., 90.

It will be sufficient to show the passage of the ordinance and its violation, since its validity depends on the charter and not on other evidence. Woods v. Prineville, 19 Oreg., 108; 23 Pac. Rep., 880.

Ordinance defining offense and penalty must be in evidence. Section merely defining penalty not sufficient. People v. Weiss-Chapman Drug Co., 5 Colo. App., 153; 38 Pac. Rep., 334.

Ordinances. Of Evidence of Ordinances.

that in an action to recover the penalty proof of the authority to enact the ordinance is necessary, especially where objection is made, but where its violation is confessed by demurrer such proof is not required.¹⁰ But where municipal corporation and police courts are bound to take judicial notice of ordinances it is not necessary to plead or prove the authority to enact them.¹¹

§ 341. **Proof of offense.** Proof that the particular offense charged has been committed will answer. Conviction means simply sufficient proof of the violation of the ordinance.¹² Where the mode of proof is not pointed out by the municipal charter or legislative acts applicable the usual method prevailing in the state is to be followed.¹³ Without express authority the general rules of evidence cannot be changed by the local corporation.¹⁴ In some jurisdictions where the action is regarded as civil it is only necessary to prove the substance of the issue, that is, the facts which constitute the cause of action,¹⁵ and a preponderance of evidence will be sufficient for this purpose,¹⁶ but in others, even where the action is regarded as civil in its nature, being also penal or quast criminal in character, it has been held that the guilt of the accused should be

10 Section 382, post.

11 In a proceeding before a city court it is no more necessary to offer proof of a public ordinance, under the seal of the city, than in the courts of the state to prove a public act of the legislature. "Municipal ordinances are private laws when brought before the superior judiciary of the state, but not when brought before a city court." Per McGowan, J., in Information v. Oliver, 21 S. C., 318, 323.

Where court cannot take judicial notice of city ordinances they are to be proved. People v. Miller, 38 Hun. (N. Y.), 82, 86.

Where the offense is a violation of an ordinance of a sub-department, as a board of excise commissioners, the ordinance must appear in evidence; it will not be noticed judicially. State (Hankin-

son) v. Trenton, 51 N. J. L., 495, 497; 17 Atl. Rep., 1083.

¹² Meaher v. Chattanooga, 1 Head (38 Tenn.), 74.

"The offense must be established by full proof." Ewbanks v. Ashley, 36 Ill., 177, 182.

13 Where mode of proof is not pointed out it follows that the common law mode must be adopted. Rule applied in excluding defendant as a witness in his own cause. City Council v. Dunn, 1 McCord (S. C.), 333.

14 In re Wong Hane, 108 Cal.,
 680; 41 Pac. Rep., 693; 49 Am. St.
 Rep., 138.

15 Shea v. Muncie, 148 Ind., 14;
46 N. E. Rep., 138; Terre Haute, etc., R. R. v. McCorkle, 140 Ind., 613;
40 N. E. Rep., 62; Long v. Doxey, 50 Ind., 385.

16 In action for violation of ordinance by the commission of an

established beyond a reasonable doubt.¹⁷ Proof that the act was committed within the limits of the local corporation, of course, is necessary.¹⁸ Admission of the violation of the ordinance upon the part of the accused has been held admissible.¹⁹ Because of the criminal character of the act, it has been held in Illinois that the defendant cannot be compelled to testify against himself.²⁰ So where the common law has not been changed by statute the defendant has been excluded from testifying in his own favor.²¹ But as a rule he is a competent witness in his own behalf.²²

Where the complaint is not limited to a single offense, but charges a violation generally, proof may be admitted of any number of offenses, provided the aggregate of the fines assessed do not exceed the jurisdiction of the magistrate.²³

§ 342. Same—Illustrative cases. Where the charge is selling beer, it is not necessary to prove that the beer alleged to have been sold was intoxicating in its character.²⁴ In a charge for selling liquor on Sunday, evidence that defendant sold it subsequent to the date of the warrant has been held inadmissible, but proof of a sale on any Sunday prior, within the time prescribed for instituting a prosecution, was held admissible.²⁴ On the charge of selling liquor unlawfully it is not

assault commenced by warrant, the action is civil and a preponderance of evidence only is necessary. Sparta v. Lewis, 91 Tenn., 370; 23 S. W. Rep., 182.

¹⁷ Ruth v. Abingdon, 80 Ill., 418; Glenwood v. Roberts, 59 Mo. App., 167.

18 Taylor v. Americus, 39 Ga., 59; Philadelphia v. Nell, 3 Yeates (Pa.), 475, 478.

Delivery of liquor. Spring Valley v. Henning, 42 Ill. App., 159.

19 "The confession of a party is, in most cases, the highest evidence that can be given against him. A person may be convicted of the highest crime known to our laws, on his own confession. On an indictment, or action of debt, for a fine imposed by the state no better evidence is required than the confession of the party that he has

incurred the penalty." Per Nott, J., in Columbia v. Harrison, 2 Mill's Const. Rep. (S. C.), 213, 215.

²⁰ Day v. Clinton, 6 Ill. App., 476, 481.

²¹ City Council v. Dunn, 1 Mc-Cord (S. C.), 333.

²² In prosecution for sale of liquor, contrary to ordinance, defendant was permitted to testify for himself. The proceeding was held not to be criminal. Graubner v. Jacksonville, 50 Ill., 87, citing People v. Starr, 50 Ill., 52, a prosecution for bastardy where defendant was allowed to testify.

²³ Byars v. Mt. Vernon, 77 Ill., 467; Hensoldt v. Petersburg, 63 Ill., 111.

²⁴ Kettering v. Jacksonville, 50 Ill., 39.

24½ Megowan v. Commonwealth, 2

necessary to prove that the liquor was handed to persons who asked for it, that it was paid for, or charged to some one.25 To prove the charge of keeping open a tippling house on Sunday, it is not necessary to prove that liquor was sold or drank therein, where these are not made ingredients of the offense.26 On a charge for driving hackney carriages at places other than stands lawfully assigned, the book of assignment of places of hackmen is admissible to show the place assigned defendant.27 The charge of erecting a slaughter house is not established on mere proof that defendant occupied a newly built slaughter house, without evidence that he erected it or caused it to be erected or possessed the land upon which it stands.28 The charge of failure to tear down a dangerous wall, after notice, is not established by the mere notice of the building inspector to tear it down. Such notice is not conclusive. The dangerous character of the wall must be shown as a fact.29 On the charge of keeping a house of ill-fame, evidence showing that a person occupied a house and used it as his own would justify a verdict that he kept the house. Knowledge of its bad character and assent to its use as a house of lewdness would authorize a conviction therefor; and such knowledge and assent might be inferred from rumor, as well as the conduct of the inmates and the owner. Where the charge is fast driving, it is not necessary to prove that any individual was actually endangered because of the violation of the ordi-

Metc. (Ky.), 3; S. P. Deitz v. Central, 1 Colo., 323, 332.

Selling liquor without license. Pendergast v. Peru, 20 Ill., 51.

Keeping open bar room. Baldwin v. Chicago, 68 Ill., 418; Jordan v. Nicolin, 84 Minn., 367, 370; 87 N. W. Rep., 916.

²⁵ Liquor "undoubtedly may be sold in many other modes than by being handed to a person, nor is it necessary that it should be asked for, to make its sale complete." Per Walker, J., in Kimball v. People, 20 Ill., 348, 350.

Evidence of officer that no record of license, held admissible. Mayson v. Atlanta, 77 Ga., 662.

26 Fant v. People, 45 Ill., 259.

²⁷ Com. v. Matthews, 122 Mass.,

Occupying private railroad property held not a violation. Buffalo v. Mulchady, Sheld (N. Y.), 431.

²⁸ St. Louis v. Howard, 119 Mo., 47; 24 S. W. Rep., 772.

Sufficient proof. St. Louis v. Krentz, 12 Mo. App., 591.

²⁹ Shoemaker v. Entwisle, 3 D.
C. App. Rep., 252.

³⁰ State v. Wells, 46 Iowa, 662, 665.

On charge of "street walking," evidence of general character of female is admissible. Braddy v. Milledgeville, 74 Ga., 516; 58 Am. Rep., 443.

nance in this respect.³¹ So on the charge of obstructing a sidewalk, it need not be shown that any one has been interfered with in the use of such sidewalk because of such obstruction.³² On a charge of permitting swine to go upon a sidewalk and obstruct and injure it, evidence of different acts of different swine in going upon and injuring different parts of the sidewalk is competent.³³

In a prosecution under an ordinance forbidding the discharge of dense smoke and which constitutes the bare emission of such smoke a nuisance, the corporation need not prove that the smoke discharged was detrimental to property close enough to be affected by it, or was personally annoying to the public The fact that smoke discharged in considerable quantities in the center of a populous city is damaging and detrimental to persons and certain classes of property will be presumed.34 But where the ordinance declares it to be a nuisance to place, or allow to remain, wood in quantities over ten cords in any manner deleterious to the health of the people of the town or offensive to them in their business avocations. or, of any private family within the corporate limits, if the evidence fails to show that the particular wood injured or put any person to inconvenience no violation is established, since no nuisance in fact is proved.35 So where the ordinance makes it unlawful to fire off or discharge "wantonly and without anyreasonable cause any gun," etc., the proof and conviction must show that the firing was so done, since the manner is the gist of the offense.³⁶ The offense of permitting minors from participating in "any game" in tippling shops is not proved by showing that the minor was suffered to play billiards

 $^{\rm 31}$ Com. v. Worcester, 3 Pick. (Mass.), 461.

³² People v. Van Houten, 69 N. Y. St., 265.

Held no violation in particular case. Morrison v. McAvoy (Cal., 1902), 70 Pac. Rep., 626.

³³ Com. v. Curtis, 9 Allen (Mass.), 266.

34 Marshall Field & Co. v. Chicago, 44 Ill. App., 410; Article 46, Central Law Journal, 147-153. Compare Moses v. United States, 16 App. Cases, D. C., 428; 50 L. R. A., 532. See sec. 456, post.

35 The court would not presume that the ordinance intended to prevent citizens from placing more than ten cords of wood on their own premises, or in their woodhouses, where it could not injure or in any degree annoy or discommode other persons. The object was "to prohibit its being so placed as to injure or annoy the inhabitants of the town." Ewbanks v. Ashley, 36 Ill., 177, 181, 182.

³⁶ Philadelphia v. Wards, 1 Phila. (Pa.), 517. therein for amusement without bet or wager. "Game" was held to mean gambling or game of chance. In a proceeding against one of two partners for selling liquor without a license, the selling of liquor by the other partner may be given in evidence against the defendant, for in such case his act is the act of both. Farther illustrations appear from the numerous cases in the note.

§ 343. **Proving the intent.** There can be no crime without a

37 Williams v. Warsaw, 60 Ind., 457.

Keeping common gaming house. Robbins v. People, 95 Ill., 175, 178.

38 "The general principle in relation to crimes, torts and misdemeanors, is, that all persons who participate in the act done are severally liable, if the offense was several or could be committed by one." Smith v. Adrian, 1 Mich., 495, 497.

MISCELLANEOUS ILLUSTRATIONS.

³⁰ Taking Lobsters unlawfully. State v. Craig, 80 Me., 85; 13 Atl. Rep., 129.

DISORDERLY CONDUCT. Jacksonville v. Headen, 48 Ill. App., 60.

Shouting, etc. Washington v. Frank, 1 Jones (46 N. C.), 436.

Playing cards and betting money in a private room on Sunday, without noise or disturbance, is not. Kahn v. Macon, 95 Ga., 419; 22 S. E. Rep., 641.

ERECTING BRICK KILN, within three hundred feet of dwelling, does not involve question of nuisance. What is residence? State ex rel. v. St. Louis Board of Health, 16 Mo. App., 8.

BURNING BRICK IN KILN; ordinance forbidding, is not violated on proof of burning in clamp. Washington v. Wheat, 1 Cranch C. C., 410.

WEIGHERS AND MEASURERS; weighing and measuring not of-

ficially, but in private capacity, is no violation. Hoffman v. Jersey City, 34 N. J. L., 172.

SOLICITORS FOR HOTELS, ETC.; proof of soliciting on private property shows violation. Niagara Falls v. Salt, 45 Hun. (N. Y.), 41.

Pond Nuisance; owner of abandoned quary held liable. Rochester v. Simpson, 134 N. Y., 414; 31 N. E. Rep., 871, reversing 57 Hun. (N. Y.), 36; 10 N. Y. Supp., 499.

OWNER OF HOUSE used as bawdy house, when proved. McAlister v. Clark, 33 Conn., 91; State v. Wells, 46 Iowa, 662.

"OWNER OR DRIVER OF VEHICLE," who is? Dane v. Mobile, 36 Ala., 304.

"KEEPING OPEN" on Sunday. Lynch v. People, 16 Mich., 472.

"Wanton or Obscene Language" addressed to another, held equivalent to lewd or lascivious language; that words "long-legged son of a bitch," "long-legged pup" and "damned son of a bitch" are not included in the ordinance. Sutton v. McConnell, 46 Wis., 269; 50 N. W. Rep., 414.

"PUBLIC MEETING" or gathering on street. Salvation Army, Bloomington v. Richardson, 38 Ill. App., 60.

SELLING SECOND-HAND GOODS, without license. Atlantic City v. Goldstein, 67 N. J. L., 517; 51 Atl. Rep., 471.

VEHICLE LICENSE, failure to ob-

However, this intent need not include all criminal intent.40 the evil consequences that may or naturally will follow a given criminal act.41 If an act forbidden by law is intentionally done the criminal intent is thereby complete. 42 But with mere guilty intention unconnected with any act or outward manifestation the law has no concern.43 "Where an act, in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found; but where the act * * * the proof of justification or exis in itself unlawful cuse lies on the defendant and in failure thereof the law implies a criminal intent." 44 Where a law makes knowledge an essential ingredient of the offense the exposure of unwholesome provisions for sale for food, or mere exposure of provisions so condemned, is not an offense, unless the person guilty thereof tain; proof that vehicle belonged ducing mutton for sale. to class, required. Atlantic City v. Turner, 67 N. J. L., 520; 51 Atl. (Del.), 123. Rep., 691.

KEEPING CRUDE PETROLEUM. Violation is shown by proof that railroad kept such for some time in warehouse for shipment. Wright v. C. & N. W. Ry. Co., 27 Ill. App., 200.

CARRIER, WITHOUT LICENSE. Delivering single load does not establish. East St. Louis v. Bux, 43 Ill. App., 276.

BRING IN AND DEPOSITING STREET DIRT, ETC., must establish both bringing and depositing. Northern Liberties v. O'Niell, 1 Phila. (Pa.), 427.

FIREWORKS forbidden; does not apply to exhibition by city itself. Heidenwag v. Philadelphia, 168 Pa., 72; 31 Atl. Rep., 1063.

GIVING FALSE ALARM OF FIRE; established by proof that defendant knowingly meddled with the apparatus with the intention of causing the false alarm and did in fact cause it. Koppersmith v. State, 51 Ala., 6.

SELLING MUTTON ON THE STREETS. To establish, must show that defendant was in the business of prowood v. Wilmington, 5 Houst.

REFUSAL TO PRODUCE LICENSE ON request of inspector, marshal or watchman: not proved by showing refusal to produce at request of justice of the peace. Stromburg v. Earick, 6 B. Mon. (45 Ky.), 578.

SLAUGHTERING ANIMALS WITHIN Killing and dressing of single animals does not establish violation. St. Paul v. Smith, 25 Minn., 372.

RIDING BICYCLE across bridge. Swift v. Topeka, 43 Kan., 671; 23 Pac. Rep., 1075.

40 State v. Johns, 124 Mo., 379; 27 S. W. Rep., 1115; State v. Painter, 67 Mo., 84; State v. Pitts, 58 Mo., 556; State v. Rielly, 4 Mo. App., 392.

41 State v. Johns, 124 Mo., 379; 27 S. W. Rep., 1115.

42 State v. Silva; 130 Mo., 440; 32 S. W. Rep., 1007; McPhearson v. State, 22 Ga., 478.

43 Howell v. Stewart, 54 Mo., 400; Ex parte Smith, 135 Mo., 223; 36 S. W. Rep., 628.

44 Per Lord Mansfield in Rex v. Woodfall, 5 Burr, 2667; State v. Goodenow, 65 Me., 30.

knew of the unwholesome character of the provisions. 45 under a statute making it a misdemeanor to use a label "knowing the same to be imitation or counterfeit," guilty knowledge of the imitation or counterfeit must be shown on the part of defendant to authorize a conviction.46 But where the law prohibits an act without regard to the intent with which it is done or a knowledge of the wrongful character of the act on the part of the defendant, which is true as to most police regulations, as evidenced by ordinance, then a prima facie case is made upon proof that the act was done.47 There are many statutes and ordinances which impose upon the public the duty to do or refrain from doing particular acts at their peril. 48 "Many statutes which are in the nature of police regulations impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." 49

§ 344. Liability of participants, keepers, subordinates, servants, etc. As a general proposition, in misdemeanors all who participate in the offense, knowingly and intentionally, are principals and may be convicted either separately or jointly. This rule is applicable to actions for penalties for violations

⁴⁵ State v. Snyder, 44 Mo. App., 429.

46 State v. Bishop, 128 Mo., 373;
31 S. W. Rep., 9; 29 L. R. A., 200.
47 Commonwealth v. Emmons, 98
Mass., 6; Commonwealth v. Waite,
11 Allen (Mass.), 264; State v. McCance, 110 Mo., 398; 19 S. W. Rep.,
648; State v. Manley, 107 Mo., 364;
17 S. W. Rep., 800; Beckham v.
Nacke, 56 Mo., 546; State v. Roche,
37 Mo. App., 480; State v. Bruder,
35 Mo. App., 475; State v. Hackfath, 20 Mo. App., 614; State v.

Permitting animals to graze on public streets. Petersburg v. Whitnack, 48 Ill. App., 663.

King, 86 N. C., 603.

⁴⁸ Applied to statute requiring saloons to be closed on Sunday. People v. Roby, 52 Mich., 577; 18 N. W. Rep., 365.

Also to killing for sale a calf less than four weeks old. Com. v. Raymond, 97 Mich., 567.

Selling naphtha. Com. v. Wentworth, 118 Mass., 441.

49 People v. Roby, 52 Mich.577; 18 N. W. Rep., 365.

Ordinance forbidding public indecent exposure of one's person, does not include an exposure purely accidental; however, in such case, the intent is not an ingredient of the offense. Grand Rapids v. Bateman, 93 Mich., 135; 53 N. W. Rep., 6.

Where, under a statute forbidding the sale of adulterated milk, no knowledge or intent being required, no criminal intent need be proved. State v. Schlenker, 112 Iowa, 642; 84 N. W. Rep., 698.

of municipal ordinances and by-laws, although recoverable by force of the statute or ordinance only by a civil action. Thus one who controls the business of keeping a victualing shop in the name and upon the credit of his wife, but without her presence or personal attention, is a keeper within the meaning of a by-law forbidding one from keeping such shop without a license and liable in an action to recover the penalty imposed. In a proceeding against a locomotive engineer for violating an ordinance prohibiting the stopping of trains or locomotives on any street crossing it is no defense that the engineer acted under the instructions of a foreman or superior agent of the railroad corporation. 51

§ 345. Liability of principal for acts of employes, servants, etc. The decisions present some conflict respecting the criminal liability of the principal for the acts of his agents or servants, where it is shown that the act complained of was in violation of the principal's direction and without his consent. In Arkansas, ⁵² Georgia, ⁵³ Illinois ⁵⁴ and Mississippi ⁵⁵ his liability is

'50 St. Johnsbury v. Thompson, 59 Vt., 300, 312; 59 Am. Rep., 731; 9 Atl. Rep., 571.

Married woman held jointly liable for keeping a bawdy house. Regina v. Williams, 1 Salk, 384; 10 Mod., 63; King v. Dixon, 10 Mod., 335.

One who aids and assists others in keeping a house of ill-fame is liable. Commonwealth v. Gannett, 1 Allen (Mass.), 7, per Bigelow, C.J.

A clerk who acts as the keeper for the owner of a coal yard, held liable for a nuisance maintained thereon. An instruction was sustained which declared that, "if defendant, with a knowledge of what was done, aided, promoted and encouraged the doing of the acts which constituted the nuisance, then he would be liable." Per Metcalf, J., in Com. v. Mann, 4 Gray (Mass.), 213.

The actual keeper of bowling alleys is liable whether he does so of his own will, or by the procurement or as the agent or hired man of another, and whether for his own emolument or that of another. Commonwealth v. Drew, 3 Cush. (Mass.), 279, per Shaw, C. J.

One having entire control and superintendence of a house in which is maintained a liquor nuisance is liable, though only a clerk or servant of the householder. Commonwealth v. Kimball, 105 Mass., 465.

Wife who lives with her husband held jointly liable with him for keeping a liquor nuisance where they both resided. Commonwealth v. Tryon, 99 Mass., 442.

A servant or bar-tender may be held liable. Commonwealth v. Dowling, 114 Mass., 259; Commonwealth v. Burke, 114 Mass., 261.

- ⁵¹ Duluth v. Mallett, 43 Minn.,204; 45 N. W. Rep., 154.
- ⁵² Robison v. State, 38 Ark., 641; Edgar v. State, 45 Ark., 356.
 - ⁵⁸ Loeb v. State, 75 Ga., 258.
- McCutcheon v. People, 91 Ill., 494;McCutcheon v. People, 69 Ill., 601.
 - 55 Whitton v. State, 37 Miss., 379,

affirmed, but in Missouri ⁵⁶ and other states it is denied.⁵⁷ The rule of these cases, growing out of the violations of laws for-bidding sales of liquor to minors, which holds the proprietor liable, irrespective of his knowledge or consent and even against his positive direction, results from construction of statutes which are in the nature of police regulations and which impose criminal penalties, regardless of any intent to violate them.⁵⁸

In an early South Carolina case, an ordinance provided that the owner or tenant of a house whose chimney should take fire and blaze out at the top should be subject to fine, etc. It seems that the chimney blazed out in consequence of a negro servant carelessly throwing into the fire a bandbox filled with pieces of silk, crepe and shreds of work, and that the blaze was but mo-

56 State v. McCance, 110 Mo., 398; 19 S. W. Rep., 648, overruling State v. McGinnis, 38 Mo. App., 15; State v. Shortell, 93 Mo., 123; 5 S. W. Rep., 691; State v. Bockstruck, 136 Mo., 335; 38 S. W. Rep., 317; Kirkwood v. Autenreith, 11 Mo. App., 515; 21 Mo. App., 73; State v. McGrath, 73 Mo., 181; State v. Heckler, 81 Mo., 417; State v. Baker, 71 Mo., 475; State v. Weber, 111 Mo., 204; 20 S. W. Rep., 33.

57 A dram shop keeper is only prima facie liable for the acts of his agent or servant and he is permitted to offer evidence that he forbade the sale and his good faith in this respect is for the jury to determine.

Connecticut—Barnes v. State, 19 Conn., 398.

Indiana—Thompson v. State, 45 Ind., 495.

Iowa-State v. Hayes, 67 Iowa, 27; 24 N. W. Rep., 575.

Maine—State v. Wentworth, 65 Me., 234.

Massachusetts - Commonwealth

v. Nichols, 10 Metc. (Mass.), 259; Commonwealth v. Putnam, 4 Gray (Mass.), 16; Commonwealth v. Stevens, 153 Mass., 421; 26 N. E. Rep., 992; Commonwealth v. Wachendorf, 141 Mass., 270; 4 N. E. Rep., 817.

North Carolina—State v. Wray, 72 N. C., 253.

Ohio—Anderson v. State, 22 Ohio St., 305.

Rhode Island—State v. Smith, 10 R. I., 258.

Texas—Gaiocchio v. State, 9 Tex. App., 387.

Vermont—State v. Bacon, 40 Vt., 456.

That liquor was sold by an employe of defendant who was not a clerk or bartender, but a mere porter or menial servant, and who in selling acted beyond the scope of his employment and in disobedience of defendant's order was held a complete defense. Minden v. Silverstein, 36 La. Ann., 912, 916.

58 See opinion of Cooley, C. J., and cases contained therein in

mentary. In holding the master liable the court aptly observed: "It is true that a master is not liable for the unauthorized acts of his slaves: but here, the slave merely made a fire in the chimney, which, being foul, took fire, and blazed out at the top, and the thing complained of is that the chimney was kept so foul as to take fire. Suppose a master were to set a spring gun and his slave or other person accidentally touching it were to set it off, upon whose head would the consequences fall? Upon the master's clearly. So here the master suffers the chimney to become so foul that the funnel became combustible, his slave accidentally increases the fire in the usual place, which ignites the soot, and the master's negligence is exposed." 59 In an action for selling adulterated milk in violation of an ordinance, it was held (erroneously) by the Kansas City Court of Appeals that the managing officer of the corporation whose milk was being sold could not be held liable for the misconduct of a subordinate servant or employe unless the sale was made by the consent or under the order of such managing agent.60 But it was declared in an Illinois case that "there is no such thing as an agency in crime. The employer is as guilty as the agent and is an accomplice before the fact and under the law a principal" as to what he does by agent.61

In an action against the master to recover a penalty for violating an ordinance requiring badges to be taken out for slaves hired in the city, the fact that the slave is employed in a bake house owned by defendant, but leased to another, to whom the slave was also hired, will not excuse the defendant from the penalty.⁶²

§ 346. Burden of proof—Negative averment. In trial for violating an ordinance in selling liquor without a license where the complaint avers that the defendant was at the time of the sale unlicensed, such negative averment need not be proved by plaintiff. It will be taken as true unless the defendant prove the license, it being a fact peculiarly within his knowledge.⁶³ The general proposition is that where the subject-matter of a

People v. Roby, 52 Mich., 577; 18 N. W. Rep., 365.

⁵⁹ Per Richardson, J., in Charleston v. Palmer, 1 McCord (S. C.), 342, 344.

60 Kansas City v. Dickey, 76 Mo. App., 437. ⁶¹ Spring Valley v. Henning, 42 Ill. App., 159, 162.

62 Charleston v. England, 3 Hill Law (S. C.), 56.

63 State (Greeley) v. Passaic, 42 N. J. L., 87, 90, declining to follow Com. v. Thurlow, 24 Pick. (Mass.), negative averment is peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.^{63½} "Such is the case in civil or criminal prosecutions, for a penalty for doing an act which the statute does not permit to be done except by those who are duly licensed therefor as for selling liquor," etc.⁶⁴ So in an action to recover the penalty provided by an ordinance forbidding the sale of liquor except for certain purposes, the corporation need only prove the sale; the burden being upon the defendant to show, if he can, that the sale was for one of the excepted purposes.⁶⁵

§ 347. Variance. A slight variance between the allegation in the complaint and the proof is immaterial. Geoff Thus an allegation that defendant did unlawfully sell beer to "persons" unknown is supported by proof of sale to one person. Geoff But the charge of maintaining a slaughter house in violation of an ordinance upon a particular day within the corporate limits

374, which was an indictment for selling liquor without a license. The latter case is followed in Com. v. Kimball, 7 Met. (Mass.), 304.

63½ 1 Green. Ev., § 79.

64 Roscoe Cr. Ev., 8; Rex v. Turner, 5 M. & Sel., 206.

65 Harbaugh v. Monmouth, 74Ill., 367; Flora v. Lee, 5 Ill. App.,629, 632.

In prosecutions for doing an action without first procuring a license in violation of an ordinance the burden is on the defendant to show that he had a license. St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045; State v. Parsons, 124 Mo., 436; 27 S. W. Rep., 1102; State v. Geise, 39 Mo. App., 189; Information v. Oliver, 21 S. C., 318, 323, 324; State v. Geuing, 1 McCord (S. C.), 573; Smith v. Adrian, 1 Mich., 495.

Contra. In a prosecution under an ordinance prescribing the width of tires, excepting wagons passing through the town, it was held that the town must show that the defendant was passing through the town. Regina v. Pipe, 1 Ont. Rep. (Can.), 43, 46.

⁶⁶ Complaint recited third day of the month and the proof was the fifth, held immaterial. State (Hershoff) v. Beverly, 45 N. J. L., 288, 290.

In a prosecution for the sale of liquor without a license the allegation of sale to persons unknown will admit proof of sale to persons known. Greeley v. Passaic, 42 N. J. L., 87, 92.

67 Statutory rule applied. State v. King, 37 Iowa, 462.

Allegation of stealing from A. held sustained by proof that the thing stolen was the property of A. and his brother as co-partners. State v. Cunningham, 21 Iowa, 433, per Wright, J., who observed: "The question is a close one; but upon the facts of the case, in view of all the allegations of the indictment and the spirit and meaning of the law, we are inclined to hold that the variance was not material." The decision results

will not admit of proof of the city limits on another day.⁶⁸ So a charge of selling coal in violation of an ordinance to "Miss Mary Bates," was held not to be supported by proving a sale to "Miss Bates." ⁶⁹ However, in such proceedings technical rules of evidence should not be applied, and, speaking generally, they are usually disregarded.⁷⁰

6. DEFENSES.

§ 348. **Defenses enumerated**. In an action to recover the penalty the defendant may show that the ordinance is void,⁷¹ as that the local corporation had no power to pass it;⁷² or, that the law was violated in its enactment;⁷³ or, that the ordinance is in itself unreasonable where it originated by virtue of implied or incidental power;⁷⁴ or, where it was passed by virtue of undoubted express power that such power has been unreasonably exercised;⁷⁵ or, that the ordinance in question is viola-

from application of statute; the common law rule is to the contrary.

68 Spokane v. Robison, 6 Wash.,547; 33 Pac. Rep., 960.

69 Charleston v. Schroeder, 4 Rich. Law (S. C.), 296.

70 A contention that it was "incumbent upon plaintiff to prove the material facts charged in the complaint," was thus disposed of in an Illinois case: "It was the duty of the court (appeal to circuit court from justice of the peace) to have the cause tried on its merits, without regard to the complaint. It was a matter of no moment whether the complaint was technically correct or not; the real question before the jury was, whether there had been a sale by appellant in violation of law, without regard to whether the evidence corresponded with the complaint or not." Harbaugh v. Monmouth, 74 Ill., 367, 371, per Craig, J.

71 Cincinnati v. Kraft, 8 Ohio Dec., 672; Austin v. Austin City Cemetery Assn., 87 Tex., 330; 47 Am. St. Rep., 114; 28 S. W. Rep., 528; Moore v. District of Columbia, 12 App. D. C., 537.

Attack to be confined to section under which defendant is prosecuted. State v. Riley, 49 La. Ann., 1617; 22 So. Rep., 843.

72 State v. Morris, 47 La. Ann. (Part 2), 1660; 18 So. Rep., 710; State v. Crenshaw, 94 N. C., 877; State v. Bean, 91 N. C., 554.

Conviction under a void ordinance held valid where state statute in force at the time denounces the same offense. Taylor v. Owensboro, 98 Ky., 271; 56 Am. St. Rep., 361; 32 S. W. Rep., 948.

COMMON LAW RULE. The validity of a by-law may be called in question by an action expressly brought to recover the penalty. So, if the penalty be ordered to be recovered by action of debt in the courts of the corporation, the validity of the by-law may be questioned in every case, but in that of the city of London on a writ of error in the King's Bench. 2 Kyd. Corp., p. 170, et sea.

73 Chapters III and IV.

74 Chapter VI.

75 Chapter VI.

tive of either the state or federal constitution,⁷⁶ or law of the state,⁷⁷ or municipal charter;⁷⁸ or, that the ordinance is not in force;⁷⁹ or, has expired by limitation;⁸⁰ or, has been repealed;⁸¹ or, that the subject matter is entirely covered by state statute and the municipal corporation is thus forbidden to enact an ordinance on the subject;⁸² (this defense is good in a few jurisdictions only);⁸³ or, that the ordinance provides no legal penalty;⁸⁴ or, that the offense is barred by the statute of limitation; or, that the regulation is not applicable to defendant; and, finally, that the defendant did not in fact violate the ordinance.

§ 349. Corporate existence cannot be questioned as a defense. In actions to enforce ordinances the existence of the municipal corporation which passed them cannot be collaterally attacked. The fact that the corporation acted as such is sufficient evidence for the purpose of recovering the penalty or proving its existence as a municipal corporation.⁸³ Generally

Question of reasonableness of ordinance, while affecting its validity, is not a question affecting court's jurisdiction. Woodruff v. Stewart, 63 Ala., 206, 211.

76 Chapter VIII.

77 Sec. 16, supra, and ch. XV.

78 Sec. 15, supra.

Action to recover penalty for failure to pay license tax not authorized by charter, denied. New York v. Second Avenue R. R., 32 N. Y., 261; New York v. Third Avenue R. R. Co., 33 N. Y., 42.

79 "An essential element of the jurisdiction of the mayor is a bylaw or ordinance of the city, established and promulgated prior to the commencement of the prosecution." Per Brickell, C. J., in Woodruff v. Stewart, 63 Ala., 206, 211.

Jurisdiction defined. Hunt v. Hunt, 72 N. Y., 217, 229; Lamar v. Gunter, 39 Ala., 324.

80 Sec. 37, supra.

81 State v. McCulla, 16 R. I., 196;14 Atl. Rep., 81.

The general rule is, as hereto-

fore stated, that the repeal of an ordinance pending a prosecution under it operates to release the defendant unless it is otherwise provided in the repealing ordinance, as where it contains a saving clause. Sec. 206, *supra*.

82 State v. McCulla, 16 R. I., 196;14 Atl. Rep., 81.

83 Chapter XV.

84 Sec. 168, supra. Fire Department of New York v. Braender, 3 N. Y. St., 580.

A penalty cannot be raised by implication, but must be expressly created and imposed by law. Health Department New York v. Knoll, 70 N. Y., 530, 536; Jones v. Estis, 2 John (N. Y.), 379; Bell v. Dole, 11 John (N. Y.), 173.

s5 Elk Point v. Vaughn, 1 Dak., 113; 46 N. W. Rep., 577; Kettering v. Jacksonville, 50 Ill., 39; Tisdale v. Minonk, 46 Ill., 9; Hamilton v. Carthage, 24 Ill., 22, 24; Decorah v. Gillis, 10 Iowa, 234, per Wright, C. J.

Acts of de facto municipal of-

the state, being the creator of municipal corporations, only is permitted to question their creation or impeach their corporate existence by information in the nature of *quo warranto* or other direct proceedings.⁸⁶ "A private person cannot directly or indirectly usurp this function of government."⁸⁷

§ 350. No defense because prosecution under validated ordinance. As we have seen, ordinances which are void, because of some irregularity in their enactment may be validated by ficers are not subject to collateral *Iowa*—Ford v. North Des

attack. Coles County v. Allison, 23 Ill., 437.

Cannot question legality of election of those who passed the ordinance. Redden v. Covington, 29 Ind., 118.

Corporation need not prove its corporate existence under the general issue, unless defendant has given notice, with his plea, that plaintiff is not a corporation. At common law it is otherwise. Smith v. Adrian, 1 Mich., 495, 498.

so United States — Ashley v. Board; 60 Fed. Rep., 55, 63; Ralls County v. Douglass, 105 U. S., 728; Montpelier v. Huron, 62 Fed. Rep., 778; Judson v. Plattsburg, 3 Dill. C. C., 181; Hill v. Kahoka, 35 Fed. Rep., 32; Shapleigh v. San Angelo, 167 U. S., 646.

Alabama—Ex parte Moore, 62 Ala., 471; Harris v. Nesbit, 24 Ala., 398.

Arkansas—Searcy v. Yarnell, 47 Ark., 269; 1 S. W. Rep., 319; State v. Leatherman, 38 Ark., 81.

Colorado—People ex rel. v. Fleming, 10 Colo., 553; 16 Pac. Rep., 298.

Illinois—Dodge v. People, 113 Ill., 491; 1 N. E. Rep., 826; People v. Spring Valley, 129 Ill., 169; 21 N. E. Rep., 843; Cleveland C. C. & St. L. R. Co. v. Dunn, 61 Ill. App., 227; Geneva v. Cole, 61 Ill., 397; Kettering v. Jacksonville, 50 Ill., 39; Tisdale v. Minonk, 46 Ill., 9; Hamilton v. Carthage, 24 Ill., 22; Mendota v. Thompson, 20 Ill., 197.

Iowa — Ford v. North Des Moines, 80 Iowa, 626, 637; 45 N. W. Rep., 1031; State ex rel. v. Carbondale School District, 29 Iowa, 264.

Kansas—Mendenhall v. Burton, 42 Kan., 570; 22 Pac. Rep., 558.

Michigan — People v. Smith (Mich., 1902), 90 N. W. Rep., 666; 9 Detroit Leg. News, 199.

Missouri—State ex rel. v. Campbell, 120 Mo., 396; 25 S. W. Rep., 392; State v. Fuller, 96 Mo., 165; 9 S. W. Rep., 583; Catholic Church v. Tobbein, 82 Mo., 418; Inhabitants, etc., v. Fox, 84 Mo., 59; State ex rel. v. Coffee, 59 Mo., 59; Shewalter v. Pirner, 55 Mo., 218; Billings v. Dunnaway, 54 Mo. App., 1; Land v. Coffman, 50 Mo., 243; State ex rel. v. Jenkins, 25 Mo. App., 484; Kayser v. Bremen, 16 Mo., 88, 90; Chambers v. St. Louis, 29 Mo., 543.

Nebraska—State v. Whitney, 41 Neb., 613; 59 N. W. Rep., 884.

New Jersey—State ex rel. v. Dover, 62 N. J. L., 138; 41 Atl. Rep., 98; Campbell v. Wainright, 50 N. J. L., 555; 14 Atl. Rep., 603; Gibbs v. Somers Point, 49 N. J. L., 515; 10 Atl. Rep., 377.

New York—People v. Clark, 70 N. Y., 518; People v. Carpenter, 24 N. Y., 86.

North Carolina—Henderson v. Davis, 106 N. C., 88; 11 S. E. Rep., 573.

Texas—Largen v. State ex rel., 76 Tex., 323; 13 S. W. Rep., 161; State ex rel. v. Dunson, 71 Tex..

subsequent proceedings upon the part of the municipal corporation or the legislature.⁸⁸ Penal ordinances may be thus validated. Although an ordinance before a certain day was originally void, the legislature may give it effect and render it valid, and prosecutions may be conducted thereafter under it.⁸⁹ In one case when the ordinance was violated the record of the village board did not show that it had been legally passed. Subsequently the record was properly amended to show the fact. The defense was overruled.⁹⁰

§ 351. Former acquittal or punishment. Where concurrent jurisdiction to enforce a given ordinance is conferred upon two different tribunals conviction in either jurisdiction may be set up as a bar to a prosecution for the same offense in the other. 91 So on two charges founded on the same wrongful act (but

65; 9 S. W. Rep., 103; Brennan v. Wheatherford, 53 Tex., 330; 37 Am. Rep., 758.

Vermont—State v. Bradford, 32 Vt., 50.

Washington—Ferguson v. Snohomish, 8 Wash., 668; 36 Pac. Rep., 969.

Wisconsin—Gilkey v. Town of How, 105 Wis., 41, 46; 81 N. W. Rep., 120; State ex rel. v. Forest Co., 74 Wis., 610; 43 N. W. Rep., 551; Schriber v. Langlade, 66 Wis., 616; 29 N. W. Rep., 547, 554.

Contest, to question regularity of incorporation, allowed in some states. Stephens v. People *ex rel.*, 89 Ill., 337.

One who has contracted with an organization as a corporation in its corporate name is estopped from denying the existence of such corporation at the time of making the contract. West Mo. Land Co. v. K. C. & S. B. R. R., 161 Mo., 595; 61 S. W. Rep., 847; Cowell v. Colorado Springs Co., 3 Colo., 82. May be questioned collaterally in Tennessee. Woodbury v.

Brown, 101 Tenn., 707; 50 S. W.

Rep., 743; State v. Frost, 103

Tenn., 685; 54 S. W. Rep., 986;

Angel v. Spring City (Tenn., 1899), 53 S. W. Rep., 191. In Tennessee when the attempted organization is void the municipality may plead the invalidity of its organization in a suit on bonds issued by such city, on the ground that no power existed to issue them. Ruohs v. Athens, 91 Tenn., 20; 18 S. W. Rep., 400; 30 Am. St. Rep., 858.

Where the question arises collaterally, it is sufficient to show a de facto incorporation. L. N. A. & C. Ry. Co. v. Shires, 108 Ill., 617.

87 National Bank v. Matthews, 98 U. S., 621; Mulliken v. Bloomington, 72 Ind., 161.

Rival corporation cannot question. Kirkpatrick v. State, 5 Kan., 673.

88 Secs. 164, 165, supra.

⁸⁹ City Council v. Truchelut, 1 Nott & McCord (S. C.), 227.

90 Gilberts v. Rabe, 49 Ill. App., 418, 421.

91 Wightman v. State, 10 Ohio, 452.

Former conviction may be shown in evidence under general issue, without being pleaded. State v. Conlin, 27 Vt., 318.

under different laws), as emission of black smoke, there can be only one conviction.⁹²

In some states a municipal ordinance and a state statute may cover the same subject matter and denounce the same offense. The question whether a conviction or acquittal upon trial in one jurisdiction will be a bar to prosecution in the other is answered both ways by the decisions, which are considered in the chapter on Municipal Control of Offenses Against the State.⁹³

Estoppel as a defense. The doctrine of estoppel in § 352. pais is applied to municipal, as well as to private, corporations and citizens, but the public will only be estopped when justice and right may so require.94 "Any positive act by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, will work an estoppel." Thus where a dramshop license is procured, pursuant to ordinance, the license being issued by de facto officers, and the sum required therefor is paid into the city treasury, and bond is given as provided, the city will be estopped from maintaining an action to recover the penalty of an ordinance forbidding the conducting of such business without a license, until the license issued is revoked and the money paid therefor is returned.96 Usually a municipal corporation will not be permitted to license an act to be done, as to sell liquor for medicinal purposes, etc., and then enforce a penal

92 Eddleston v. Barnes, 1 Ex. Div. Law Rep., 67, 71, Pollock, B.: "I am of opinion that the appellant ought not to be convicted twice. Logically what was done by the appellant was done in disobedience to both the orders (to abate but the question is, smoke). whether the evidence of the act done being the same in each case, there can be two offenses which may be dealt with concurrently. I think not in this case, for though I am far from saying that that can never happen, here the statutes are in pari materia, the orders are in pari materia, and the conduct complained of in each information is identical."

93 Chapter XV, sec. 510, post.

94 Chicago, R. & P. R. R. Co. v. Joliet, 79 Ill., 25, 39.

95 Martel v. East St. Louis, 94Ill., 67, 70.

Mere non-action of municipal officers is not sufficient to create an estoppel. There must be some act done to influence the action of the other party. Logan Co. Supervisors v. Lincoln, 81 Ill., 156, 159.

When city not estopped, relating to sale of land. Roby v. Chicago, 64 Ill., 447.

96 Martel v. East St. Louis, 94 Ill., 67. ordinance for the doing of it as for an illegal act. In such case the maxim volenti non fit injuria applies.97 Where an applicant for a license to keep a dram shop complies with all of the requirements of the ordinance respecting its issuance, but he is refused a license by the corporate authorities and who make discriminations and issue similar licenses to others, in a prosecution for keeping a dram shop without a license this will be a good defense. The fact that the license was refused was no fault of the defendant.98 The grant of a license to retail liquor from a day past has been held to operate as a release of the penalties for retailing without a license subsequent to that day, although prior to the taking out of the license. The court illustrated the point thus: If A has committed various trespasses on the close of B and B afterwards conveys the close to A or gives him a license to enter at pleasure, to take effect as of a period antecedent to the first trespass, this can only mean a release of the several trespasses.1 But under an ordinance expressly providing that after suit is commenced no license shall be granted without discharging the penalty, and should such license be granted "the penalty shall not thereby be remitted," a license granted after the institution of suit for the penalty will not operate as a release of the penalty, although the license by its terms takes effect from a day previous to the commission of the offense and covers the date of the offense.² In

⁹⁷ Genoa v. Van Alstine, 108 Ill.,555, 559.

In one case the city granted defendant a license and subsequently passed an ordinance requiring all retailers including defendant to close their doors and forbear to sell while any "denomination of Christian people" was holding divine service anywhere in the town. While the ordinance was held void the view taken by the court was that it could not be enforced in any event against defendant. Gilham v. Wells, 64 Ga., 192.

98 Zanone v. Mound City, 11 Ill., App., 334, 339; Prather v. People, 85 Ill., 36. Compare Deitz v. Central, 1 Colo., 323.

1 "This view is confirmed by

what we understand to be the practice under the ordinance." Per Harper, J., in Charleston v. Corleis, 2 Bailey (S. C.), 186, 189.

² Charleston v. Schmidt, 11 Rich. (S. C.), 343, 346, distinguishing Charleston v. Corleis, 2 Bailey (S. C.), 186.

The same principle is applied under slightly different state of facts by O'Neall, J., in Charleston v. Feckman, 3 Rich. (S. C.), 385.

It is established law that a municipal corporation may waive strict compliance with police regulations, unless restricted by charter, but a waiver will not be presumed. Chicago City Ry. Co. v. People ex rel., 73 Ill., 541; Urquhart v. Ogdensburgh, 97 N. Y., 238.

Georgia the doctrine of estoppel was invoked in restraining a municipal corporation from enforcing an ordinance forbidding the storing of guano, or commercial fertilizer, within the corporate limits against a railroad company, where it appeared that the company, without objections on the part of the municipal authorities and at great expense, erected buildings for such purpose.³

In a New York case—an action to recover a penalty for keeping gunpowder in violation of an ordinance—it appeared that the law allowed a pecuniary penalty to be recovered by action, and, in addition, permitted a seizure of the property, and if such property was not restored the owner had an action to try the question of forfeiture. The gunpowder had been seized. An order of the mayor and two aldermen directing the gunpowder to be restored to the owner was held not to be a judgment of acquittal in a proceeding in rem and as such was not conclusive or even proper evidence in defense. The court said: "If the question of the forfeiture of the property had been 'determined by due course of law' * * the judgment would perhaps have been conclusive as an estoppel between the same parties, in this action for the pecuniary penalty."

In a proceeding to recover the penalty for erecting a building contrary to ordinance, without first obtaining the consent of two-thirds of the members of the council, it appeared that after the construction of the building had begun the defendant, on petition, obtained unanimous consent of the council to proceed. Such consent was held not to be a bar to the recovery of the penalty.⁵

§ 353. When defendant estopped from pleading unreasonableness of ordinance. Where the local corporation under undoubted charter power grants a license and imposes terms and conditions respecting the conduct of the business thereunder,⁶

³ Athens v. Georgia R. R. Co., 72 Ga., 800.

⁴ Talmage v. Fire Department of New York, 24 Wend. (N. Y.), 235, per Bronson, J.

^{5 &}quot;The defendant did not apply to have the penalty remitted, nor did the council by their resolution relieve him from past *liability. The right to sue had vested in the

plaintiff, and that right the council, conceding their power to do so, did not in any wise attempt to impair." State (Clark) v. Fire Department of Elizabeth, 43 N. J. L., 172, 174.

⁶ Schwuchow v. Chicago, 68 Ill.,444; Wiggins v. Chicago, 68 Ill.,372. See sec. 419, post.

as in the business of a pawnbroker, and one condition is that he is required to make daily reports of the personal property deposited at his shop, together with a description of the persons leaving the same to the police officers, in a prosecution for failure to observe the ordinance regulations in this respect he will be estopped from pleading that such provisions are oppressive, tyrannical, etc., or that such disclosure would have a detrimental effect upon his business. He accepted the license under the conditions required and he is thereby bound by them.⁷

§ 354. **Defenses—Miscellaneous.** Mere irregularities in bringing the action, as where it is instituted at the instance of the wrong officer, will not constitute a good defense. So the fact that others have violated the ordinance and have not been prosecuted is no defense. As all persons upon whom ordinances are binding are charged with constructive notice of all valid ordinances, defendant cannot show that he did not know of the existence of the ordinance. So, for like reason, it is no defense that one owner is a non-resident, where the ordinance is intended to apply to all within the corporate limits, as ordinances forbidding the running at large in the streets and public highways of animals. The rule, being in

7 Launder v. Chicago, 111 Ill.,291; 53 Am. Rep., 625.

s"The city is clothed with the right of action, and has, in fact, brought this suit, and it is no concern of the defendant whether it was done at the instance of the city solicitor or the building inspectors." It appeared the law contained no provision on the subject. Singer v. Philadelphia, 112 Pa., 410, 413; 4 Atl. Rep., 28, per Green, J.

Port Jervis v. Close, 6 N. Y.
 Supp., 211; Charleston v. Reed, 27
 W. Va., 681, 696; 55 Am. Rep., 336.

Prosecution for obstructing sidewalk can not be justified by fact that other persons placed obstructions thereon in the same block. People v. Van Houten, 35 N. Y. Supp., 186; 13 Misc. Rep. (N. Y.), 603.

It is no defense that other nuisances are in the same neighborhood. Burlington v. Stockwell, 5 Kan. App., 569.

10 Sec. 22, supra.

¹¹ Central Georgia R. R. Co. v. Bond, 111 Ga., 13; 36 S. E. Rep., 299.

¹² Horney v. Sloan, Smith (Ind.), 136.

¹³ Alabama—Folmar v. Curtis, 86 Ala., 354; 5 So. Rep., 678.

Illinois—Roberts v. Ogle, 30 Ill., 459; 83 Am. Dec., 201.

Iowa—Gosselink v. Campbell, 4 Iowa, 296.

Kentucky—McKee v. McKee, 8 B. Mon. (47 Ky.), 433.

Massachusetts—Gilmore v. Holt, 4 Pick. (21 Mass.), 257.

North Carolina—Rose v. Hardie, 98 N. C., 44; 4 S. E. Rep., 41; Whit-

some jurisdictions that, publication of an ordinance must be shown before a conviction under it can be sustained,¹⁴ the defense of lack of publication must be established by defendant.¹⁵

Defenses—Illustrative cases. On a charge of fast driving, evidence of the general character of defendant as a careful driver is inadmissible.16 So on such charge evidence of permission from the mayor and aldermen to drive faster than the by-law permitted was held inadmissible.¹⁷ In one case on a charge of riding faster than a walk in turning a corner of the street, the ordinance permitted defendant to show as a defense to the satisfaction of the court that urgent causes compelled him to so ride. But here the court decline to permit the defendant to testify in his own behalf. The rule of the common law being applied and no mode of proof was pointed out.18 On the trial of a charge that defendant stopped his vehicle on the street for a longer period than twenty minutes, evidence that defendant has a license as a hawker and peddler from the commonwealth is no defense. 19 On the trial of a charge for the violation of an ordinance "for the protection of the beach or shore" in a Wisconsin case, it was held that defendant may show by expert evidence that the act charged would have no effect to injure the harbor or to render the city liable to inundation.²⁰ In a prosecution for the violation of an or-

field v. Longest, 6 Iredel (28 N. C.), 268.

Missouri—Spitler v. Young, 63 Mo., 42.

South Carolina — Kennedy v. Sowden, 1 McMull, (S. C.), 323.

Tennessee-Knoxville v. King, 7 Lea (75 Tenn.), 441.

Texas—Moore v. Crenshaw, 1 White & W. Civ. Cas. Ct. App. Tex., sec. 264.

Contra. Marietta v. Fearing, 4 Ohio, 427.

Particular ordinance, held to apply only to cattle of residents. Plymouth v. Pettijohn, 4 Dev. (15 N. C.), 591.

14 Schott v. People, 89 Ill., 195; Elizabethtown v. Lefler, 23 Ill., 90; Hutchison v. Mt. Vernon, 40 Ill. App., 19. Contra. Charleston v. Chur, 2 Bailey (S. C.), 164.

15 Van Buren v. Wells, 53 Ark.,
368; 14 S. W. Rep., 38; 22 Am. St.
Rep., 214; Downing v. Miltonvale,
36 Kan., 740; 14 Pac. Rep., 281.

¹⁶ Commonwealth v. Worcester, 3 Pick. (Mass.), 461.

¹⁷ Commonwealth v. Worcester, 3 Pick. (Mass.), 461.

¹⁸ City Council v. Dunn, 1 Mc-Cord (S. C.), 333.

Contra. Defendant permitted to testify in his own behalf, Graubner v. Jacksonville, 50 Ill., 87.

Commonwealth v. Lagorio, 141
 Mass., 81; 6 N. E. Rep., 546; Commonwealth v. Fenton, 139
 Mass., 195; 29 N. E. Rep., 653.

²⁰ Clason v. Milwaukee, 30 Wis., 316.

dinance as to speed, the defense that the defendant railroad was carrying the United States mail and was required by contract to transport such mail within a prescribed time and the enforcement of such ordinance would prevent this, was held bad.²¹ An ordinance forbade the erection of wooden buildings within prescribed limits without a license granted by the council on petition to be approved by the mayor and chief of the fire department. In a prosecution to recover the penalty named the defense that there was no chief of the fire department was denied. Here it was shown that the wooden building was erected in entire disregard of the ordinance.22 A resolution of the council granting permission to construct a wooden building which is obtained by fraud is no defense in a prosecution for creeting a wooden building without legal permission.²³ Where the law provides for the examination of fire escapes and, if approved, a certificate is to be issued which shall relieve the party from liabilities, fines, etc., in a prosecution for the violation of such regulations, the certificate issued by the proper authorities is a complete defense.24

NOTICE - VIOLATING BUILDING LAW. That commissioner failed to give notice to city solicitor of violation, and if building conforms to requirements of such notice, one-half of the fine shall be abated. "But the right of the Held bad. city to recover the penalty is not made to depend upon the performance of this duty by the commissioners of highway. On the contrary, the right of recovery is expressly given upon the mere violation of the law. While an allegation that the commissioners of highways had not performed their duty of giving notice might possibly raise a question whether they would be liable to the defendant in damages therefor, it does not take away or impair the city's right of action for the penalty." Per Green, J., in Singer v. Philadelphia, 112 Pa. St., 410, 413; 4 Atl. Rep., 28.

Hogs Running at large without fault of defendant will not render

him responsible. Spitler v. Young. 63 Mo., 42.

"WILLFUL VIOLATION"; inability to prevent a good defense, when. Indianapolis v. Consumers' Gas & Trust Co., 140 Ind., 246; 39 N. E. Rep., 943.

BRICK KILN. Authority to open is no defense where the brick kiln is a nuisance. State *ex rel.* v. St. Louis Board of Health, 16 Mo. App., 8.

When brick kiln is a nuisance. Kirchgrober v. Lloyd, 59 Mo. App., 59.

²¹ Whitson v. Franklin, 34 Ind., 392.

²² Alexander v. Greenville, 54 Miss., 659, 663.

Failure to show consent to erect a wooden building as required by law. Troy v. Winters, 4 Thomp. & C. (N. Y.), 256.

²³ Grayson v. Gas Co., 4 Lanc. Law Rev. (Pa.), 41.

²⁴ Commonwealth v. Emsley, 5 Pa. Co. Ct. Rep., 476.

In a proceeding to recover the penalty for violating an ordinance requiring abutters on public highways to remove filth, etc., it is no defense that defendant was required to remove matter which he had no agency in depositing on the way, or to do what he would not be obliged to do if he did not own land abutting thereon, or that the ordinance required the defendant to do in part the work which the city had formerly done, or that another ordinance forbade the defendant from removing filth or refuse matter through the streets without a permit from the board of health, or that the ordinance omitted to provide a time beyond which the filth should not be allowed to remain.²⁵ On the charge of selling liquor without a license defendant cannot show that the city clerk improperly refused to issue a license to him.²⁶

In a prosecution under a by-law which made it unlawful to "permit" swine to go upon any sidewalk and obstruct or injure it, evidence that it was impossible to drive swine through the street so as to prevent them from going upon the sidewalks and that defendant did all that could be done to prevent it, is inadmissible. As the defendant voluntarily drove the swine through the streets under the law he was bound to prevent them at all hazards from going upon the sidewalks and doing the injury alleged. "Permit," as used in the by-law, means "to allow by not prohibiting." In considering the by-law the word "permit" is not to be preceded with "carelessly" or "without using all preventative care." ²⁷

Erected according to plans and specifications approved, is good defense. New York Fire D. v. Braender, 14 Daly (N. Y.), 53.

²⁵ Commonwealth v. Cutter, 156 Mass., 52: 29 N. E. Rep., 1146.

²⁶ Deitz v. Central, 1 Colo., 323. But compare Zanone v. Mound City, 11 III. App., 334, and Prather v. People, 85 III., 36.

²⁷ Per Metcalf, J., in Com. v. Curtis, 9 Allen (Mass.), 266, 271.

Driving Vehicle on Sidewalk. Defense that street on account of mud was in such condition that he could not drive a loaded wagon, with safety to its load, over it, ex-

cept by going upon the sidewalk, and that the particular street was the only one available for his business, held bad. State v. Brown, 109 N. C., 802.

OBSTRUCTING STREET with railroad cars, no defense that defendant was acting as agent of the railroad company. Duluth v. Mallett, 43 Minn., 204; 45 N. W. Rep., 154.

Hog-Pen Nuisance. Where the facts prove a public nuisance it is no defense to show that the pens are kept as clean as possible under the circumstances. Burlington v. Stockwell, 5 Kan. App., 569,

7. THE JUDGMENT, RECORD AND EXECUTION.

§ 356. The verdict. In proceedings for the violation of ordinances usually courts are not technical respecting the form of the verdict. Substance and not form is regarded. The verdict will be held sufficient if it is responsive to the issue. It has been held in Illinois that it may be given in open court and entered by the clerk. Thus, where after hearing, the court announced that he found defendant guilty and ordered that defendant be fined, etc. and awarded execution, etc.. this will be sufficient.²⁸

In Colorado it has been held that on the charge of selling liquor without a license a verdict of guilty is substantially responsive to the issue, although the proceedings is in form of an action of debt. The question in issue is whether the defendant has been guilty of a violation of the ordinance, and this issue is certainly settled by the verdict of guilty.²⁹

§ 357. The judgment. The judgment must be for the precise offense. The defendant cannot be tried on one charge and convicted on another.³⁰ Where the ordinance imposes a penalty for each of several distinct acts, some of which are within the corporate power to punish and some are not, a general charge of the violation of the ordinance, without specifying any act whatever, will not sustain a judgment or a plea of guilty.³¹ Where the complaint charges several violations of the

28 Wiggins v. Chicago, 68 Ill.,372, 376.

29 "The only other finding which, upon any principle, could have been made, is the common law verdict, in the action of debt, that 'the defendant doth owe the said plaintiff the said sum of, etc., above demanded,' but it cannot be said that there is any specific debt or sum certain sought or demanded in such prosecution as this; the fine to be imposed, which is the only thing recovered, might be greater or less within limits, and in the absence of any regulation by ordinance it appears to us that the jury could have nothing to do with fixing the

amount of the fine." Deitz v. Central, 1 Colo., 323, 333.

VAGRANCY. Verdict: "We, the jury, in the above entitled cause, find the defendant guilty of being a vagrant at the time charged in the complaint." Held sufficient. State v. Preston (Idaho, 1894), 38 Pac. Rep., 694.

30 Columbus v. Arnold, 30 Ga., 517; Lesterjelle v. Columbus, 30 Ga., 936.

Must be tried on the charge that he was summoned to answer. Regina v. Mines, 25 Ont. Rep. (Canada), 577.

31 Collins v. Hall, 92 Ga., 411;
 17 S. E. Rep., 622,

same ordinance and the defendant is convicted, punishment for the different violations cannot be aggregated in order to make a single or entire punishment for all, but the sentence for each violation is to be imposed separately and as for a separate offense.32 In one case the ordinance provided a fine for each day that a certain business was carried on without registration. The charge was expressly limited to one day's business. The trial court imposed a fine for three days' business. On appeal this was held erroneous, but the fine was reduced to one day's business.33 Where the charter authorizes the recovery of several fines in one action and the proof is clear showing four distinct violations, a verdict and judgment for the penalty of but one is improper, since it is a bar to future prosecutions for the other penalties. The judgment should be for all the penalties proved.34 On trial of charge for swearing the same profane oath several times on the same day there need not be a separate conviction for swearing each oath.³⁵ As we have seen, where the ordinance provides no penalty none can be inflicted.36 The nature and extent of the penalties that may be imposed are considered in the chapter on penalties.37

The penalty of imprisonment cannot be imposed unless authorized. Thus where the ordinance allows the justice to imprison for non-payments of a fine imposed in event an appeal is not taken, in case an appeal is taken to the circuit court, the latter court cannot inflict the penalty of imprisonment for the non-payment of the fine.³⁸ Where the charter provides that if defendant has no property whereof the judgment can be collected he may be committed to jail, it is error to enter judgment that defendant stand committed until the fine and costs imposed are paid. In such case execution should be awarded

32 El Dorado v. Beardsley, 53
 Kan., 363; 36 Pac. Rep., 746; In re
 Donnelly, 30 Kan., 424; 1 Pac.
 Rep., 648, 778.

33 "Thrice this unquiet case has materialized at the sitting of this tribunal. We hope its perturbed spirit will now enter into unbroken rest." Bleckley, C. J., Phillips v. Atlanta, 87 Ga., 62; 13 S. E. Rep., 201.

Joint indictment against two;

conviction of one. Philadelphia v. Kitchen, 2 Phila, (Pa.), 44.

34 St. Charles v. O'Mailey, 18 Ill., 407, 412.

35 Johnson v. Barclay, 16 N. J. L., 1.

36 Smith v. Gouldy, 58 N. J. L., 562; 34 Atl. Rep., 748.

³⁷ Chapter V, secs. 168 to 180, supra.

88 Carson v. Bloomington, 6 Ill. App., 481, 484.

and if no property of defendant can be found the defendant may then be committed to jail.³⁹

Sometimes it is sufficient to enter the judgment in the language of the charter, as where the charter provides that on conviction defendant may be fined and if the fine is not paid he may be imprisoned for a time specified.⁴⁰ But a judgment in favor of the corporation upon a complaint consisting entirely of a copy of the section of the ordinance, unaided by any averment tending to show a cause of action, is insufficient.⁴¹

The sentence must be definite and certain. A sentence "to commence after the expiration of previous sentences have expired or otherwise disposed of according to law," is too uncertain and indefinite to be supported. Likewise is a sentence "to commence after the expiration of the sentence aforesaid," where the record does not show to what the word "aforesaid" related. The term of imprisonment should be so definite and certain on the face of the record as to advise fully of the time of its commencement and termination.

The fact that the judgment does not possess the formal parts of a judgment in debt is not material. Where it orders and adjudges and awards execution for its collection it is sufficient. An erroneous form of entry of a judgment is no objection to its validity if it is clearly a finding and an adjudication.⁴⁵

The court cannot set aside a judgment of conviction at a sub-

³⁹ Deitz v. Central, 1 Colo., 323, 333.

Imprisonment—Form under particular charter. Keokuk v. Dressell, 47 Iowa, 597, 601; State v. Jordan, 39 Iowa, 387.

40 "This section of the charter taken in connection with other provisions may be susceptible of the construction that the defendant is to be released when he pays the fine, but if so, there is no error in entering the judgment in the language of the statute. If the defendant, after being committed upon such judgment, pays the fine, he can raise the question on habeas corpus." State (Flanagan) v. Plainfield, 44 N. J. L., 118, 121; Ex parte Chin Yan, 60 Cal., 78, 80; Ex parte Ellis, 54 Cal., 204.

- 41 Long v. Brookston, 79 Ind., 83.
- ⁴² Larney v. Cleveland, 34 Ohio St., 599.
- ⁴⁸ Williams v. State, 18 Ohio St., 46, 48.
- 41 Picket v. State, 22 Ohio St., 405, 410.
- ⁴⁵ Wiggins v. Chicago, 68 Ill., 372.

A finding and judgment in damages was sustained when the proceeding was in debt for the recovery of a penalty. "There is no doubt but a finding and recovery in the latter form is more conformable to the ancient practice, but it was strictly technical, and not calculated, in the slightest degree, to promote justice. In furtherance of justice, mere technical

sequent term, because in the meantime the governor remits the fine, where under the law he has no power to do so.⁴⁶

Record of conviction. Although generally a liberal construction is given, and properly so, to proceedings before inferior tribunals, yet in view of the precision of recital demanded by some appellate courts of charges of a penal nature it is better to have the record show on its face that everything necessary to a legal trial and conviction has been duly observed. Ordinarily it should show what ordinance was violated, that legal notice was given defendant (when required), or that he appeared voluntarily, whether defendant was present at the trial, or absent, his plea (when required), the precise nature of the offense, the mode of trial, whether summary or by jury (when required), the verdict (if any) and the judgment of the court, stated in clear and unequivocal terms.⁴⁷ In addition, where there is no trial de novo on appeal, but only a trial on the record, in some jurisdictions it is held that it is necessary to set out the names of the witnesses and the substance of their

rules should not be permitted to prevail, unless the courts are not at liberty to disregard them, as settled law." Pendergast v. Peru, 20 Ill., 51, 53, approving Horton v. Critchfield, 18 Ill., 133; C. & R. I. R. R. Co. v. Whipple, 22 Ill., 105, 109.

⁴⁶ State *ex rel.* v. Renick, 157 Mo., 292; 57 S. W. Rep., 713.

⁴⁷ Described in the words of the law and setting out fact that charge was satisfactorily proved is sufficient. Byers v. Com., 42 Pa. St., 89.

All material steps should be shown. Philadelphia v. Hughes, 4 Phila. (Pa.), 148.

As to sufficiency of record of conviction, see King v. Thompson, 2 Durnf. & East., 18.

Should specify the by-law and the manner in which it was violated. Boothe v. Georgetown, 2 Cranch. C. C., 356; 3 Fed. Cas. No. 1651.

Record to set forth ordinance,

authorizing the proceeding where the conviction is summary. Commonwealth v. Hill, 12 Pa. Co. Ct. Rep., 559; Lancaster v. Hirst, 1 Lanc. Law Rev. (Pa.), 209.

THE ESSENTIALS OF A RECORD have been stated to be: (1) a legal information, (2) a summons issued thereon, specifying the charge, (3) opportunity of defendant to make a defense, and (4) the evidence taken on the hearing. Lancaster v. Baer, 5 Lanc. Bar (Pa.), 606.

The record must show, on its face, everything necessary upon general principles, to constitute a legal conviction. It must show, first, such facts as are necessary to constitute the offense; second, that defendant was convicted thereof; third, upon what evidence he was convicted, and fourth, judgment of forfeiture. Per Woodhull, J., in Buck v. Danzenbacker, 37 N. J. L., 359, 362; Handlin v. State, 16 N. J. L., 96,

testimony.⁴⁸ However, this is rarely ever required.⁴⁹ The jurisdiction must appear on the face of the record.⁵⁰ Thus where a justice of the peace is permitted to try charges of violations of ordinances only in the absence of the mayor or his inability to act, the record must recite the mayor's absence or inability, in order to give the justice jurisdiction.⁵¹ So the record must show the specific charge. Where it appears from the record that defendant was charged with a misdemeanor, and he is shown to be an offender against an ordinance it fails to show jurisdiction.⁵² Where the ordinance specifies two penalties the judgment must be certain for which penalty it is given.⁵³ A record of conviction for peddling without a license, which recites that defendant was found guilty of "selling" tea, etc., is bad.⁵⁴

§ 359. **Execution.** The power to inflict the penalty imposed by the ordinance cannot be exercised until there has been a judicial determination of the fact that the ordinance has been violated.⁵⁵ The proceeding relative to the execution of the

Keeping open gambling house. State v. Grimes, 83 Minn., 460; 86 N. W. Rep., 449.

48 Keeler v. Milledge, 24 N. J. L.,
 142, 146; Rex v. Vipont, 2 Burr,
 1163; Rex v. Killet, 4 Burr, 2063.

Whole of evidence and proceedings brought up and rehearing is had on record. People v. McCarthy, 45 How. Pr. (N. Y.), 97. Setting out evidence — Sufficiency. Van Swartow v. Com., 24 Pa. St., 131.

⁴⁹ The record need not state the evidence supporting the conviction. Philadelphia v. Duncan, 4 Phila. (Pa.), 145.

50 G. R. N. & L. S. R. R. Co. v. Gray, 38 Mich., 461; Johnson v. Barclay, 16 N. J. L., 1; Philadelphia v. Roney, 2 Phila. (Pa.), 43; Philadelphia v. Nell, 3 Yeates (Pa.), 475.

⁵¹ Muscatine v. Steck, 7 Iowa, 505.

⁵² People v. Miller, 38 Hun. (N. Y.), 82.

Judgments of superior court established for city imports same absolute verity as judgment of court of general jurisdiction. Vassault v. Austin, 36 Cal., 691.

Of recorder's court of a city.
Dobbin v. San Antonio, 2 Tex.
Unrep. Cases, 708.

When existence of facts necessary to give a city court jurisdiction will not be presumed. Beaudrias v. Hogan, 16 N. Y. App. Div., 38.

Necessary facts may be shown by parol in absence of record recital. Beaudrias v. Hogan, 23 N. Y. App. Div., 83.

Judgment of inferior court as evidence—Sufficiency. Simmons v. De Barre, 8 Abb. Pr. (N. Y.), 269; 4 Bosw. (N. Y.), 547.

⁵³ Manayunk v. Davis, 2 Pars. Eq. Cas. (Pa.), 289.

⁵⁴ Gallitzen Borough v. Gains, 15 Pa. Co. Ct., 337; 7 Kulp., 479.

55 Ex parte Burnett, 30 Ala., 461; Craig v. Burnett, 32 Ala., 728.

judgment and sentence is controlled by local law. Usually the clerk of the court is authorized to issue executions.⁵⁶ Where the governor pardons, without authority, one convicted of violating an ordinance the clerk cannot refuse to issue execution against the surety on appeal bond.⁵⁷ An ordinance providing that execution should be issued "forthwith," was construed as conferring the authority and prescribing the form, but did not compel the justice to proceed immediately, regardless of the circumstances.⁵⁸ Under such ordinance the defendant cannot object that execution was not issued forthwith when the delay was occasioned by his own act in taking a futile appeal.⁵⁹ The failure to issue execution in time is a mere irregularity which does not affect the judgment.⁶⁰

Usually the power is conferred upon police justices to stay executions and grant reprieves.⁶¹ And generally the mayor possesses power to remit fines imposed for violation of ordinances.⁶² The remit of a fine by the mayor must describe the offense accurately.⁶³ The governor cannot pardon one convicted of violation of an ordinance under power conferred by the constitution authorizing him to pardon those convicted of violating state laws.⁶⁴ Nor can the governor relieve the surety on the appeal bond.⁶⁵

8. REVIEW.

§ 360. Right of review. The right to review the proceedings of inferior courts in actions for the violation of municipal or-

Committal by verbal order is illegal—Officer who holds defendant on such order acts without authority and in violation of law. Odell v. Schroeder, 58 Ill., 353.

56 Ex parte Kiburg, 10 Mo. App., 442.

⁵⁷ State *ex rel.* v. Renick, 157 Mo., 292; 57 S. W. Rep., 713.

58 Ex parte Burns, 7 Mo. App., 563.

59 Ex parte Thamm, 10 Mo. App., 595.

60 Ex parte Burns, 7 Mo. App., 563.

61 Ex parte Burns, 7 Mo. App., 563; Ex parte Higgins, 14 Mo. App., 601.

62 Charter of St. Louis, art. IV,

Committal by verbal order is il- sec. 16; Mun. Code of St. Louis, gal—Officer who holds defendant sec. 1419, p. 726.

63 Ex parte Higgins, 14 Mo. App., 601.

Who to serve where mayor acts as justice of the peace. Bain v. Mitchell, 82 Ala., 304; 2 So. Rep., 706.

64 State ex rel. v. Renick, 157 Mo., 292; 57 S. W. Rep., 713.

⁶⁵ State ex rel. v. Renick, 157 Mo., 292; 57 S. W. Rep., 713.

WORKHOUSE PRISONERS. Ordinance authorizing the contracting for work of, with private person, held to be *ultra vires*, but not illegal. St. Louis v. Davidson, 102 Mo., 149; 14 S. W. Rep., 825.

Imprisonment cannot extend the

dinances by some appropriate method usually exists by virtue of statutory enactment. In some cases an appeal lies to a higher court where the proceedings are reviewed both as to facts appearing in the record and questions of law; in others, the review is confined to questions of law appearing on the face of the record. The jurisdiction of superior courts over inferior tribunals of a municipality and their power to review their proceedings will not be construed to be taken away unless expressly stated.66 The courts have held that, even where by statute the right to a writ of certiorari has been taken away, it does not deprive the aggrieved party of the right to sue out such writ, where the proceeding has been without jurisdiction; and the want of jurisdiction when arising from matters not appearing in any way in the proceedings, may even be shown aliunde by affidavits. 67 The right of appeal cannot be taken away, where given by the constitution of the state, as by the creation of a city court and denying appeals from its judgments in all cases where the fine is twenty dollars or less.68 But in cases within the limits of the constitution the subject of review is under the control of the legislature and in the ab-

charter limit for any one offense. St. Louis to use of Duff v. Karr, 85 Mo. App., 608.

Reasonable rules for government of workhouse prisoners may be made by ordinance. Ulrich v. St. Louis, 112 Mo., 138; 20 S. W. Rep., 466.

The rule requiring prisoners to labor is a reasonable regulation both for discipline and for sanitary reasons. *Ex parte* Mills, 135 U. S., 263; Topeka v. Boutwell, 53 Kan., 20; 35 Pac. Rep., 819.

66 State v. Kempf, 69 Wis., 470; 34 N. W. Rep., 226; Rex v. Moreley, 2 Burr, 1040; Rex v. Commissioner, 2 Keeble, 43.

67 Municipal courts are ordained to prevent disorder in matters of local convenience, and to regulate the use of public and *quasi* public easements so as to prevent confusion. "If, in exercising this power, they can incidentally decide

upon the rights of private property so as to determine its enjoyment without review, there would seem to be a practical annihilation of the right to resort to the general tribunals and the common The consequences of such a doctrine, whether correct or incorrect, are serious enough to render it our duty to examine very carefully into its foundations. power of reviewing upon certiorari judicial proceedings of inferior tribunals and bodies not according to the common law, has long been exercised in England, as well as in this country. The power has jealously maintained, and has been deemed necessary to prevent oppression." Per Campbell, J., in Jackson v. People, 9 Mich., 111, 118.

68 Leach v. State, 36 Tex. Crim. App., 248; 36 S. W. Rep., 471. sence of statutory provision therefor there is no appeal.69

§ 361. Review by appeal. The right to review proceedings for the alleged violation of a municipal ordinance by appeal exists only when authorized by law. The principle is well established that, when a particular jurisdiction is conferred upon an inferior court, its decision, when acting within its jurisdiction, is final, unless provision is made for an appeal from such decision. However, in most jurisdictions provision has been made for review by appeal and the scope and extent of this right must be determined by the law controlling it. Where the right of appeal is given to a designated court the law in this respect must be observed. In Kansas where the prosecu-

69 Tierney v. Dodge, 9 Minn., 166.

The Common Law Powers of the court of review are confined to the examination of the jurisdiction of such inferior tribunals, and to questions of law arising out of their proceedings, not to an examination of their decisions upon questions of fact. Upon such questions the decision of the inferior courts are final unless the statutes have provided a mode of review. Starr v. Rochester, 6 Wend (N. Y.), 564.

70 Tierney v. Dodge, 9 Minn., 166. 71 Alabama—Camden v. Bloch, 65 Ala., 236.

Connecticut—McGarty v. Deming, 51 Conn., 422.

Illinois—Ward v. People, 13 Ill., 635; Edwards v. Vandemack, 13 Ill., 633.

Iowa—Muscatine v. Steck, 7 Iowa, 505; Conboy v. Iowa City, 2 Iowa, 90; Dubuque v. Rebman, 1 Iowa, 444.

Kentucky—Payne v. Commonwealth, 14 Ky. Law Rep., 302.

Maryland—Rundle v. Baltimore, 28 Md., 356.

Michigan—Galloway v. Corbitt, 52 Mich., 460; 18 N. W. Rep., 218; People v. Jackson, 8 Mich., 110. Minnesota—St. Peters v. Bauer, 19 Minn., 327.

Mississippi — Water Valley v. Davis, 73 Miss., 521; 19 So. Rep., 235.

Missouri—Wertheimer v. Boonville, 29 Mo., 254.

New Jersey—Holzworth v. Newark, 50 N. J. L., 85; 11 Atl. Rep., 131; Greely v. Passaic, 42 N. J. L., 87.

Ohio—Street v. Francis, 3 Ohio, 277.

South Dakota—Sioux Falls v. Kirby, 6 S. Dak., 62; 60 N. W. Rep., 156; 25 L. R. A., 621; Huron v. Carter, 5 S. Dak., 4; 57 N. W. Rep., 947.

⁷² Montgomery v. Belser, 53 Ala., 379.

Alabama—Judgments of city court of Mobile are subject to review by supreme court. Nugent v. State, 18 Ala., 521.

California—Appeal may be taken from the municipal court of San Francisco to the county court. People v. Nyland, 41 Cal., 129.

Indiana—No appeal from the circuit court to the supreme court will lie where the fine does not exceed \$10. Quigley v. Aurora, 50 Ind., 28; Donovan v. Huntington, 24 Ind., 321; Cheny v. Shelbyville,

tion under the ordinance is for matter made penal by the state statute, it is a criminal action and therefore, if after judgment in the district court on appeal from the police court it is sought to take the case to the supreme court for review, it can be done by appeal, and not by proceeding in error.⁷³ In Louisiana an appeal to the supreme court will be allowed in cases where the legality and constitutionality of the ordinance is raised.⁷⁴

In those jurisdictions where the action is held to be civil, ordinarily the corporation is given the right of appeal from a

19 Ind., 84; Bogart v. New Albany, 1 Ind., 38.

In Missouri the supreme court has no jurisdiction of an appeal from a conviction of a violation of a city ordinance where the fine imposed is less than \$2,500. Kansas City v. Neal, 122 Mo., 232; 26 S. W. Rep., 695; Kansas City v. Zahner, 138 Mo., 453; 40 S. W. Rep., 103.

Appeals from the St. Louis court of criminal correction for violation of municipal ordinance must be taken to the supreme court, as they are proceedings in the nature of civil actions in which a political subdivision of the state is a party. St. Louis v. Coffee, 76 Mo. App., 318.

An appeal to the supreme court will lie from a judgment discharging a preliminary rule of prohibition if the protection of the state and federal constitutions was invoked by appellant in the trial court, and which is alleged to have been denied by that court. The supreme court has jurisdiction in all cases wherein the constitutionality of ordinances are involved. Delaney v. Kansas City Pol. Ct., 167 Mo., 667; 67 S. W. Rep., 589.

South Carolina—Under a charter vesting the intendant with the same power given to state trial justices for violation of ordinances a writ of appeal from the intendant lies in like manner as a writ from such justice. Beaufort v. Ohlandt, 24 S. C., 158; Lexington v. Wise, 24 S. C., 163.

An appeal lies from the recorder's court to the circuit court. *Exparte* Brown, 42 S. C., 184; 20 S. E. Rep., 56.

73 Question whether the rule would be different if the prosecution was simply to enforce a private right of the local corporation, not determined. Neitzel v. Concordia, 14 Kan., 446, per Brewer, J., distinguishing Emporia v. Volmer, 12 Kan., 622.

Kansas—In all cases before the police judge, arising under the ordinances of the city, an appeal may be taken by the defendant to the district court. Gen. Stat., 1899, sec. 1117; In re Rich, 10 Kan. App., 280; 62 Pac. Rep., 715.

Right of appeal is given by statutes to the court of appeals. Burlington v. Stockwell, 56 Kan., 208; 42 Pac. Rep., 826, reversing 1 Kan App., 414; 41 Pac. Rep., 221.

No appeal is authorized from a police judge to the district court in a proceeding for contempt. *In re* Rich, 10 Kan. App., 280; 62 Pac. Rep., 715.

74 State v. Hohn, 50 La. Ann., 432; 23 So. Rep., 966; Lafton v. Dufrocq, 9 La. Ann., 350; Ex parte Travers, 3 La. Ann., 693.

judgment of acquittal, as well as the defendant, from a judgment of conviction. But where the action is regarded as criminal or quasi criminal, especially if the offense is in its essence a misdemeanor at common law or by statute, unless expressly authorized by law, it is generally held that no appeal lies in behalf of the corporation from a judgment in favor of the defendant. However, appeals in such cases have been allowed; and laws often provide therefor, in case the decision is against the validity of the ordinance. Under the statutory provision of Ohio relating to appeals in criminal cases, it is held that the supreme court has jurisdiction to review a judgment of acquittal of the defendant in the circuit court, charged with the violation of a city ordinance, where the judgment was based on the ground that the ordinance was unconstitutional.

§ 362. Same—Time and method of taking. Where appeals are allowed the formal steps necessary to perfect them are

75 Geeley v. Hammann, 12 Colo., 94; 20 Pac. Rep., 1; Durango v. Reinsberg, 16 Colo., 327; 26 Pac. Rep., 802; Greenfield v. Mook, 12 Ill. App., 281; Baldwin v. Chicago, 68 Ill., 418; Knowles v. Wayne City, 31 Ill. App., 471; Kansas City v. Clark, 68 Mo., 588; Kansas City v. Muhlback, 68 Mo., 638; St. Charles v. Hackman, 133 Mo., 634; 34 S. W. Rep., 878; St. Louis v. Marchel, 99 Mo., 475; 12 S. W. Rep., 1050; Kirkwood v. Autenreith, 11 Mo. App., 515.

In Kansas where a motion to quash the complaint was sustained by the police judge, an appeal was allowed to the district court. Leavenworth v. Weaver, 26 Kan., 392.

But where the defendant was convicted in the police court and on appeal to the district court a motion to quash was sustained, an appeal by the city to the supreme court was refused. Salina v. Wait, 56 Kan., 283; 43 Pac. Rep., 255.

So where the defendant was discharged by the district court, no appeal was allowed. Lyons v. Wellman, 56 Kan., 285; 43 Pac. Rep., 267.

76 Platteville v. McKernan, 54
 Wis., 487; 11 N. W. Rep., 798;
 Northville v. Westfall, 75 Mich.,
 603; 42 N. W. Rep., 1068.

The supreme court cannot reverse an acquittal by a justice of the peace. State v. Vail, 57 Iowa, 103; 10 N. W. Rep., 297.

The only means of review given to the plaintiff by the statutes is by writ of error. St. Louis v. Marshel, 99 Mo., 475; 12 S. W. Rep., 1050; St. Louis v. White, 99 Mo., 477; 12 S. W. Rep., 1050.

77 An appeal lies in favor of a municipal corporation, from a judgment of the circuit court, quashing the judgment of the mayor's court in a quasi criminal proceeding for the violation of an ordinance. Camden v. Bloch, 65 Ala., 236,

⁷⁸ Com. v. Ingraham, 3 Bush (70 Ky.), 106.

⁷⁹ State v. Rouch, 47 Ohio St., 478; 25 N. E. Rep., 59; Van Wert v. Brown, 47 Ohio St., 477; 25 N. E. Rep., 59.

usually prescribed; substantial observance is required.⁸⁰ Some charters provide that appeals are to be taken in like manner as appeals from justices of the peace—sometimes as in criminal,⁸¹ and sometimes as in civil cases.⁸² When the record shows nothing to the contrary it will be presumed that an appeal from an inferior court was taken within the time allowed by law.⁸³

§ 363. Same—Trial de novo on appeal. As a general rule on appeal from the police court to the city court or to the circuit court, in a proceeding for the violation of a municipal ordinance, the case is tried in the same manner that it should be tried before the police court. The statute governing appeals from the police court usually provide for a trial de novo in the same manner as trials on appeal from a justice court to the circuit court are conducted.⁸⁴

Under writ of certiorari trial de novo cannot be had; the re-

80 Jenkins v. Cheyenne, 1 Wyo. Ter., 287.

The affidavit for an appeal should be filed the same day of conviction, unless satisfactory reasons for delay appear. St. Louis v. The R. J. Gunning Co., 138 Mo., 347; 39 S. W. Rep., 788, overruling State v. Clevenger, 20 Mo. App., 626; State v. Anderson, 84 Mo., 524; see State v. Epperson, 4 Mo., 90; Robinson v. Walker, 45 Mo., 117; State v. Herman, 20 Mo. App., 548.

The record cannot be amended by filing the affidavit before dismissal. De Soto v. Merciel, 53 Mo. App., 57.

81 Charter St. Louis, Mo., Art. IV., sec. 25; The Municipal Code St. Louis, p. 238, § 25; 2 R. S. Mo. (1899), p. 2495, sec. 25; Stevens v. Kansas City, 146 Mo., 460; 48 S. W. Rep., 658; Deitz v. Central, 1 Colo., 323.

Appeals are governed by the statutes in force at the time the appeal is taken, and not by the statute in force at the time the charter was adopted. St. Louis v.

The R. J. Gunning Co., 138 Mo., 347; 39 S. W. Rep., 788.

82 Goshen v. Croxton, 34 Ind., 239.

An appeal from a prosecution for the violation of an ordinance, as relates to the appeal bond, is governed by the law applicable to civil actions. Miller v. O'Reilly, 84 Ind., 168.

So the proceeding on an appeal from a conviction for the violation of an ordinance is governed by the rules applying to civil cases. Hoyer v. Mascoutah, 59 Ill., 137.

⁸³ Kansas City v. Clark, 68 Mo., 588; Feurth v. Anderson, 87 Mo., 354.

Appeal Bond can only provide that defendant shall appear in the appellate court, obey every order that shall be made in the premises, and not depart without leave of court. Howlett v. Turner, 93 Mo. App., 20.

84 Selma v. Stewart, 67 Ala., 336; Mobile v. Barton, 47 Ala., 84; Mc-Gregor v. Lovington, 48 Ill. App., 202; Ottumwa v. Schaub, 52 Iowa, 515; 3 N. W. Rep., 529; Anderson view is upon the record, unless trial de novo is expressly given by statutes.85 But in an early North Carolina case it was held that where a party, entitled to an appeal from an inferior to a superior tribunal, was denied the right, or deprived of it by fraud or otherwise unjustly prevented from taking the appeal, he was entitled to certiorari to bring up the whole case both as to law and fact, to have a de novo in the Superior Court.86 Usually the circuit court will on appeal from the police court on trial de novo, take judicial notice of ordinances of the city and their substance in the same manner as the police court. So it is held that the circuit court during the time of the trial on appeal is substituted for the police court, and hence, whatever the police court could have taken judicial notice of while the case was in that court, the circuit court should take judicial notice of after the removal of the case to the circuit court.87 But the weight of authority seems to be that unless the ordinance alleged to have been violated is introduced in evidence in the trial court and made a part of the record, the state court on appeal from the circuit court will not take judicial notice of it

v. O'Donnell, 29 S. C., 355; 7 S. E. Rep., 523; 1 L. R. A., 632; 13 Am. St. Rep., 728.

If the justice had jurisdiction of a proceeding for the violation of an ordinance the trial on appeal to the circuit court is *de novo*. Alton v. Kirsch, 68 Ill., 261.

But under particular provision for an appeal to the common council from a conviction for the violation of a city ordinance, a new trial de novo is not given. Keeler v. Milledge, 24 N. J. L., 142.

On an appeal from the recorder's court to the law court, that court is to try the case with the same discretion as the recorder himself had and may in its discretion reduce the fine. Memphis v. Schade, 12 Heisk. (59 Tenn.), 579; Mobile v. Barton, 47 Ala., 84.

85 Camden v. Bloch, 65 Ala., 236.
86 State v. Bill, 13 Ired. (N. C.),
373.

87 Smith v. Emporia, 27 Kan., 528, 530; Solomon v. Hughes, 24 Kan., 211; March v. Commonwealth, 12 B. Mon. (Ky.), 25.

It is not necessary that the record in a proceeding in error to the court of common pleas, to reverse a judgment for conviction in the police court for the violation of an ordinance shall show the ordinance which was alleged to have been violated. Keck v. Cincinnati, 4 Ohio Dec., 324.

So on an appeal from the decision of the mayor for the violation of the ordinance it is not necessary that the complaint set out the ordinance alleged to have been violated: it is sufficient if it identify the ordinance violated by pleading its title and date of passage. Goldthwaite v. Montgomery, 50 Ala., 486.

and the ordinance not being before the court the judgment of the trial court will be allowed to stand.88

If either party desires to take advantage of defects in the proceedings objection must be taken in the trial court; it is too late to raise the objection by motion to quash for the first time in the city court on an appeal from the mayor's court or in the circuit court on appeal from the police court.⁸⁹ So it has been held that if the jurisdiction of the justice of the peace in an action for the violation of an ordinance is questioned because there was no complaint in writing, signed and sworn to, and no warrant issued thereunder, the objection must be made in the justice's court; it is too late if made for the first time in the circuit court.⁹⁰ So objection to the sufficiency of the proof of the ordinance should be made in the trial below;⁹¹ to its introduction in evidence;⁹² to the proof of its publication;⁹³ to the sufficiency of the declaration, respecting form;⁹⁴ to the

ss Furhmann v. Huntsville, 54 Ala., 263; Baton Rouge v. Cremonini, 35 La. Ann., 366; State v. Clesi, 44 La. Ann., 85; 10 So. Rep., 409.

In an appeal by the defendant it is his duty to bring up with the record the ordinance which he claims is illegal or unconstitutional, otherwise the court can take no notice of it. New Orleans v. Boudro, 14 La. Ann., 303.

Where the record on *certiorari* did not contain the ordinance under which the conviction was had, the supreme court will not reverse a judgment of the lower court, overruling a *certiorari* brought to set the conviction aside. Davis v. Rome, 89 Ga., 724; 15 S. E. Rep., 632.

But where the record on *certio*rari did not contain the ordinance alleged to have been violated, and no complaint that a sufficient ordinance did not exist, the supreme court on reviewing will presume that such ordinance did exist. Chambers v. Barnesville, 89 Ga., 739; 15 S. E. Rep., 634.

So where the ordinance on which

the defendant was convicted was not brought up in the record, the court issuing the *certiorari* and the supreme court are both bound to presume that the ordinance in all respects was legal. Benson v. Carrollton, 96 Ga., 761; 22 S. E. Rep., 303.

89 Selma v. Stewart, 67 Ala., 338, 340.

90 Tisdale v. Minonk, 46 Ill., 9.

Where the justice has jurisdiction of the subject-matter of the suit he acquires jurisdiction of the person by his appearing and defending the suit, and objection to jurisdiction of person cannot be raised on appeal. Wiggins v. Chicago, 68 Ill., 372; Alton v. Kirsch, 68 Ill., 261.

⁹¹ Jacksonville v. Holland, 19 Ill., 271.

92 Flora v. Lee, 5 Ill., App., 629; Bethalto v. Conley, 9 Ill. App., 339.

93 Kanouse v. Lexington, 12 Ill. App., 318.

94 Stokes v. New York City, 14
Wend. (N. Y.), 87; Commonwealth
v. Lagorio, 141 Mass., 81; 6 N. E.
Rep., 546.

form of the verdict; 95 and generally to all matters of form, as copiously illustrated in the cases in the notes. 96 But objections which go to the jurisdiction of the subject matter may be raised at any time, although not presented in the trial court. 97

In Louisiana where an appeal to the supreme court from a judgment for the violation of an ordinance is allowed only in case where the legality or constitutionality of the ordinance is called in question, in order to entitle the defendant to review in

95 Moss v. Oakland, 88 Ill., 109.

⁹⁶ Deitz v. Central, 1 Colo., 323. Where the record of the village trustees was not introduced in evidence in the trial court and not a part of the record before the supreme court, the objection that the ordinance was not passed by calling the ayes and noes, cannot be raised for the first time in the supreme court. Doyle v. Bradford, 90 Ill., 416.

Where on appeal from the recorder's court to the circuit court on trial *de novo* a demurrer is filed by the defendant and before the demurrer is acted upon a plea of not guilty filed, the demurrer will be waived. Pitts v. Opelika, 79 Ala., 527.

Failure to raise point of irregularity of beginning proceeding in trial court, held waived on appeal. Aderhold v. Anniston, 99 Ala., 521; 12 So. Rep., 472.

Where the suit was brought in the name of the corporation instead of in the name of the people, as required, if no objections are made in the trial court the point will be considered as waived. People v. Vinton, 82 Mich., 39, 46; 46 N. W. Rep., 31.

So suit brought in the name of the state instead of the name of the corporation as required will not be sufficient ground for reversal, especially if point not raised in trial court. State v. King, 37 Iowa, 462. In Alabama on appeal from the recorder's court to the city court a complaint may be filed in the latter court. Aderhold v. Anniston, 99 Ala., 521; 12 So. Rep., 472.

On appeal to the circuit court no advantage can be taken of irregularities in the process or its service. The only requisite is that the justice of the peace has jurisdiction. Alton v. Kirsch, 68 Ill., 261; Coulterville v. Gillen, 72 Ill., 599; Jacksonville v. Block, 36 Ill., 507; Roberts v. Formhalls, 46 Ill., 66.

The filing of the appeal bond by the defendant is a waiver of all defects and irregularities in the process of the justice. Coulterville v. Gillen, 72 Ill., 599.

Whether the complaint is technically correct or not is immaterial on appeal to the circuit court. Harbaugh v. Monmouth, 74 Ill., 367.

The objection that the justice is disqualified because he is one of the village trustees is waived by appeal. McGregor v. Lovington, 48 Ill. App., 202.

97 Rice v. State, 3 Kan., 141.

Rule applied where objections were not taken to the action of the recorder in summoning a jury to try defendant, upon whose verdict he rendered a judgment of conviction, without legal authority. St. Peters v. Bauer, 19 Minn., 327, 334.

the supreme court it must affirmatively appear in the record that the jurisdiction of the trial court was contested upon the ground of the legality or constitutionality of the ordinance.¹

§ 364. Review by certiorari. Certiorari, which was in the common law practice an original writ issuing out of a superior court, directed to the judges or officers of an inferior tribunal, commanding them to certify or return the records or proceedings in a case before them, for the purpose of judicial review of their action, is the proceeding authorized in some jurisdictions to review a judgment of conviction in an inferior court for the violation of a municipal ordinance.²

¹ State v. Clesi, 44 La. Ann., 85; 10 So. Rep., 409; State v. Tsni Ho, 37 La. Ann., 50; State v. Hennessey, 44 La. Ann., 805; 11 So. Rep., 39.

When questions of fact are reviewed by supreme court. Greenville v. Kemmis, 58 S. C., 427; 50 L. R. A., 725; 36 S. E. Rep., 727. 2 See § 287, supra.

Georgia—Archie v. State, 99 Ga., 23; 25 S. E. Rep., 612; Maxwell v. Tumlin, 79 Ga., 570; 4 S. E. Rep., 858; Hayden v. State, 69 Ga., 731.

Michigan—Swift v. Wayne Circuit Judges, 64 Mich., 479; 31 N. W. Rep., 434.

Minnesota—In re Wilson, 32 Minn., 145; 19 N. W. Rep., 723; Tierney v. Dodge, 9 Minn., 166.

Pennsylvania—West Pittston v. Dymond, 8 Kulp. (Com. Pl. Pa.), 12.

Held to lie from supreme court to justice court. Warner v. Porter, 2 Doug. (Mich.), 358.

Certiorari will lie without moving for a new trial in the city court. Archie v. State, 99 Ga., 23; 25 S. E. Rep., 612; Maxwell v. Tumlin, 79 Ga., 570; 4 S. E. Rep., 858; Daniel v. State, 55 Ga., 222.

In absence of legislative restriction certiorari will lie where no appeal is provided. Tierney v. Dodge, 9 Minn., 166.

Certiorari is a writ from a superior directed to one of inferior jurisdiction commanding the latter to certify and return to the former the records in the specified case. It is used as a mode of appeal from the judgments of courts not of record. It is also the proper process for correcting any errors that may have occurred in the proceedings of an inferior court when such proceedings are, in any stage of them, different from the course of the common law, unless some different process is given by statute. Massachusetts it is defined by statute as a writ issued by the Supreme Judicial Court to an inferior tribunal, commanding it to certify and return to the former court its records in a particular case, in order that any errors or irregularities which appear in the proceedings may be corrected. Pub. St. of Mass., 1882, p. 1288.

AT COMMON LAW the writ issued out of chancery or the King's Bench, directed, in the King's name, to the judges or officers of the inferior court, commanding them to return before him the record of a cause depending before them, that the party may have more speedy justice or such other justice as he shall assign to deter-

Where the party aggrieved has the right to review by appeal or writ of error he is not entitled to a writ of certiorari.³ And it will not issue for relief in cases where the party has allowed the time for appeal to expire, unless he show clearly that it was without any negligence or fault upon his part.⁴

Certiorari from the Circuit Court is the appropriate remedy, where the party would be remediless, to correct an improper judgment rendered by an officer of a municipal corporation, where a new jurisdiction has been created by statute, and the court exercising it, proceeds in a summary method, or in a course different from the common law.⁵ And where no remedy

mine the cause. Anderson's Law Dict., 'tit. "Certiorari."

Certiorari derives its name from the emphatic word in the old Latin form of the writ, which ran as follows: quia certis de causis certiorari volumus, because we wish to be certified concerning certain causes. It signifies to be informed of, to be made certain in regard to. Black's Law Dict., tit. Certiorari.

³ Alabama→Dean v. State, 63 Ala., 153.

Illinois—Harvey v. Dean, 62 III. App., 41.

New York—Birdsall v. Phillips, 17 Wend. (N. Y.), 464; Storm v. Odell, 2 Wend. (N. Y.), 287.

New Jersey—Smith v. Clinton, 53 N. J. L., 329; 21 Atl. Rep., 304. North Carolina—Petty v. Jones, 1 Ired. (N. C.), 408.

West Virginia—Beasley v. Beckley, 28 W. Va., 81, 89; Poe v. Machine Works, 24 W. Va., 517.

The granting of the writ is not a matter of right, but vested in the legal discretion of the court. Hunt v. Jacksonville, 34 Fla., 504; 43 Am. St. Rep., 214; 16 So. Rep., 398; Jacksonville, Tampa & K. W. Ry. Co. v. Boy, 34 Fla., 389; 16 So. Rep., 290.

It lies to keep the inferior court

within the scope of its powers, but not to correct errors of fact. *Exparte* Schmidt, 24 S. C., 363.

In Texas held, proceedings of a mayor's court are examinable on *certiorari* from the district court, but the prosecution is not triable *de novo*. Burns v. La Grange, 17 Tex., 415.

Where no appeal is given by the statute in cases of proceedings by municipal authorities in relation to petitions for and against the issuance of a license to sell liquors, certiorari will lie to correct errors. Corbett v. Duncan, 63 Miss., 84; Loeb & Co. v. Duncan, 63 Miss., 89.

* Beasley v. Beckley, 28 W. Va., 81, 89; Poe v. Machine Works, 24 W. Va., 517; Duggen v. McGruder, Walker (Miss.), 112; 12 Am. Dec., 527; Dye v. Noel, 85 Ill., 290; Hagar v. Board of Supervisors, 47 Cal., 222.

⁵ Ex parte Tarlton, 2 Ala., 35; Marion v. Chandler, 6 Ala., 899; Camden v. Bloch, 65 Ala., 236; Ridgway v. Hinton, 25 W. Va., 554; Tierney v. Dodge, 9 Minn., 166; Commonwealth v. Ellis, 11 Mass., 462; Collins v. Kinnare, 89 Ill. App., 236; Smith v. Hudson Tp. Commissioners, 150 Ill., 385; 36 N. E. Rep., 967.

And in such case the court issu-

by statute for reviewing the judgment of municipal courts is provided *certiorari* will lie, but if any special method of review is provided that method must be followed.⁶

In New Jersey it has been held that the writ of certiorari will lie at the instance of a party aggrieved to review the acts of a municipal corporation whether such acts are judicial or legislative.7 And the remedy extends to the power of setting aside an ordinance which the common council without power to pass enacted, where it was brought by certiorari before the court by a person who might be affected by it.8 In Georgia it has been held that certiorari will not lie in favor of a municipal corporation to reverse an acquittal.9 So certiorari will not lie where it does not appear that the plaintiff has some interest and will suffer injury unless the court acts.10 Nor will it lie where the plaintiff after being convicted for the violation of a city ordinance, paid the fine, since reversal could not benefit him.¹¹ The office of the writ is to bring up the record for review and correct errors of law appearing on its face. Thus where it is shown that the mayor and city council had no jurisdiction to try the defendant, because the act complained of was not committed within the corporate limits of the city, certiorari

ing the writ may consider other than jurisdictional questions. Poe v. Machine Works, 24 W. Va., 517.

So where there is nothing in the summons to inform the defendant whether it is an action of debt in a justice court or an information, certiorari will lie to review the proceedings. State (Hershoff) v. Beverly, 43 N. J. L., 139.

6 Taylor v. Americus, 39 Ga., 59; Montgomery v. Belser, 53 Ala., 379; Marion v. Chandler, 6 Ala., 899; John v. State, 1 Ala., 95; State v. Bill, 13 Ired. (N. C.), 373; Miller v. Trustees, 88 Ill., 26.

Where after an appeal has been taken from the mayor's court the records are corrected in the mayor's court. *certiorari* is the proper method to bring the corrected record before the court. Camden v. Bloch, 65 Ala., 236.

⁷ Camden v. Mulford, 26 N. J. L., 49; Carron v. Martin, 26 N. J. L., 594.

Contra—Certiorari will not lie to review a mere legislative act of a municipal corporation. Thus it will not lie to review the ordinance and proceedings by which it was attempted to establish districts outside of which no license to sell liquors should be granted, and under which the petitioner's application for a license was denied. In re Wilson, 32 Minn., 145; 19 N. W. Rep., 723; Harvey v. Dean, 62 Ill. App., 41.

8 State v. Jersey City, 29 N. J. L., 170.

⁹ Cranston v. Augusta, 61 Ga., 572.

State v. Blauvelt, 34 N. J. L..
261; Davison v. Otis, 24 Mich., 23.
People v. Leavitt, 41 Mich.,

will lie.¹² It seems that by provision of the statute of New Jersey *certiorari* is the only method of review of judgments given by confession; judgments rendered without jurisdiction are reviewable on appeal or by *certiorari*.¹³

§ 365. **Record on certiorari**. In proceedings by *certiorari* the trial is not *de novo*, and conclusions of fact cannot be reviewed. The only questions to be considered are those relative to the jurisdiction of the court, which pronounced judgment and the regularity of the proceedings—that is, errors of law apparent on the face of the record and which are jurisdictional in their nature. Plaintiff in *certiorari* must allege error so distinctly that the reviewing court may understand the ground of error relied on. The

470; 2 N. W. Rep., 812; Powell v. People, 47 Mich., 108; 10 N. W. Rep., 129.

12 Taylor v. Americus, 39 Ga., 59; Camden v. Bloch, 65 Ala., 236; Jackson v. People, 9 Mich., 111; Poe v. Machine Works, 24 W. Va., 517; Dean v. State, 63 Ala., 153; Ex parte Madison Turnpike Co. 62 Ala., 93; White v. Neptune City, 56 N. J. L., 222; 28 Atl. Rep., 378; Flanagan v. Plainfield, 44 N. J. L., 118

A petition for *certiorari* which alleges that in the trial before the mayor there was no evidence that the offense for which the petitioner was found guilty was committed within the corporate limits of the city, makes out a *prima facie* case which would entitle the party to the issue of the writ to correct the error by the superior court. Taylor v. Americus, 39 Ga., 59.

On review by *certiorari* the question as to whether the evidence was sufficient was for the recorder and his opinion is final and will not be disturbed by the reviewing court. Lynch v. People, 16 Mich., 472.

13 Watson v. Plainfield, 60 N. J.
 L., 260; 37 Atl. Rep., 615; Ritter v.

Kunkle, 39 N. J. L., 259; Drake v. Berry, 42 N. J. L., 60.

Where a judgment for a violation of an ordinance was based upon a confession made in the privacy of the judge's office, the party convicted is entitled to have the proceedings reviewed on *certio-rari*. Watson v. Plainfield, 60 N. J. L., 260; 37 Atl. Rep., 615.

Review by *certiorari* allowed where the ordinance was claimed to be invalid. Muhlenbrinck v. Commissioners, 42 N. J. L., 364; 36 Am. Rep., 518.

The remedy to review a judgment in the court of small causes, except where there is a district court, is by appeal to the common pleas and on *certiorari*. Smith v. Clinton, 53 N. J. L., 329; 21 Atl., Rep. 304.

14 Camden v. Bloch, 65 Ala., 236;
State ex rel. v. Smith, 101 Mo., 174;
14 S. W. Rep., 108; Hannibal & St. Joseph Ry. Co. v. State Board of Equalization, 64 Mo., 294; Chicago, R. I. & P. R. R. Co. v. Young, 96 Mo., 39; 8 S. W. Rep., 776.

Rehearing had on record. People v. McCarthy, 45 How. Pr. (N. Y.), 97.

15 Hayden v. State, 69 Ga., 731.

record should show that the defendant committed the offense which should be so described as to appear that it falls within the condemnation of the ordinance. If the record on certiorari fails to show that the offense was committed within the limits of the borough, the proceedings will be dismissed. Failure of the record to show the affidavit or warrant by which the prosecution was commenced renders it defective and such defect cannot be cured by extrinsic proof. The proceeding will be dismissed if the record fails to show that the act was committed after the passage of the ordinance. Where the recorder of the city rested his judgment in overruling a demurrer to the complaint, upon an ordinance of the city, the ordinance should be set out in the return made by the recorder.

§ 366. Same—Writ of error. Review of proceedings of an inferior court in actions for the violation of an ordinance are allowed upon writ of error in some states by statutory provision. The application for review by writ of error should be

The jurisdiction of the magistrate and the liability of the defendant should affirmatively appear. Reading v. O'Reilly, 1 Woodw. Dec. (Pa.), 408.

Alleging act of defendant under which ordinance imposed penalty. Northern Liberties v. O'Neill, 1 Phila. (Pa.), 427.

The statute in New Jersey governing certiorari does not require the supreme court to consider any question of fact which might have been presented in the trial court, but which no attempt was made to present. State (Smith) v. Elizabeth, 46 N. J. L., 312.

Where on review by certiorari objection was not raised at the trial that the ordinance was not properly proved, it cannot be considered where the magistrate has certified in the record that the ordinance was proved. Sparks v. Stokes, 40 N. J. L., 487.

Where defendant raised the constitutionality of the statute authorizing the proceedings, but made no mention of it in the argument or brief of counsel, the point was regarded by the court as waived. White v. Neptune City, 56 N. J. L., 222; 28 Atl. Rep., 378.

- Reid v. Wood, 102 Pa. St., 312.
 Plymouth Borough v. Penkok,
 Kulp. (Pa. Com. Pl.), 101.
- 18 Camden v. Bloch, 65 Ala., 236.
 19 Reading v. O'Reilly, 1 Woodw.
 Dec. (Pa.), 408.

Phillips v. Atlanta, 78 Ga.,
 773; 3 S. E. Rep., 431.

The return to a writ of certiorari should set out the evidence upon the conviction. Jackson v. People, 9 Mich., 119.

On a petition for *certiorari* to review the proceedings of the city council in regard to its action relating to certain street improvements, the return should show that the application for the improvements was signed by a majority of the resident owners; the burden of proof is on the defendant and such fact being a jurisdictional one must appear on the face of the proceedings. State v. Council of Elizabeth, 30 N. J. L., 176.

upon a transcript of the complete record.²¹ Where no right to review by appeal is given the defendant may bring up the case by writ of review, in the same manner as the common law writ of certiorari.²² But a writ of error does not lie from the judgment of the mayor imposing a fine for the violation of an ordinance where the right of review by appeal is given.²³ A plea of guilty is not a waiver of a right of review by writ of review, where the defendant claims that the ordinance violated is void.²⁴ The city cannot prosecute a writ of error from a judgment of the superior court refusing to dismiss a writ of certiorari to review the conviction in the municipal court.²⁵

§ 367. Habeas corpus. The writ of habeas corpus is regarded as a civil process and may be employed to release a prisoner illegally confined or held in subjection. Such process is termed a habeas corpus ad subjiciendum. It is a general rule that the writ does not perform the office or function of an appeal or writ of error.²⁶ Thus it is not a proper remedy and cannot be used

²¹ Van Buskirk v. Newark, 26 Ohio St., 37.

In Ohio the statute provides that proceedings for the violation of a city ordinance shall be reviewed by the court of common pleas by a petition in error. Miller v. Bellefountaine, 2 Ohio Cir. Ct. Rep., 139.

So by a proceeding in error a conviction in a police court may be reviewed on the ground that it is against the weight of the evidence. Slaughter v. Columbus, 61 Ohio St., 53; 55 N. E. Rep., 221.

In Kentucky the supreme court was held to have jurisdiction to revise on writ of error a judgment of the city court of Lexington. Williamson v. Commonwealth, 4 B. Mon. (Ky.), 146. And in Georgia, of city court of Brunswick. Johnson v. Hilton, etc., 103 Ga., 212; 29 S. E. Rep., 819; Roach v. Sulter, 54 Ga., 458.

²² Barton v. La Grande, 17 Or.,
 577; 22 Pac. Rep., 111; Cunning-ham v. Berry, 17 Or., 622; 22 Pac.
 Rep., 115.

23 Ridgway v. Hinton, 25 W. Va.,
 554; Savage v. Gulliver, 4 Mass.,
 171. 178.

24 Grossman v. Oakland, 30 Or.,
 478; 41 Pac. Rep., 5; 36 L. R. A.,
 593; 60 Am. St. Rep., 832.

Hawkinsville v. Ethridge, 96
 Ga., 326; 22 S. E. Rep., 985.

26 State v. Glenn, 54 Md., 572;
Ex parte Mitchell, 104 Mo., 121; 16
S. W. Rep., 118; Ex parte Snyder,
29 Mo. App., 256; Ex parte Clay,
98 Mo., 578; 11 S. W. Rep., 998;
Ex parte Boennighausen, 91 Mo.,
301; 21 Mo. App., 267; 1 S. W.
Rep., 761; Ex parte Bowler, 16 Mo.
App., 14; In re Harris, 47 Mo., 164;
Perry v. State, 41 Tex., 488, 490;
Ex parte Scwartz, 2 Tex. Ct. App.,
74.

Inability of the offender to give bail by reason of his poverty is no ground for discharge on habeas corpus. In re Jahn, 55 Kan., 694, 699; 41 Pac. Rep., 956.

A discharge under a writ of habeas corpus was denied where it was held that an appeal would lie as a summary process to review errors or irregularities which occur upon the trial of a case in a court of competent jurisdiction.²⁷ The principle is applied to convictions and sentences for the violation of ordinances.²⁸ But where a court exceeds its jurisdiction and acts contrary to law a writ of habeas corpus may be invoked.²⁹ Sometimes the court will release one on habeas corpus held in custody who has been convicted under a void ordinance;³⁰ but unless it appears as a matter of law that the ordinance is void the court will remand the petitioner, leaving him to his remedy of review by appropriate proceedings.³¹

from a conviction for the violations of a city ordinance. *In re* Rolfs, 30 Kan., 758, 765; 1 Pac. Rep., 523.

27 Ex parte Mitchell, 104 Mo., 121; 16 S. W. Rep., 118; Ex parte Ruthven, 17 Mo., 541.

²⁸ Madden v. Smeltz, 2 Ohio Cir. Ct. Rep., 168; Morris Canal, etc., v. Jersey City, 12 N. J. Eq., 252.

A circuit judge has no power to discharge a person on habeas corpus who is in custody under a sentence of imprisonment, imposed by the mayor of a municipal corporation for the violation of a valid city ordinance. Ex parte Montgomery and Knox, 64 Ala., 463.

Where a party has been improperly discharged on habeas corpus by the circuit court the proper remedy for review is on petition for certiorari to the supreme court. Ex parte Montgomery and Knox, 64 Ala., 463.

Where the record does not contain the ordinance alleged to have been violated it will be presumed that the charge was in accordance with the ordinance, in the absence of any showing to the contrary in the record. Morgan v. Nolte, 37 Ohio St., 23.

29 Ex parte Page, 49 Mo., 291;
 Ex parte Snyder, 64 Mo., 58; State
 ex rel., v. Fox, 85 Mo., 61.

80 Ex parte Slaren, 3 Tex. Ct.

App., 662, 668; Ex parte Gregory, 1 Tex. Ct. App., 753.

³¹ In re Wright, 29 Hun. (N. Y.), 357, 362.

Habeas corpus lies only when the sentence is void, not merely voidable, State ex rel. v. McMahon, 69 Minn., 265; 72 N. W. Rep., 79; nor when the term of imprisonment has expired. State ex rel. Karr v. Shelby Co. Taxing Dist., 16 Lea. (84 Tenn.), 240.

Conviction under a valid ordinance, on a valid complaint, by a court of competent jurisdiction cannot be disturbed on habeas corpus. In re Bushey, 105 Mich., 64; 62 N. W. Rep., 1036.

If the judgment is regular on its face and entered by a court of competent jurisdiction defendant will not be discharged on habeas corpus. Ex parte Douglass, 1 Utah, 108.

If the imprisonment is under a void ordinance the prisoner will be released on habeas corpus. Herrick v. Smith, I. Gray (67 Mass.), 1; 61 Am. Dec., 381; Exparte Clamp, 9 Ohio Dec., 672; Exparte Fagg, 38 Tex. Crim. Rep., 573; 44 S. W. Rep., 294; 40 L. R. A., 212; Exparte Grace, 9 Tex. App., 381; Exparte Rollins, 80 Va., 314. Compare In re Underwood, 30 Mich., 502.

Conviction without jury trial

§ 368. **Injunction**. A bill in equity as a general rule will not lie to restrain a prosecution under a municipal ordinance, upon the mere ground of alleged illegality of such ordinance. If the defendant is convicted under a void ordinance his remedy is by appropriate proceedings in review.³² Thus the collection of a fine assessed for the violation of an ordinance cannot be enjoined upon the ground that there was no offense charged in the complaint. The remedy is by appeal.³³ But where the act complained of would work irreparable damage a court of equity has jurisdiction to restrain proceedings under an ordinance.³⁴ The remedy by injunction to test the validity of ordinances is fully treated in another chapter.³⁵

entitled defendant to release on habeas corpus. Thomas v. Ashland, 12 Ohio St., 124.

It appears now to be the established doctrine in Missouri that appellate courts will interfere by means of the writ of habeas corpus to look into and investigate the constitutionality of a statute or ordinance on which a judgment which results in the imprisonment of a petitioner found. Ex parte Smith, 135 Mo., 223; 58 Am. St. Rep., 576; 33 L. R. A., 606; 36 S. W. Rep., 628, overruling Ex parte Boenninghausen, 91 Mo., 301; 1 S. W. Rep., 761; 21 Mo. App., 267, and In re Harris, 47 Mo., 164.

Compare also Ex parte Marmaduke, 91 Mo., 228; 4 S. W. Rep., 91; Ex parte Swann, 96 Mo., 44; 9 S. W. Rep., 10; In re Thompson, 117 Mo., 83; 22 S. W. Rep., 863; Ex parte Bowler, 16 Mo. App., 14.

Validity of ordinance cannot be raised by defendant by habeas corpus. Platt v. Harrison, 6 Iowa, 79; 71 Am. Dec., 389.

Where prosecutor is in custody, only validity of the process on its face and the jurisdiction of the court issuing it will be considered. This for the reason that the writ cannot be legally converted into a writ of error. Ex parte Foote, 70

Ark., 12; 65 S. W. Rep., 706; 91 Am. St. Rep., 63; State v. Neel, 48 Ark., 283, 289; 3 S. W. Rep., 631.

When return reciting record to be taken as true. Ex parte Hollwedell, 74 Mo., 395.

On habeas corpus the court cannot review the facts of the case as upon appeal, but is confined to the case as presented to the legal sufficiency or insufficiency of the return to the writ. Where it appears that the magistrate has jurisdiction and a conviction within that jurisdiction in the warrant of commitment, on habeas corpus the conviction is presumed to be lawful until the contrary is shown. State v. Glenn, 54 Md., 572.

32 Taylor v. Pine Bluff, 34 Ark.. 603; Poyer v. Des Plaines, 20 Ill. App., 30; Yates v. Batavia, 79 Ill., 500; Gartside v. East St. Louis. 43 Ill., 47; West v. New York, 10 Paige (N. Y.), 539.

33 Schwab v. Madison, 49 Ind., 329; Wertheimer v. Boonville, 29 Mo., 254.

⁸⁴ Morris Canal, etc., v. Jersey City, 12 N. J. Eq., 252; Oakley v. Williamsburgh, 6 Paige (N. Y.), 262.

"Courts of equity will not, by injunction, prevent the institution of prosecutions for criminal offenses, § 369. **Prohibition**. Prohibition may be invoked to prevent an inferior court from proceeding in a cause depending before it on the suggestion that the cognizance of such cause does not properly belong to it. It is an original remedial writ and was provided by the common law as a remedy for encroachment of jurisdiction. It is directed to the judge and parties to a suit in an inferior jurisdiction, upon the ground that they have assumed and transgressed the limitations of their authority. It is also granted in some cases where the inferior court proceeds upon the misconstruction of the law.

The writ may be issued for defect of jurisdiction or defect in the manner of trial—pro defecto jurisdictionis or pro defecto triationis.³⁶ Prohibition will not lie solely to correct errors of an inferior court. The purpose of the writ is to prevent the inferior tribunal from assuming a jurisdiction with which it is not legally vested, or where, having jurisdiction, it has exceeded its legitimate powers and especially in the latter class of cases where there is no remedy by appeal.³⁷ The writ of prohibition is not like the writ of habeas corpus, a writ of right. It is a writ, the award of which is to be governed by the discretion of the court applied to the facts presented by the individual case.³⁸ Where the allegations in the application if true show

whether the same be the violations of State statutes or municipal ordinances; nor will they, upon petition for an injunction of this nature, inquire into the constitutionality of a legislative act, or the validity or reasonableness of an ordinance making penal the act or acts for the doing of which prosecutions are threatened." Paulk v. Sycamore, 104 Ga., 24; 30 S. E. Rep., 417; 41 L. R. A., 772; Bainbridge v. Reynolds, 111 Ga., 758; 36 S. E. Rep., 935.

35 Sections 282 to 285, supra.

36 Thomas v. Mead, 36 Mo., 232.

37 State ex rel. v. St. Louis Court of Appeals, 99 Mo., 216, 221; 12 S. W. Rep., 661, per Black, J.; United States v. Shanks, 15 Minn., 369; Quimbo Appo v. People, 20 N. Y., 531; Zylstra v. Charleston, 1 Bay (S. C.), 382; Supervisors v. Gorrell, 20 Gratt. (Va.), 484.

Prohibition to prevent trial justice from proceeding contrary to law. Delaney v. Kansas City Police Court, 167 Mo., 667; 67 S. W. Rep., 589, to prevent usurpation of jurisdiction. If police justice has jurisdiction, prohibition will not lie. Remedy is appeal if convicted.

Prohibition against justice of peace granted by superior court on ground that justice was proceeding without jurisdiction, and his conclusion would be void, not disturbed by supreme court where it appeared questionable whether defendant would have an adequate remedy to appeal from judgment of justice. State ex rel. v. Kennan, 25 Wash., 621; 66 Pac. Rep., 62 relying on Callan v. Wilson, 127 U. S., 540; 8 Sup. Ct. Rep., 1301.

38 State ex rel. v. Levens, 32 Mo. App., 520.

that the proceedings sought to be prohibited are absolutely void the writ will not issue.³⁹ The writ should issue only under such circumstances where the ordinary remedies are inadequate to the ends of justice; hence it will not lie to arrest proceedings for errors which may be corrected on appeal or writ of error.⁴⁰ Likewise the writ will be refused where the applicant has an adequate remedy by certiorari.⁴¹

Sufficiency of record for review. The record must show that sentence was passed before the supreme court will review a conviction in the recorder's court for the violation of an ordinance.42 A statement of the facts in a case cannot be filed in the appeal court unless first filed in the trial court and sent up as a part of the record.43 Usually the appeal will be dismissed where the transcript does not contain the ordinance, or the substance of it, for the alleged violation of which the appellant was fined.44 But where it is necessary for the purpose of justice the appeal court will in some cases take notice of the ordinance of a municipal corporation, although not contained in the record. 45 In determining whether an ordinance violates a city charter the court of appeal will not consider grounds of repugnancy under sections of the charter not cited in the record. 46 Where the record in an appeal from a justice of the peace in a proceeding for the violation of an ordinance fails to set out facts sufficient to show that the justice had jurisdiction and the record is vague and uncertain, referring to no

³⁹ Barnes v. Gottschalk, 3 Mo. App., 222.

⁴⁰ Bowman's Case, 67 Mo., 146; State ex rel. v. Heege, 39 Mo. App., 49; State ex rel. v. Ross, 136 Mo., 259, 273; 41 S. W. Rep., 1041; State ex rel. v. Withrow, 108 Mo., 1, 8; 18 S. W. Rep., 41; State ex rel. v. Southern Ry. Co., 100 Mo., 59; 13 S. W. Rep., 398; State ex rel. v. St. Louis Court of Appeals, 99 Mo., 216; 12 S. W. Rep., 661; Mastin v. Sloan, 98 Mo., 252; 11 S. W. Rep., 558; Lloyd on Prohibition, p. 48; Shortt on Mand. & Proh., p. 436.

⁴¹ State ex rel. v. Bowerman, 40 Mo. App., 576.

Prohibition will not lie where the court has jurisdiction of the

person and subject matter, although the ordinance is void. The grievance may be redressed on appeal or recordai or certiorari. State v. Whitaker, 114 N. C., 818; 19 S. E. Rep., 376.

⁴² People v. Jackson, 8 Mich., 110.

⁴³ Curry v. State (Tex. Crim. App., 1893), 24 S. W. Rep., 516.

⁴⁴ Baton Rouge v. Cremonini, 35 La. Ann., 366; State v. Clesi, 44 La. Ann., 85; 10 So. Rep., 409; Furhman v. Huntsville, 54 Ala., 263.

⁴⁵ March v. Commonwealth, 12 B. Mon. (Ky.), 25, 28.

⁴⁶ State *ex rel.* v. St. Louis, 169 Mo., 31; 68 S. W. Rep., 900.

ordinance a motion to dismiss in the circuit court should be sustained.⁴⁷ As a general rule where the record does not contain all the evidence bearing upon a point raised the point will not be considered by the appellate court.⁴⁸ A criminal prosecution for the violation of an ordinance cannot on appeal be transformed into a civil suit.⁴⁹

In one case the defendant was found guilty upon a verdict of a jury. The case was taken to the state district court and decided upon the questions of law appearing on the recorder's record and the judgment of the recorder was affirmed. On being removed to the supreme court upon writ of error the latter court found that under the law the recorder had no power to summon a jury and the sentence, being illegal, the defendant was discharged.⁵⁰

47 Salisbury v. Patterson, 24 Mo. App., 169.

48 State v. Graffmuller, 26 Minn., 6; 46 N. W. Rep., 445.

Where on appeal from the mayor's court to the circuit court that court reduces the sentence the supreme court will not interfere where no facts are stated on appeal but will assume that the facts before the circuit court justified such modification. Greenville v. Eichelberger, 44 S. C., 351; 22 S. E. Rep., 345.

⁴⁹ Webster v. Lansing, 47 Mich., 192; 10 N. W. Rep., 196.

50 St. Peters v. Bauer, 19 Minn., 27,

CHAPTER XI.

OF PLEADING ORDINANCES IN CIVIL PROCEEDINGS.

- § 371. Pleading ordinances when cause of action is founded thereon.
 - 372. Same—Illustrative cases.
 - 373. Judicial notice of ordinances.
 - 374. Pleading substance of ordinance.
 - 375. Pleading ordinance by title and date of passage.
 - 376. Pleading negligence in violation of ordinances.

- § 377. Same—Proof of acceptance of ordinance by defendant.
 - 378. Same—Relating to public safety.
 - 379. Same—Relating to operation of railroad trains and street cars.
 - 380. Same—Relating to the removal of snow and ice.
 - 381. Pleading in action of special tax bill for improvements.
- § 371. Pleading ordinances when cause of action is founded thereon. Where a cause of action is founded upon an ordinance the plaintiff must plead the ordinance, or so much of it as relates to the action must be set out in the declaration. The same is true where the defendant relies upon an ordinance as the ground of his defense; he must plead it in his answer. And where the action is brought to enforce the performance of a duty imposed by an ordinance, the ordinance must be pleaded. An averment that the passage of a municipal ordinance relied upon was procured by bribery, not specifying the names of the officers bribed, nor the sums paid or promised, is not sufficiently definite and certain on demurrer.
- § 372. Same—Illustrative cases. In an action by mandamus to compel the issue of a building permit, an allegation that the petitioner has complied with all the requirements of the ordinances of the city relative to the erection of buildings therein, is not sufficient. The ordinance, or so much thereof as is relied
- ¹ Idaho—People v. Buchanan. 1 Idaho, 681.
- Indiana—Clevenger v. Rushville, 90 Ind., 258.
- Missouri—Mooney v. Kennett, 19 Mo., 551.
- New York—People v. New York, 7 How. Pr. (N. Y.), 81.
- Oregon—Pomeroy v. Lappens, 9 Oregon, 363.
- ² Charleston v. Ashley Phosphate Co., 34 S. C., 541; 13 S. E. Rep., 845; Rockford City Ry. Co. v. Matthews, 50 Ill. App., 267.
- ³ Perry v. New Orleans, M. & C. Ry. Co., 55 Ala., 413.

upon, should be set forth. So in an action by a city marshal to recover salary, fixed by an ordinance, the ordinance must be set out in, or filed with, the declaration.⁵ So a complaint upon a cause of action based upon the making and annulling of a contract by a city must contain a copy of the orders of the council in making and annulling the contract.6 In an action to recover an office which has been created by ordinance it is not necessary to set out the entire ordinance creating the office, but it will be sufficient to state substantially only so much thereof as is necessary to show prima facie the plaintiff's title and right to recover.⁷ In an action by a property owner against the city for damages caused by raising the grade of a street, an allegation that the city raised the grade was held equivalent to an allegation that the grade was raised in pursuance of an ordinance, since the city could only act in such matters by ordinances.8 So in pleading that an ordinance was duly passed, it is necessarily implied that all essential antecedent acts, requisite to the legal enactment of the ordinance, were done.9 Thus in an action by the city for condemnation of land, an averment that an ordinance was duly "passed and adopted," is a sufficient statement that everything necessary to be done by the council to give it legal effect had been done.10 But under the charter of St. Louis it is held that the petition for the condemnation of private property for a street must show that the ordinance providing for opening the street was passed as provided by the charter-either on the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground, fronting on the proposed street.¹¹ In an action to recover a sum stipulated by ordinance to be paid for the privilege of operating passenger cars upon the streets the declaration must set out enough of

Rule Applies to All Courts. The rule applicable to pleading ordinances is the same whether the cause of action originated in the justice court or circuit court. Judd v. W., St. L. & P. Ry. Co., 23 Mo. App., 56.

- ⁴ Burkley v. Eisendrath, 58 Ill. App., 364.
- ⁵ Brazil v. McBride, 69 Ind., 244. ⁶ Terre Haute v. Lake, 43 Ind., 480.

- ⁷ Callopy v. Cloherty, 95 Ky., 330; 25 S. W. Rep., 497.
- % Werth v. Springfield, 78 Mo., 107; Stewart v. Clinton, 79 Mo., 603; Unionville v. Martin, 95 Mo. App., 28; 68 S. W. Rep., 605.
- ⁹ Becker v. Washington, 94 Mo.,375; 7 S. W. Rep., 291.
- 10 Los Angeles v. Waldron, 65Cal., 283; 3 Pac. Rep., 890.
- ¹¹ St. Louis v. Gleason, 89 Mo., 67; 14 S. W. Rep., 768.

the ordinance so that it will appear upon its face that the defendant is within its provisions.¹² In an action for damages an allegation that the defendant "wantonly, carelessly, recklessly and negligently" omitted to do acts imposed on it by a municipal ordinance, is sufficient to allow the admission of the ordinance in evidence to show negligence.¹³

§ 373. Judicial notice of ordinances. Courts will judicially notice the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a public statute, but when it is public or general in its nature or purposes. ¹⁴ But state courts will not take judicial notice of ordinances of municipal corporations; hence they must be pleaded with as much certainty of description as to their subject matter as a contract or other private paper. ¹⁵

Courts of the state take judicial notice of public laws of the

¹² Cape May v. Cape May Transp. Co., 64 N. J. L., 80; 44 Atl. Rep., 948.

¹³ Brasington v. South Bound Ry. Co., 62 S. C., 325; 40 S. E. Rep., 665.

14 Alabama—Albrittin v. Huntsville, 60 Ala., 486; Perryman v. Greenville, 51 Ala., 507, 510.

Illinois—Doyle v. Bradford, 90 Ill., 416; Potwin v. Johnson, 108 Ill., 70; Jones v. Lake View, 151 Ill., 663; 38 N. E. Rep., 688; Harmon v. Chicago, 110 Ill., 400.

Minnesota—State v. Tosney, 26 Minn., 262; 3 N. W. Rep., 345.

Missouri—Kansas City v. Vineyard, 128 Mo., 75; 30 S. W. Rep., 326; St. Louis v. Lang, 131 Mo., 412, 420; 33 S. W. Rep., 54.

Virginia—Duncan v. Lynchburg (Va., 1900), 34 S. E. Rep., 964; 48 L. R. A., 331,

Vermont—Winooski v. Gokey, 49 Vt., 282.

Wisconsin—Smith v. Janesville, 52 Wis., 680; 9 N. W. Rep., 789; Rains v. Oshkosh, 14 Wis., 372; Swain v. Comstock, 18 Wis., 463.

15 Alabama—Case v. Mobile, 30 Ala., 538.

Colorado—Garland v. Denver, 11 Colo., 534; 19 Pac. Rep., 460.

Idaho-People v. Buchanan, 1 Idaho, 681.

Illinois—Bloomington v. Illinois Cent. Ry. Co., 154 Ill., 539; 39 N. E. Rep., 478.

Indiana—Green v. Indianapolis, 22 Ind., 192.

. Iowa—Wolf v. Keokuk, 48 Iowa, 129; Stier v. Oskaloosa, 41 Iowa, 353; Goodrich v. Brown, 30 Iowa, 291; Garvin v. Wells, 8 Iowa, 286.

Kansas—McPherson v. Nichols, 48 Kan., 430; 29 Pac. Rep., 679; Watt v. Jones, 60 Kan., 201, 207; 56 Pac. Rep., 16.

Kentucky—Lucker v. Commonwealth, 4 Bush. (Ky.), 440.

Louisiana—New Orleans v. Labatt, 33 La. Ann., 107; Hassard v. Municipality, No. 2, 7 La. Ann., 495.

Maine—Lewistown v. Fairfield, 47 Me., 481.

Minnesota—Winona v. Burke, 23 Minn., 254.

Missouri—St. Louis v. Roche, 128 Mo., 541; 31 S. W. Rep., 915; Butler v. Robinson, 75 Mo., 192; State v. Oddle, 42 Mo., 210; Keane state. Ordinances when legally enacted operate throughout the limits of the city in like manner as public laws operate within the state limits. The city or municipal courts bear the same relation to ordinances of the city as the state courts do to the public laws of the state. Hence, on principle, the municipal courts may for like reason take judicial notice of all city ordinances of a general nature, or those having a general obligatory force throughout the city. Hence the rule that courts will not take judicial notice of municipal ordinances does not apply to police courts and city courts, which have jurisdiction of complaints for the enforcement of ordinances. They will take judicial notice of their ordinances, without allegation or proof of their existence.¹⁶

§ 374. Pleading substance of ordinance. Sometimes it is sufficient in pleading to set out the substance of the ordinance. In pleading private statutes the common law practice was to recite so much of the act as was pertinent to the issue made. In pleading the substance of an ordinance all of the ordinance that is legally necessary must appear, and it is generally sufficient if the descriptive words of the ordinance are

v. Klausman, 21 Mo. App., 485; Cox v. St. Louis, 11 Mo., 431; Bowie v. Kansas City, 51 Mo., 454; St. Louis v. St. Louis Ry. Co., 12 Mo. App., 591; Mooney v. Kennett, 19 Mo., 551.

New York—Harker v. New York, 17 Wend. (N. Y.), 199.

South Carolina — Charleston v. Ashley Phosphate Co., 34 S. C., 541; 13 S. E. Rep., 845.

Texas — Austin v. Walton, 68 · Tex., 507; 5 S. W. Rep., 70.

"Courts do not take judicial notice of city ordinances. Such ordinances should be pleaded and proved." Suth. St. Const. (2nd Ed.), sec. 296.

¹⁶ California — Ex parte Davis, 115 Cal., 445; 47 Pac. Rep., 258.

Iowa—Scranton v. Danenbaum, 109 Iowa, 95; 80 N. W. Rep., 221; Laporte City v. Goodfellow, 47 Iowa, 572; State v. Leiber, 11 Iowa, 407; Conboy v. Iowa City, 2 Iowa, 90.

Kansas—Solomon v. Hughes, 24 Kan., 211; West v. Columbus, 20 Kan., 633.

Maine—O'Malia v. Wentworth, 65 Me., 129.

South Carolina — Anderson v. O'Donnell, 29 S. C., 355; 7 S. E. Rep., 523; Charleston v. Chur, 2 Bailey (S. C.), 164.

West Virginia — Moundsville v. Velton, 35 W. Va., 217; 13 S. E. Rep., 373; Wheeling v. Black, 25 W. Va., 266.

¹⁷ Apitz v. Mo. Pac. Ry. Co., 17 Mo. App., 419; Kansas City v. Johnson, 78 Mo., 661; Hirst v. Ringen Real Estate Co., 169 Mo., 194, 200; 69 S. W. Rep., 368; Moberly v. Hogan, 131 Mo., 19, 25; 32 S. W. Rep., 1014; Decker v. Mc-Sorley, 111 Wis., 91; 86 N. W. Rep. 554. followed.¹⁸ The contents should be so stated that the court can judge from the provision of the ordinance itself.¹⁹ Where the plaintiff depends upon an ordinance for his rights it is not sufficient to refer to "certain terms of an ordinance," but the terms upon which he relies must be set out in the declaration.²⁰ In an action by quo warranto to oust the occupant of an office the party asserting a right founded upon ordinances must set them forth in the pleading in whole or in substance.²¹ In a suit to recover a merchant tax, pleading that a tax was "duly levied" is equivalent to pleading the substance of the ordinance under which it was levied and is sufficient to authorize the reception of the ordinance in evidence.²²

§ 375. Pleading ordinance by title and date of passage. In some jurisdictions it is permissible by statute to plead an ordinance by referring to its title, number and date of its passage; but a statute which provides that in pleading a private statute or a right derived therefrom it is sufficient to refer to such statute by its title and the day of its passage is not complied with by pleading an ordinance, as "that a certain ordinance of said city of T., known as No. 66." 23 Unless authorized by statute a municipal ordinance cannot be pleaded in a civil action by its title and date of its passage; it must be set out in full, or in substance and where it is pleaded in substance it is not necessary to set out its title, the date of its passage or a copy of it.²⁴ So in a return to a writ of habeas corpus where an ordinance must be set forth in a pleading as any other fact of which the courts take no judicial notice, a mere reference to it by number, title and date of enactment, is not sufficient.25

§ 376. Pleading negligence in violation of ordinances. It

Mandamus. The same rule was held to apply in an action by man-

¹⁸ Woods v. Prineville, 19 Or., 108; 23 Pac. Rep., 880.

¹⁹ Austin v. Walton, 68 Tex., 507;5 S. W. Rep., 70.

²⁰ Cincinnati Water Co. v. Cincinnati, 4 Ohio, 443.

²¹ But if the material allegations were founded upon a city charter, and the act was pleaded by its title, the court could, under the provisions of the practice act, take judicial notice of its provisions. State v. Oddle, 42 Mo., 210.

²² Kansas City v. Johnson, 78 Mo., 661.

 ²³ Tulare v. Hevren, 126 Cal.,
 226; 58 Pac. Rep., 530.

²⁴ Apitz v. Mo. Pac. Ry. Co., 17
Mo. App., 419; State v. Oddle, 42
Mo., 210; St. Louis v. Stoddard, 15
Mo. App., 173.

²⁵ Pomeroy v. Lappeus, 9 Or.,363; People v. New York, 7 How.Pr. (N. Y.), 81.

seems that where the cause of action is based upon negligence in the violation of an ordinance, the ordinance may be introduced in evidence to show such negligence, although not pleaded.26 Thus is an action against a contractor for damages caused by the negligent manner in which he blasted rock near the plaintiff's house, an ordinance of the city providing that any one blasting within the city limits should cover the orifice in which the explosive was placed, so as to prevent fragments of rock from being thrown into the air, was held to be admissible in evidence, where the petition alleged that the blasts were set off in such a negligent manner as to cause "loose fragments of rock to be thrown upon plaintiff's home." 27 The general rule is that an ordinance tending to show negligence must be pleaded where it is relied upon as giving a right to recover.²⁸ But where an ordinance is relied on as a cause of action, establishing negligence, it is sufficient to plead it by statement of the substance, general terms, and legal effect of the ordinance.29

§ 377. Same—Proof of acceptance of ordinance by defendant. Many cases hold that the violation of an ordinance, regulating the speed of trains is negligence per se,³⁰ and where the plaintiff bases his cause of action upon an ordinance, regulating the speed of trains, it is not necessary to the admission of the ordinance in evidence that he show and plead an agreement upon the part of the defendant to comply with the ordinance

damus to compel approval and acceptance of officer's bond. Commonwealth v. Torrey, 13 Pa. Co. Ct., 362; Commonwealth v. Chittenden, 2 Pa. Dist., 804.

26 Minnesota—Faber v. St. Paul,
M. & M. Ry. Co., 29 Minn., 465; 13
N. W. Rep., 902; Kelly v. St. Paul,
M. & M. Ry. Co., 29 Minn., 1; 11
N. W. Rep., 67; Klotz v. Winona
& St. P. Ry. Co., 68 Minn., 341; 71
N. W. Rep., 257.

Missouri—Judd v. W. St. L. & P. Ry. Co., 23 Mo. App., 56; Riley v. The W. St. L. & P. Ry. Co., 18 Mo. App., 385; Robertson v. W. St. Louis & Pac. Ry. Co., 84 Mo., 119; Goodwin v. Chicago, Rock Island & Pac. Ry. Co., 75 Mo., 73.

South Carolina — Nohrden v. North Eastern Ry. Co., 54 S. C., 492; 32 S. E. Rep., 524; Brasington v. South Bend Ry. Co., 62 S. C., 325; 40 S. E. Rep., 665.

²⁷ Mahoney v. Dankwart, 108
 Iowa, 321; 79 N. W. Rep., 134.

²⁸ Richter v. Harper, 95 Mich.,
 221; 54 N. W. Rep., 768.

²⁹ Hirst v. Ringen Real Estate Co., 169 Mo., 194; 69 S. W. Rep., 368.

30 Prewitt v. Railroad, 134 Mo., 615; 36 S. W. Rep., 667; Gratiot v. Railroad, 116 Mo., 450; 21 S. W. Rep., 1094; Dickson v. Railroad, 104 Mo., 491; 16 S. W. Rep., 381; Hanlon v. Railroad, 104 Mo., 381; 16 S. W. Rep., 233; Murray v. Railroad, 105 Murray v. Railroad, 106 S. W. Rep., 233; Murray v. Railroad, 107 Murray v. Railroad, 108 Murray

nance, or that the defendant had accepted the ordinance.³¹ Prior to the decision in the case of Jackson v. Railroad,³² it had been held in Missouri that the plaintiff in order to recover where the violation of an ordinance is relied upon to establish negligence, must allege and prove an agreement upon the part of the defendant to accept the ordinance violated.³³

- § 378. Same—Relating to public safety. The violation of ordinances which have for their purpose the protection of the lives, limbs, health, comfort and quiet of all persons within the city, such as ordinances regulating the speed of trains and street cars within the corporate limits, and the regulation and protection of dangerous openings and hatchways upon the premises of persons or firms, passed for the protection of persons rightfully upon the premises, is negligence per se, and the plaintiff, where his cause of action is based upon negligence, may introduce the ordinance in evidence and prove its violation, although the ordinance was not pleaded.³⁴
- § 379. Same—Relating to operation of railroad trains and street cars. But, on the other hand, it has been held that in an action for damages resulting from the negligence of a railroad company, an ordinance fixing the rate of speed of cars within the city limits is material and if relied upon by plaintiff it must be specially pleaded.³⁵ Hence where the declaration contained

road, 101 Mo., 236; 13 S. W. Rep., 817; Drain v. Railroad, 86 Mo., 574; Kellny v. Railroad, 101 Mo., 67; 13 S. W. Rep., 806. See sec. 397, post.

31 Jackson v. K. C. F. S. & M. Ry. Co., 157 Mo., 621; 58 S. W. Rep., 32, refusing to follow Fath v. Tower Grove & L. Ry. Co., 105 Mo., 537; 16 S. W. Rep., 913. To the same effect, Weller v. Chicago, M. & St. P. Ry. Co., 164 Mo., 180; 64 S. W. Rep., 141; Hutchinson v. Mo. Pac. Ry. Co., 161 Mo., 246; 61 S. W. Rep., 635.

³² 157 Mo., 621; 58 S. W. Rep., 32.

33 Fath v. Tower Grove & L. Ry.
Co., 105 Mo., 537; 16 S. W. Rep.,
913; Sanders v. Southern Elec. Ry.
Co., 147 Mo., 411; 48 S. W. Rep.,

855; Byington v. St. Louis Ry. Co., 147 Mo., 673; 49 S. W. Rep., 876; Sheehan v. Citizens' Ry. Co., 72 Mo. App., 524. But these cases have not been followed in the more recent decisions.

34 Jackson v. K. C. F. S. & M. Ry. Co., 157 Mo., 621; 58 S. W. Rep., 32; Wendler v. People's House Furnishing Co., 165 Mo., 527; 65 S. W. Rep., 737; Hirst v. Ringen Real Estate Co., 169 Mo., 194; 69 S. W. Rep., 368.

Ordinances relating to civil rights and liabilities, secs. 40 to 42, supra.

85 Chicago W. D. Ry. Co. v. Klauber, 9 Ill. App., 613.

In an action for damages against a street railway company an ordinance fixing the rate of speed in no allegation that there was a city ordinance regulating the speed of engines, the admission of the ordinance in evidence was held erroneous.³⁶ The rule has been declared in Michigan that where the plaintiff seeks to charge a street railway company with violation of duty imposed by ordinance, giving to him a right to recover, the ordinance must be pleaded.³⁷ But where, in an action against a railroad company for injury resulting from negligence, in running its trains in violation of an ordinance, the cause of action is based upon negligence and not on the ordinance, the ordinance may be introduced in evidence, to support the charge of negligence, although the existence of the ordinance has not been alleged in the pleading.³⁸ Under an allegation of "want of due care" evidence that the defendant omitted to ring the bell of the engine or sound the whistle as required by law was held admissible.³⁹

§ 380. Same—Relating to the removal of snow and ice. The violation of ordinances requiring the abutting owners of property fronting on a street to remove ice and snow from the walks in front of their premises, is not such evidence of negligence when the ordinance and its violation is pleaded as will entitle the plaintiff to recover in a suit for damages against the owner of the property for injuries received from a fall on the sidewalk.⁴⁰ It being the duty of the city to keep its streets in a reasonably safe condition, it cannot shift that duty by requiring the abutting owner to remove the ice and snow and upon failure to do so create a civil liability in favor of any one injured by the violation of the ordinance.⁴¹

the city has a direct bearing on the question of negligence. Moore v. St. Louis Transit Co., 95 Mo. App., 728; 75 S. W. Rep., 699; Shinner v. Merchants Bank, 4 Allen (Mass.), 290.

36 Chicago W. D. Ry. Co. v. Klauber, 9 Ill. App., 613.

37 Gardner v. Railway Co., 99Mich., 182; 58 N. W. Rep., 49.

38 Brasington v. South Bound R.
Co., 62 S. C., 325; 40 S. E. Rep., 665; Lynn v. C., R. I. & P. Ry. Co., 75 Mo., 167. See cases in sec. 376, supra.

39 Jones v. Andover, 10 Allen (Mass.), 18.

40 Kansas—Jansen v. Atchison, 16 Kan., 358.

Maryland—Flynn v. Canton Co., 40 Md., 312.

Massachusetts—Kirby v. Boylston Market Assn., 14 Gray (Mass.), 249.

Missouri—Norton v. St. Louis, 97 Mo., 537; 11 S. W. Rep., 242; St. Louis v. Connecticut Mut. Life Ins. Co., 107 Mo., 92; 17 S. W. Rep., 637.

Ohio-Vandyke v. Cincinnati, 1 Disney (Ohio), 532.

Rhode Island — Heeney v Sprague, 11 R. I., 456.

41 See secs. 40-42, supra.

§ 381. Pleading in action on special tax bill for improvements. The petition in a suit on a special tax bill, must allege that the work was done in accordance with the charter and ordinances.42 The ordinance under which the work was done must be pleaded. The general averment that the ordinance. stating its general purport, was duly enacted, is usually sufficient.43 It is not necessary to set out the ordinance in full, and the steps leading to its enactment, unless they constitute jurisdictional facts, in the proceedings, wherein the jurisdiction of the court is special and limited.44 In one case an allegation which stated the substance and general tenor of the ordinance which formed the foundation of plaintiff's demand, was held sufficient.45 But where the plaintiff pleaded an ordinance by its number and the date of its approval, a motion to make more definite and certain was sustained. The court said: "Municipal ordinances, not being subjects of judicial notice, must be pleaded with as much certainty of description, as to their subject matter and effect as a contract or other private paper.''46 So a petition on a special tax bill, which pleaded an ordinance by its number, title and date of passage, and failed to set out the substance of the ordinance, would be bad on demurrer.47 A complaint which avers that an ordinance for the improvement was enacted "by a two-thirds vote of her common council," the vote required by charter, is sufficient as to the validity of its passage. 48 However, under particular charter provisions, it has been held that the suit is based on the tax bill and not on the ordinance, hence, the ordinance need not be pleaded, but, if pleaded, it is sufficient to refer to it by giving its title and date of passage.49

42 Irvin v. Devors, 65 Mo., 625.

43 Eyerman v. Payne, 28 Mo. App., 72.

Sufficiency. Welch v. Mastin (Mo. App., 1903), 71 S. W. Rep., 1090.

44 Herman v. Payne, 27 Mo. App., 481.

⁴⁵ Especially is this so where the defendant has taken no steps by motion to have the petition made more definite and certain. Moberly v. Hogan, 131 Mo., 19; 32 S. W. Rep., 1014.

46 Keane v. Klausman, 21 Mo. App., 485, 489; State v. Oddle, 42 Mo., 210.

⁴⁷ Crone v. Mallinckrodt, 9 Mo. App., 316; St. Louis v. Stoddard, 15 Mo. App., 173.

⁴⁸ Connersville v. Merrill, 14 Ind. App., 303.

⁴⁹ Kansas City v. Am. Surety Co., 71 Mo. App., 315; St. Louis v. Hardy, 35 Mo., 261.

CHAPTER XII.

OF EVIDENCE OF ORDINANCES.

- § 382. Proof of authority to enact.
 - Proof of existence of ordinance, when required.
 - 384. Burden of proof.
 - 385. Judicial notice Appeal from municipal courts.
 - 386. Proof of formal steps in enactment, when required.
 - Proof of record of ordinance.
 - 388. Proof of publication of ordinance, when required.
 - 389. How proof of publication made.
 - 390. How ordinances proved.
 - Same—Ordinances published by authority.

- § 392. Same—When original record required.
 - 393. Same-Proof by copy.
 - 394. Same—Sufficiency of authentication.
 - 395. Same—Proof in actions for penalty.
 - 396. Admissibility of parol testimony to prove.
 - 397. Proof of violation of ordinances as evidence of negligence.
 - 398. Proof of violation by plaintiff in actions for civil liability.
- § 382. Proof of authority to enact. It seems that a conclusive presumption of the regularity of the passage of an ordinance does not exist. Some courts have held that, in a prosecution to recover a penalty under an ordinance, proof of the authority to enact it is necessary, as where the ordinance is objected to as incompetent evidence, or where the objection is made on the ground that it interferes with common rights. But where the violation of the ordinance is confessed by demurrer it is unnecessary to show the authority to enact it. And where municipal police courts take judicial notice of ordinances it is not necessary to plead or prove the authority to enact.
- \$ 383. Proof of existence of ordinance when required. Where the adoption of the ordinance is denied, it must be proved, to render it admissible in evidence. The enactment can be proved
- ¹ Altoona City v. Bowman, 171 Pa. St., 307; 33 Atl. Rep., 187.
- ² Alton v. Hartford Ins. Co., 72 Ill., 328; State v. Threadgill, 76 N. C., 17; Dunham v. Rochester, 5 Cow. (N. Y.), 462.
 - 3 Schott v. State, 89 Ill., 195.
- ⁴ St. Paul v. Laidler, 2 Minn., 190; 72 Am. Dec., 89.
- ⁵ Frankfort v. Aughe, 114 Ind., 77; 15 N. E. Rep., 802; 114 Ind., 600; 15 N. E. Rep., 804.
 - 6 Secs. 312 and 373, supra.
 - 7 Union Pac. R. Co. v. Ruzicka

by the proceedings of the council and their promulgation duly attested.⁸ But it is not competent to prove by extrinsic testimony that an ordinance was voted upon and passed, where the journal of the council only showed that it was reported.⁹ The book of ordinances kept by the municipal corporation containing the ordinance in question is prima facie evidence of its passage.¹⁰ A lapse of fourteen years after the passage of the ordinance was held to raise a sufficient presumption of the existence of every fact necessary to the validity of the ordinance, including its approval by the mayor and publication.¹¹

§ 384. Burden of proof. The ordinance is presumed to be valid and reasonable where it has reference to a subject matter which is within the corporate jurisdiction, unless the contrary appeared on the face of the law itself. Therefore, the general rule is that, when the validity of an ordinance is called in question, the burden is upon the party who denies the validity to demonstrate it by proper proof, as where the question of the lack of power to enact it is raised.¹³ So the introduction of the ordinance book, containing a certain ordinance, and showing its passage by the board, with the vote thereon, and the proper authentication thereof, together with evidence, as to its due publication, is prima facie proof of its validity, and the burden is upon the defendant to overcome the presumption.¹⁴ And where the defendant raises the objection that the ordinance has been repealed the burden is upon him to prove So the burden is upon the defendant to prove that the ordinance was not published, as required. 16

(Neb., 1902), 91 N. W. Rep., 543. Sec. 340, supra.

⁸ Breaux's Bridge v. Dupuis, 30 La. Ann., 1105; People v. Murray, 57 Mich., 396; 24 N. W. Rep., 118. ⁹ Covington v. Ludlow, 1 Metc. (Ky.), 295.

10 Barr v. Auburn, 89 Ill., 361.

Book of printed ordinances held prima facie evidence of the existence and legality of ordinances. State v. King, 37 Iowa, 462; Barr v. Auburn, 89 Ill., 361; Prell v. McDonald, 7 Kan., 426, 446; Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark., 370; 19 S. W. Rep., 1053; Van Buren v. Wells, 53 Ark.,

368, 377; 14 S. W. Rep., 38.

11 Santa Rosa v. Central St. Ry.
Co. (Cal., 1895), 38 Pac. Rep., 986.

12 Van Hook v. Selma, 70 Ala.,
361; 45 Am. Rep., 85; Frankfort
v. Aughe, 114 Ind., 77; 15 N. E.
Rep., 802; Trenton Horse Ry. Co.
v. Trenton, 53 N. J. L., 132; 20 Atl.
Rep., 1076; 11 L. R. A., 410.

18 Haywood v. N. Y. Cent. & H.Ry. Co., 59 Hun. (N. Y.), 617; 13N. Y. Suppl., 177.

14 Merced County v. Fleming,111 Cal., 46; 43 Pac. Rep., 392.

¹⁵ Hanna v. Kankakee, 34 Ill. App., 186.

16 Van Buren v. Wells, 53 Ark.,

§ 385. Judicial notice — Appeal from municipal courts. While, as we have seen, municipal or city courts will take judicial notice of the ordinances and resolutions passed and in force within the jurisdiction of the court, without being pleaded and proved,17 in many jurisdictions it is held, and the weight of authority seems to be that, on appeal from such courts to a state court the latter will not take judicial notice of ordinances unless they have been pleaded in the municipal or city court and set out in the record.18 But the better view appears to be that where an action for the violation of an ordinance has been commenced in a municipal or police court and the case is appealed, the latter court, whether state or municipal, will take judicial notice of the incorporation of the city and of the existence or substance of its ordinances.19

§ 386. Proof of formal steps in enactment, when required. It has been said that the same presumption does not exist respecting the regularity of the passage of an ordinance as in the case of an act of the legislature.20 Where it appears that a

Atlantic City, 34 N. J. L., 99, 106.

17 Sec. 373, supra.

18 Alabama—Furhman v. Huntsville, 54 Ala., 263.

Colorado-Garland v. Denver, 11 Colo., 534: 19 Pac. Rep., 460.

Georgia-McDonald v. Lane, 80 Ga., 497; 5 S. E. Rep., 628; Mayson v. Atlanta, 77 Ga., 662.

Idaho-People v. Buchanan, 1 Idaho, 681.

Iowa-Garvin v. Wells, 8 Iowa, 286; Goodrich v. Brown, 30 Iowa, 291.

Maine-Lewiston v. Fairfield, 47 Me., 481.

Maryland-Shanfelter v. Baltimore, 80 Md., 483; 31 Atl. Rep., 439; Central Savings Bank v. Baltimore, 71 Md., 515; 18 Atl. Rep., 809; 20 Atl. Rep., 283.

Minnesota-Winona v. Burke, 23 Minn., 254.

Missouri-Cox v. St. Louis, 11 Mo., 431.

New York-Porter v. Waring, 69

368; 14 S. W. Rep., 38; State v. N. Y., 250; Harker v. New York. 17 Wend. (N. Y.), 199.

> South Carolina - Charleston v. Ashley Phosphate Co., 34 S. C., 541; 13 S. E. Rep., 845.

> Vermont-State v. Soragan, 40 Vt., 450.

WHERE THE PARTIES STIPULATE that a paper filed in the appellate court is a genuine ordinance, it will not be evidence, as the appellate court only passes on cases as they appear in the trial court. O'Connor v. Shahbona, 49 Ill. App., 619.

19 Solomon v. Hughes, 24 Kan., 211; Downing v. Miltonvale, 36 Kan., 740; 14 Pac. Rep., 281; Moundsville v. Velton, 35 W. Va., 217; 13 S. E. Rep., 373.

By provision of the Code of Iowa, in an appeal from a town or city court, the district court takes judicial notice of ordinances the same as public statutes. Scranton v. Danenbaum, 109 Iowa, 95; 80 N. W. Rep., 221.

20 Altoona v. Bowman, 171 Pa.

city ordinance was enacted and the charter requires unanimity in its enactment this will be presumed until the contrary is shown.²¹ So where a two-thirds vote is necessary to enact an ordinance the presumption is that the ordinance received such vote, in the absence of proof to the contrary.²² In an Illinois case the introduction of the ordinance was objected to. The charter provided that before an ordinance should be in force it should be submitted to the voters of the town for their approval or rejection, and that it should be published in a particular manner. It was held that these must be proved before the ordinance could be received in evidence.²³ Ordinances published in book form will be presumed to have been signed by the mayor, in the absence of evidence to the contrary, where the city charter provides that such books shall be received in evidence without further proof.24 There is no presumption that other proceedings than those mentioned in the record were had in the passage of the ordinance.25

§ 387. **Proof of record of ordinance.** The failure of the city to comply with a charter provision that all ordinances shall be recorded does not render the ordinance void, the provision being merely directory. So a city charter requiring ordinances to be recorded in a book kept for that purpose, is complied with by a publication of the ordinance in book form. The fact that a printed ordinance was cut out and pasted in the record book instead of writing it in the book, is no objection to the admission of it in evidence. After an ordinance was signed by the mayor certain changes, and interlineations were made on the record. It was held that as the charges were made to

St., 307; 33 Atl. Rep., 187; 37 Wkly. Notes Cases (Pa.), 102; Schott v. People, 89 Ill., 195.

Louisville v. Hyatt, 2 B. Mon.
 (41 Ky.), 177; 36 Am. Dec., 594;
 Lexington v. Headley, 5 Bush
 (Ky.), 508.

²² Buffalo & N. F. R. Co. v. Buffalo, 5 Hill (N. Y.), 209.

23 Schott v. People, 89 Ill., 195.

24 Allen v. Davenport, 107 Iowa,90; 77 N. W. Rep., 532.

²⁵ Tracey v. People, 6 Colo., 151. As to sufficiency of record, etc.,

of council proceedings in the passage of ordinances, see sec. 126, ct seq.

26 Allen v. Davenport, 107 Iowa,
90, 97; 77 N. W. Rep., 532; Whalin v. Macomb, 76 Ill., 49; Upington v. Oviatt, 24 Ohio St., 232, 241; Amey v. Allegheny City, 24 How. (U. S.),
364; Stevenson v. Bay City, 26 Mich., 44. See sec. 153, supra.

Allen v. Davenport, 107 Iowa,
 77 N. W. Rep., 532.

²⁸ Eubanks v. Ashley, 36 Ill., 177. show the true ordinance, as passed, that it was not an impeachment of the record, and the record of the ordinance as passed was admissible in evidence.²⁹ The defendant may introduce a certified copy of the record of the proceedings of the board held at the meeting in which the ordinance was adopted to show that the ordinance was not passed as required.³⁰

§ 388. Proof of publication of ordinance, when required. No general rule as to the presumption of the publication of ordinances can be deduced from the cases, as this is affected by the local regulations and the facts in each case. In the absence of evidence to the contrary it will be presumed that ordinances were duly published.31 A copy of an ordinance duly certified by the recorder of a town is prima facie admissible in evidence without proof that it was properly recorded and published.32 Proof of publication, in Indiana, is not required unless the publication is denied under oath.33 Where an ordinance has been recognized by the city for a long time as being in force the publication will be presumed.34 Where the ordinances are published in book or pamphlet form by authority no other publication is necessary.35 It has been held that the publication of the ordinance must be shown by proper proof before a conviction under it can be sustained.36 So where the statute requires that all ordinances imposing a fine shall be published proof of the publication is a prerequisite to a recovery.³⁷ But where one sets up as a defense omission to publish the burden is on him to establish it.38

29 Yesler v. Seattle, 1 Wash., 308;25 Pac., 1014.

30 Tracey v. People, 6 Colo., 151.
31 Mo. Pac. Ry. Co. v. Chick., 6
Kan. App., 481; 50 Pac. Rep., 605;
Van Buren v. Wells, 53 Ark., 368;
14 S. W. Rep., 38; Fonda v. Louisville, 20 Ky. Law Rep., 1652; 49 S.
W. Rep., 785. Compare Larkin v.
Burlington, etc., R. R. Co., 85 Iowa,
492; 52 N. W. Rep., 480.

³² Bayard v. Baker, 76 Iowa,220; 40 N. W. Rep., 818.

33 Rowland v. Greencastle, 157 Ind., 591; 62 N. E. Rep., 474; Hardenbrook v. Ligonier, 95 Ind., 70; Green v. Indianapolis, 25 Ind., 490;

Lake Erie, etc., R. Co. v. Noblesville, 16 Ind. App., 20; 44 N. E. Rep., 652.

34 Atchison v. King, 9 Kan., 550;
Quincy v. Chicago, B. & Q. Ry. Co.,
92 Ill., 21; Santa Rosa v. Central
St. Ry. Co. (Cal., 1895), 38 Pac.
Rep., 986.

35 Raker v. Maquon, 9 Ill. App., 155; State v. King, 37 Iowa, 462.

36 Elizabethtown v. Leffer, 23 III., 90; Schott v. People, 89 III., 195. Contra Charleston v. Chur., 2 Bailey (S. C.), 164.

37 Hutchison v. Mt. Vernon, 40. Ill. App. 19.

38 Van Buren v. Wells, 53 Ark.,

§ 389. How proof of publication made. In the absence of a statute or charter provision to the contrary, oral evidence is competent to prove the publication of an ordinance.39 Where the publication was by posting, in order to give such posting effect, it must be shown that there was no newspaper published in the village in which such ordinance could have been published. The publication by posting may be proved by the testimony of the clerk that he posted up copies of the ordinance.41 A memorandum upon the record of an ordinance reciting that it has been duly published was held to be prima facie proof of such fact. 42 The certificates of the village clerk attached to the ordinance is sufficient evidence of due publication of the ordinance, by provision of the statute of Illinois.43 Where proof of the publication is not shown, as required by the charter, the ordinance is not admissible in evidence.44 The introduction of the printed copy of the ordinance, with the affidavit of the printer, his foreman, or clerk, or any competent witness, stating the fact of its publication and the dates thereof, has been held sufficient.45 The certificate of the clerk

368; 14 S. W. Rep., 38; 22 Am. St.
Rep., 214; Downing v. Miltonvale,
36 Kan., 740; 14 Pac. Rep., 281.
See Secs. 155-157.

³⁹ Eldora v. Burlingame, 62 Iowa, 32; 7 N. W. Rep., 148; Des moines v. Casady, 21 Iowa, 570; Bayard v. Baker, 76 Iowa, 220; 40 N. W. Rep., 818. *Contra* Napa v. Easterly, 61 Cal., 509. Compare Santa Rosa City R. Co. v. Central St. R. Co. (Cal., 1895), 38 Pac.

Rep., 986.

Where it was shown that the files of the paper in which the ordinance was published could not be obtained, and that no proof of publication was on file, parol evidence was held admissible to prove publication. Larkin v. Burlington, etc., Ry. Co., 91 Iowa, 654; 60 N. W., 195.

In the absence of charter or other provisions requiring proof of publication in a particular way, any competent proof tending to establish the publication of the ordinance is admissible. Seattle v. Doran, 5 Wash., 482; 32 Pac., Rep., 105, 1002.

Presumption of publication after lapse of time. Quincy v. Chicago, etc., R. Co., 92 Ill., 21.

40 Raker v. Maquon, 9 III. App., 155.

41 Teft v. Size, 10 Ill., 432.

⁴² Downing v. Miltonvale, 36 Kan., 740; 14 Pac. Rep., 281.

43 Moss v. Oakland, 88 Ill., 109.

But it is incompetent as evidence unless made so by statute. Railroad v. Engle, 76 Ill., 317.

44 Schott v. People, 89 Ill., 195.

45 Kettering v. Jacksonville, 50 Ill., 39; Rowland v. Greencastle, 157 Ind., 591; 62 N. E. Rep., 474; Schwartz v. Oshkosh, 55 Wis., 490; 13 N. W. Rep., 450.

Charter provided for proof by the affidavit of the foreman or publisher of the newspaper, and it was held that the statement in the affidavit that the person making it was the foreman was sufficient evidence of the fact. Faribault v. attached to an ordinance was held to be sufficient proof of publication where no objection was raised.⁴⁶ An error in the printing of a word in the publication of an ordinance, will not affect its validity where it is plain from the context what word was intended.⁴⁷ So a mistake in the publication of the date of the passage will not affect it, the date of passage not being a part of the ordinance.⁴⁸

§ 390. How ordinances proved. In many states the method of proving ordinances is prescribed by statute.⁴⁹ but the statu-

Wilson, 34 Minn., 254; 25 N. W. Rep., 449.

The method of proving the publication of ordinances is controlled largely by the charter provisions of the municipality, and in many instances by statutory provisions. Schott v. People, 89 Ill., 195; Terra Haute & I. Ry. Co. v. Voelker, 129 Ill., 540; 22 N. E. Rep., 20; 1 Starr and Curtis Anno. Stat., p. 718, and notes to par. 66.

46 Chamberlain v. Litchfield, 56 Ill. App., 652.

Proof of publication held to be sufficient. Albia v. O'Harra, 64 Iowa, 297; 20 N. W. Rep., 444; DeLoge v. N. Y. Central & H. R. Ry. Co., 92 Hun. (N. Y.), 149; 36 N. Y. Suppl., 697.

Not necessary that the certificate of the recorder show dates of publication. Preston v. Cedar Rapids, 95 Iowa, 71; 63 N. W. Rep., 577.

47 Moss v. Oakland, 88 Ill., 109.
 48 Vincent v. Pacific Grove, 102
 Cal., 405; 36 Pac. Rep., 773.

As to time and frequency and method of publication, see secs. 156 and 157.

⁴⁹ Printed copies of the ordinances, resolutions, rules, orders and by-laws of any city or incorporated town of the state of Missouri, purporting to be published by authority of such city or incorporated town, and manuscript or

printed copies of such ordinances. resolutions, rules, orders and bylaws, certified under the hand of the officer having the same in lawful custody, with the seal of such town or city annexed, shall be received as evidence in all courts and places in Missouri, without further proof; and any printed pamphlet or volume, purporting to be published by authority of any such town or city, and to contain the ordinances, resolutions, rules, orders or by-laws of such town or city, shall be evidence in all courts and places within the state of Missouri, of such ordinances, resolutions, rules, orders or by-laws. R. S. Mo., 1899, sec. 3100; Eichenlaub v. St. Joseph, 113 Mo., 395; 21 S. W. Rep., 8; 18 L. R. A., 590; Rutherford v. Hamilton, 97 Mo., 543; 11 S. W. Rep., 249; Keating v. Skiles, 72 Mo., 97.

Where printed volume of ordinances may be put in evidence, by charter, the ordinances stand as statutes so far as relates to the method of proving their contents. Napman v. People, 19 Mich., 352, 355.

Ordinances are not admissible in evidence unless certified under seal of the town. Civil Code of Georgia, sec. 5216; Central Ga. Ry. Co. v. Bond, 111 Ga., 13; 36 S. E. Rep., 299.

tory method is not exclusive; the common law method may be employed.⁵⁰ Where the state statute provides that, "all ordinances of the city may be proved by the seal of the corporation," a document purporting to be a city ordinance approved by the mayor, attested by the register and under the seal of the city is admissible in evidence.⁵¹ The book in which ordinances are recorded, properly authenticated and proved is competent to prove the ordinance therein contained.⁵² So ordinances may be proved by entries in city records, kept by proper authority.⁵³ Where the city fails to provide a book for the record of ordinances, ordinances placed on file by the proper custodian may be used as evidence.⁵⁴ And the minutes kept by the council clerk were held, in a New York case, competent evidence to prove the adoption of the ordinance.55 So ordinances may be proved by a book containing a compilation of them legally adopted, notwithstanding a different method of proof is prescribed in the charter. 56 So the record book of ordinances made by the clerk is competent evidence, although the ordinances were never signed by the presiding officer of the council, as the law required.⁵⁷ A printed compilation of the ordinance when properly authenticated as correct is admissible where it is shown the original ordinance was destroyed.⁵⁸ And where the record of the ordinance is shown to have been destroyed by fire, extrinsic evidence is competent to prove an ordinance.⁵⁹ Proof of the repeal of the

Printed copies of by-laws or ordinances of a corporation published under authority are admissible in evidence. 1 Bates Anno. Ohio Stat., sec. 1699.

50 Birmingham v. Tayloe, 105 Ala., 170; 16 So. Rep., 576; Metropolitan Street R. R. Co. v. Johnson, 90 Ga., 500; 16 S. E. Rep., 49; Green v. Indianapolis, 25 Ind., 490; Johnson v. Finley, 54 Neb., 733; 74 N. W. Rep., 1080.

⁵¹ Eichenlaub v. St. Joseph, 113
 Mo., 395; 21 S. W. Rep., 8; 18 L.
 R. A., 590.

52 Rutherford v. Swink, 90 Tenn.,
152; 16 S. W. Rep., 76; Metropolitan St. R. Co. v. Johnson, 90 Ga.,
500; 16 S. E. Rep., 49; Wapella v. Davis, 39 Ill. App., 592.

53 Billings v. Dunnaway, 54 Mo.
App., 1; Clarence v. Patrick, 54
Mo. App., 462; People v. Murray,
57 Mich., 396; 24 N. W. Rep., 118.
54 Troy v. Atchison & N. R. R.
Co., 11 Kan., 519.

 55 Kennedy v. Newman, 3 N. Y. Super. Ct. (1 Sandf.), 187.

⁵⁶ Birmingham v. Tayloe, 105 Ala., 170; 16 So. Rep., 576.

⁵⁷ Toledo Consolidating St. Ry. Co. v. Toledo Elec. St. Ry. Co., 6 Ohio Cir. Ct. Rep., 362.

58 Ex parte Canto, 21 Tex. App.,61; 17 S. W. Rep., 155; 57 Am.Rep., 609.

⁵⁹ Gulf Sea & S. F. R. R. Co. v.
 Calvert, 11 Tex. Civ. App., 297; 32
 S. W. Rep., 246.

ordinance may be made by the production of the repealing ordinance.⁶⁰ An ordinance is to be proved by evidence addressed to the court and not to the jury.⁶¹

§ 391. Same—Ordinances published by authority. Under charter provisions reciting that ordinances published by authority of the corporation shall be received in evidence without further proof, a book of ordinances which appears to be so published is admissible in evidence without further proof. A case of prima facie publication is thus made out, but, of course, may be rebutted.62 So a printed copy of an ordinance published by authority of the city is prima facie evidence of the legal existence of the ordinance and its contents. The burden is on the defendant to overcome this evidence.63 If it can be determined from any part of a printed book or pamphlet of ordinances that it purports to be published by proper authority it is admissible in evidence. 64 But a book containing a series of ordinances, with no declaration in, or upon, or as a part of, it, that it was published by competent authority is not conclusive evidence of the adoption and publication of any particular ordinance contained therein.65 An ordinance contained in a printed book which is in charge of the proper custodian and purports to have been published by authority of the city and to contain its ordinances, is admissible in evidence without further proof.66 Authority to reprint and publish a charter is

60 Illinois Central R. R. Co. v.Gilbert, 157 Ill., 354; 41 N. E. Rep.,724; 51 Ill. App., 404.

61 Roulo v. Valcour, 58 N. H., 347

Proof of ordinance in particular cases, in accordance with certain provisions of charters. Pendergast v. Peru, 20 Ill., 51; Lindsay v. Chicago, 115 Ill., 120; 3 N. E. Rep., 443; Boyer v. Yates City, 47 Ill. App., 115.

62 St. Louis v. Foster, 52 Mo.,
513; Lindsay v. Chicago, 115 Ill.,
120; 3 N. E. Rep., 443.

63 Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark., 370; 19 S. W. Rep., 1053; State v. King, 37 Iowa, 462; Tarkio v. Cook, 120 Me., 1; 25 S. W. Rep., 202; 41 Am. St. Rep., 678.

64 Wapella v. Davis, 39 Ill. App.,
 592; McGregor v. Lovington, 48
 Ill. App., 202, 207.

⁶⁵ Quint v. Merrill, 105 Wis.,406; 81 N. W. Rep., 664.

66 Starks v. State, 38 Tex. Crim. Rep., 233; 42 S. W. Rep., 379; Tarkio v. Cook, 120 Mo., 1; 25 S. W., 202; 41 Am. St. Rep., 678; Tipton v. Norman, 72 Mo., 380; Sheehan v. Owen, 82 Mo., 458; Canton v. Ligon, 71 Mo. App., 407.

When the ordinances of the city of St. Louis are collated and published by authority of the city they are admissible in evidence without any seal, or attestation. St. Louis v. Foster, 52 Mo., 513; Rockville v. Merchant, 60 Mo. App., 365; Schweitzer v. Liberty, 82 Mo., 309; Tipton v. Norman, 72 Mo., 380.

not authority to publish ordinances in a book therewith so as to make it conclusive of the regularity of the ordinances.⁶⁷

§ 392. Same—When original record required. Where a city is required by statute or the provisions of its charter to keep a journal of its proceedings, and of all acts, resolutions and ordinances of the corporation, such journal or record is admissible in evidence to prove the ordinance.68 And where the book containing the ordinances of the city was produced and the mayor testified that it was the journal of the proceedings of the board of aldermen, including the ordinance adopted, ordinances contained therein were held admissible in evidence by reading from the book.69 Where the charter of a town requires its officers to keep a record of the by-laws, and ordinances, and of the time, manner and place of publication, in a book to be provided for that purpose, which shall be received in all courts as evidence, other proof than such record is unnecessary.70 Where by statute it is essential to the validity of a village ordinance that the vote upon the passage be taken and recorded, the record of the proceedings of a village board reciting that all the members were present and that the ordinance in question was passed unanimously, is sufficient to show that the ordinance was legally passed.71

§ 393. Same—Proof by copy. A properly authenticated copy of an ordinance is usually admissible in evidence, where it is attested by the seal of the corporation and the signature of the officers having charge of the original.⁷² So it has been held that a sworn copy of an ordinance of an incorporated city of another state is competent evidence.⁷³ State statutes and city charters usually authorize the admission in evidence of printed copies of by-laws and ordinances when certified under the hand of the

But a pamphlet purporting to contain an ordinance, which does not purport to be published by authority, is incompetent to prove the ordinance. Baker v. Maquon, 9 Ill. App., 155.

67 Quint v. Merrill, 105 Wis., 406; 81 N. W. Rep., 664.

68 Stewart v. Clinton, 79 Mo.,
 603; Lebanon Light & Water Co.
 v. Lebanon, 163 Mo., 254; 63 S. W.
 Rep., 811.

69 Jackson v. K. C., Ft. S. & M.

Ry. Co., 157 Mo., 621, 634; 58 S. W. Rep., 32.

70 St. Charles v. O'Mailey, 18 Ill., 407.

71 Schofield v. Tampico, 98 Ill. App., 324; Gilberts v. Rabe, 49 Ill. App., 418.

72 Pugh v. Little Rock, 35 Ark., 75; Bayard v. Baker, 76 Iowa, 220; 40 N. W. Rep., 818; Metropolitan Street R. R. Co. v. Johnson, 90 Ga., 500; 16 S. E. Rep., 49; Green v. Indianapolis, 25 Ind., 490.

officer having the same in lawful custody, with the seal of such town annexed.74

§ 394. Same—Sufficiency of authentication. Where objection is raised to the introduction of an ordinance in evidence. its authenticity as a part of an ordinance of the city must be shown by proper proof.⁷⁵ The production of a newspaper, published in the town, containing what appears as an ordinance of the town, which is headed "Published by Authority," and the ordinance purports to be signed by the president of the board. and countersigned by the town clerk, proves a sufficient adoption and authentication of the ordinance, to render it admissible in evidence, under the charter of the city. 76 The certificate of the city clerk, under his official seal, is prima facie evidence of the passage of an ordinance, and renders it admissible in evidence.⁷⁷ The identification by a policeman of the ordinance book and the signature of the mayor to the ordinance was held sufficient to render it admissible in evidence.78

§ 395. Same—Proof in actions for penalty. In most states the manner of pleading ordinances and the method of proof in actions to recover a penalty, is prescribed by statute. In the main the rules of evidence and proof of ordinances in actions for the recovery of a penalty are the same as in a civil action, with this difference, however, municipal courts have jurisdiction of actions to recover a penalty, and since these courts take judicial notice of the ordinances of the municipality, the same care in pleading and proving the ordinance is not required as in a civil action in a state court.⁷⁹

§ 396. Admissibility of parol testimony to prove. Parol evidence is not admissible to prove an ordinance or resolution. The ordinance itself or a proper authenticated copy, 80 or the

73 Louisville N. A. & C. Ry. Co.
 v. Shires, 108 Ill., 617.

74 R. S. Mo., 1899, secs. 3100, 5521, 5694; 1 Bates Ann. Ohio Stat., sec. 1699; Eichenlaub v. St. Joseph, 113 Mo., 395; 21 S. W. Rep., 8; 18 L. R. A., 590.

To Union Pac. Ry. Co. v. Ruzicka,
 (Neb., 1902), 91 N. W. Rep., 543.
 Block v. Jacksonville, 36 Ill.,
 301.

77 McChesney v. Chicago; 159 Ill.,223; 42 N. E. Rep., 894; Lindsay v.

Chicago, 115 Ill., 120; 3 N. E. Rep., 443.

⁷⁸ Ottumwa v. Schaub, 52 Iowa, 515; 3 N. W. Rep., 529.

The proof of authenticity of an ordinance, held sufficient in particular cases. Terre Haute & I. R. Rý. Co. v. Voelker, 129 Ill., 540; 22 N. E. Rep., 20, affirming 31 Ill. App., 314; Knight v. Railroad Co., 70 Mo., 231.

79 Sec. 340, supra.

80 Pugh v. Little Rock, 35 Ark.,

council record 81 must be produced. So parol evidence is not admissible to explain representations and understandings of an ordinance at the time of its passage,82 nor to prove that an ordinance, valid upon its face, was not legally passed, or was passed and approved prior or subsequent to the date of its attestation; and it seems that not even the record of the proceedings of the city council would be admissible for the purpose.83 As a rule, the records of municipal action by a city council cannot be contradicted or supplemented by parol evidence. Where the law requires such records to be kept they are the only lawful evidence of the action to which they refer.84 So extrinsic proof of the consent of the mayor is not admis-But where an ordinance has been destroyed by fire parol proof is admissible to show that it had been signed by the mayor.86 And in one case the testimony of the mayor who presided at the time the ordinance was passed was admitted to prove the passage of the ordinance.87 So in another, where the records of a city were imperfect, and did not show all the proceedings, parol testimony to show that an ordinance did pass the council was admitted.88 And in an Illinois case parol evidence was admitted to show that interlining in an ordinance was done before the passage of it.89

§ 397. Proof of violation of ordinances as evidence of negligence. The passage of ordinances by a municipality regulating the speed of trains and the running of street cars within the city limits, is a valid police regulation for the protection of the lives of persons, and the evidence of such an ordinance and

75, 80. Contra Troy v. Atchinson Ry. Co., 11 Kan., 519.

But in one case parol evidence of resolutions was held competent where it appears that no record of them has been made and the charter did not, in express terms, require them to be recorded. Darlington v. Commonwealth, 41 Pa. St., 68.

⁸¹ Stewart v. Clinton, 79 Mo., 603; Lebanon Light & Water Co. v. Lebanon, 163 Mo., 254; 63 S. W. Rep., 811.

82 State v. Paris Ry. Co., 55 Tex.,

76; Hagerstown v. Startzman, 93 Md., 606; 49 Atl. Rep., 838.

83 Ball v. Fagg, 67 Mo., 481.

84 Stevenson v. Bay City, 26 Mich. 44. See sec. 124 et seq., supra.

85 Lexington v. Headley, 5 Bush. (Ky.), 508.

86 Seattle v. Doran, 5 Wash., 482;32 Pac. Rep., 105, 1002.

87 Heller v. Alvarado, 1 Tex. Civ.App., 409; 20 S. W. Rep., 1003.

88 Troy v. A. & N. Ry. Co., 11 Kan., 519.

89 Ronan v. People, 193 Ill., 631;61 N. E. Rep., 1042.

proof of its violation in a civil action for damages is negligence per se. 90 The effect of evidence of the violation of an ordinance regulating the speed of trains has been extensively discussed in a large number of cases in the Supreme Court of Missouri. The final conclusion of that court appears to be that evidence of the violation of an ordinance regulating the speed of trains is negligence per se and that it is not necessary for the plaintiff to allege and prove acceptance of the ordinance upon the part of the railroad company. 91

Ordinances which have for their purpose the protection of persons from injury, may be introduced in evidence in actions

Ocorrell v. B. C. R. & M. Ry.
S. 38 Iowa, 120; Wilson v. Southern Ry. Co., 64 S. C., 162; 36 S.
E. Rep., 701; 41 S. E. Rep., 971.

Obstructing street, held negligence. Overhouser v. American Cereal Co. (Iowa, Oct. 3, 1902), 92 N. W. Rep., 74.

It is negligence per se for a railway company to violate valid ordinances and the court may so instruct the jury, as ordinances regulating the speed of trains. tral of Ga. Ry. Co. v. Bond, 111 Ga., 13, 17; 36 S. E. Rep., 299 (doubting W. & A. R. R. v. King, 70 Ga., 261); Atlanta & W. P. R. R. v. Wyly, 65 Ga., 120; Central R. R. v. Thompson, 76 Ga., 770; Tift v. Jones, 77 Ga., 181; 3 S. E. Rep., 399; Central R. R. v. Smith, 78 Ga., 694, 697; 3 S. E. Rep., 397; Western & A. R. R. Co. v. Young, 81 Ga., 397, 412; 7 S. E. Rep., 912; Columbus v. Ogletree, 96 Ga., 177, 179: 22 S. E. Rep., 709.

91 Jackson v. K. C. F. S. & M. Ry. Co., 157 Mo., 621; 58 S. W. Rep., 32, per Burgess, J., reviewing leading Missouri cases. Upon the latter point the court refused to follow Fath v. Tower Grover Ry. Co., 105 Mo., 537; 16 S. W. Rep., 913, and subsequent cases adopting the rule therein contained, which was that in order to recover for negli-

gence in the violation of an ordinance regulating the speed of trains the plaintiff must prove acceptance of the ordinance by defendant. The Fath case was followed in Sanders v. So. Electric Ry. Co., 147 Mo., 411; 48 S. W. Rep., 855. Compare also Bluedorn v. Mo. Pac. R. R., 108 Mo., 439; 18 S. W. Rep., 1103; 32 Am. St. Rep., 615; Dahlstorm v. St. Louis, I. M. & S. R. R. Co., 108 Mo., 525; 18 S. W. Rep., 919; Grube v. Mo. Pac. R. R. Co., 98 Mo., 330; 11 S. W. Rep., 736; 14 Am. St. Rep., 645; Bergman v. St. L., I. M. & S. Ry. Co., 88 Mo., 678; Merz v. Mo. Pac. R. R., 14 Mo. App., 459; 88 Mo., 672; Becker v. Schutte, 85 Mo. App., 57; Brannock v. Elmore, 114 Mo.; 55; 21 S. W. Rep., 451; Butz v. Cavanaugh, 137 Mo., 503; 38 S. W. Rep., 1104; Harman v. St. Louis, 137 Mo., 494; 38 S. W. Rep., 1102; Gratiot v. Mo. Pac. R. R. Co., 116 Mo., 450; 21 S. W. Rep., 1094; Murphy v. Lindell Ry., 153 Mo., 252; 54 S. W. Rep., 442; Day v. Citizens' Ry. Co., 81 Mo. App., 471; McAndrew v. St. Louis & S. Ry. Co., 88 Mo. App., 97.

Ordinance admissible to show negligence without being pleaded. Brasington v. South Bound R. R. Co., 62 S. C., 325; 40 S. E. Rep., 665. Contra Chicago W. D. Ry. Co. for damages resulting from the violation of such ordinance.⁹² Thus an ordinance requiring "any owner or contractor who shall hereafter build or cause to be built" any building abutting upon a public sidewalk after the completion of the first story to cause a roofed passageway to be built in front of the building upon the sidewalk is admissible in evidence in an action for an injury resulting by reason of the failure to roof such passageway, and is evidence of negligence.⁹³ So evidence of the failure to comply with an ordinance regulating the use of elevators,⁹⁴ and an ordinance regulating the protection of hatchways was held to be negligence per se.⁹⁵ So evidence that a street car was stopped in the middle of the crossing of a street in violation of an ordinance is admissible in an action for damages resulting therefrom, and is sufficient proof of negligence.⁹⁶

An ordinance designed to enforce the performance of a common law duty, is properly admitted in evidence in an action for damages arising from common law negligence. Thus an ordinance requiring that openings in pavements should be properly guarded is admissible in evidence in an action for damages for injuries resulting from falling into an unguarded opening in the sidewalk.⁹⁷ So ordinances prohibiting animals from running at large upon the streets and highways without a keeper are admissible in evidence in actions to recover damages arising from injuries received by allowing animals to be improperly at large in violation of the ordinance.⁹⁸ So violating an ordinance forbidding horses to stand in the street unhitched and

v. Klauber, 9 III. App., 613, 619. Compare Illinois Central R. R. v. Godfrey, 71 III., 500.

92 Decker v. McSorley, 111 Wis.,
91; 86 N. W., 554; Wright v. Malden & M. Ry. Co., 4 Allen (Mass.),
283; Lane v. Atlantic Works, 111
Mass., 136; Karle v. K. C., St.
Joseph & C. B. Ry. Co., 55 Mo., 476.

93 Smith v. Milwaukeé B. & T.
 Exch., 91 Wis., 360, 367; 64 N. W.
 Rep., 1041; 51 Am. St. Rep., 912.

94 Wendler v. People's House Furnishing Co., 165 Mo., 527; 65
S. W. Rep., 737.

95 Hirst v. Ringen Real EstateCo., 169 Mo., 194; 69 S. W. Rep.,368.

96 Mueller v. Milwaukee St. Ry. Co., 86 Wis., 340; 56 N. W. Rep., 914.

⁹⁷ Roberson v. Wabash St. L. & Pac. Ry. Co., 84 Mo., 119.

98 Baldwin v. Ensign, 49 Conn.,
113; Decker v. Gammon, 44 Me.,
322; Barnes v. Chapin, 4 Allen
(Mass.), 444.

Violation of an ordinance forbidding horses to run loose upon the streets which results in injury to a child, held to be negligence. "The ordinance having been declared on, and in evidence, and the plaintiff having shown that appellant's horses were loose upon the streets, the accident, and due care unguarded where injury results, is evidence of negligence. Such ordinances are designed to protect life and limb. Persons upon the streets have a right to expect that such regulations will be obeyed, and hence will govern themselves accordingly. So ordinances forbidding wagons to stand crosswise of the streets and trucks and other obstructions to be placed on the streets or sidewalks, of course, are intended to render the streets more safe and convenient, and are, therefore, proper police regulations.²

It seems that where the duties enjoined by a city ordinance are due to the municipality or to the public at large, and not as composed of individuals, the admission of the ordinance in evidence and proof of its violation is not evidence of negligence and cannot create a civil liability upon the part of the person violating the ordinance. This is well illustrated in cases where the city by ordinance undertakes to place upon the abutting owner of property on a public street the duty of removing the ice and snow therefrom. Evidence of such ordinance and its violation will not make the abutting owner liable to persons injured by the neglect to remove the snow and ice as required by the ordinance.³

In cases of negligence growing out of injuries resulting from the violation of statutes the violation is generally held to be negligence per se.⁴

upon her part, that proof made a prima facie case of negligence." Maxwell v. Durkin, 86 Ill. App., 257, 261, affirmed 185 Ill., 546.

99 Jones v. Belt, 8 Houston (Del.), 562.

Failure, negligence per se. Siemers v. Eisen, 54 Cal., 418, approving Jetter v. N. Y. & H. R. R. Co., 2 Abb. (N. Y.), 458, 464.

¹ Bott v. Pratt, 33 Minn., 323; 23 N. W. Rep., 237.

² Lane v. Atlantic Works, 111 Mass., 136, 140.

In an action for damages resulting from the violation of certain ordinances it was held that the ordinance might be considered by the court with other evidence. Baltimore City Pass. Ry. v. Mc-

Donnell, 43 Md., 534; Wright v. Malden & M. R. R., 4 Allen (Mass.), 283.

³ Kirby v. Boylston Market Assn., 14 Gray, 249; Flynn v. Canton Co., 40 Md., 312, 323. See secs. 40 to 42, and sec. 376, supra.

4 Dodge v. B. C. R. & M. R. R. Co., 34 Iowa, 276; Reynolds v. Hindman, 32 Iowa, 146; Johnson v. St. P. & D. R. Co., 31 Minn., 283; 17 N. W. Rep., 622.

Statute required door opens in buildings to be protected, and failure was held to be *prima facie* evidence of negligence. McRickard v. Flint, 114 N. Y., 222, 227; 21 N. E. Rep., 153.

The failure to perform a statutory duty, specifically imposed

§ 398. Proof of violation by plaintiff in actions for civil liability. In an action for damages for negligence, evidence of the fact that at the time the injury for which damages is sought was received the plaintiff himself was violating an ordinance, will not prevent recovery unless it is shown that such violation upon the part of plaintiff contributed to the injury. "Because a plaintiff is himself negligent or is acting in violation of law, he is not therefore prevented from recovering damages for an injury which has resulted from the negligence of defendant where but for the want of ordinary care on the part of the defendant the misfortune would not have happened."5 a Massachusetts case the ordinance required horses and wagons while loading to be placed lengthwise of the street and as near as possible to the sidewalk. Plaintiff violated the ordinance by placing his horse and wagon transversely to the course of the street. It was held that his failure to comply with the ordinance in this respect did not prevent him from maintaining an action against one who injures his horse by negligently driving another wagon against it, when by exercising more care he might have avoided doing so. It was "found that, though plaintiff's team was standing there in violation of a city ordinance, yet there was room for defendant's team to pass by, using due care, and the only fault of the plaintiff consisted in the violation of the city ordinance. It was not found that this violation contributed to the injury." In an early English case it was held that evidence of wrongfully allowing a fettered donkey to be on the highway, where the donkey was injured, did not bar action by the owner for damages. So leaving a horse attached to a vehicle untied and unattended in a street in violation of an ordinance, will not bar recovery for damages by a street car.8 In a New York case the statute forbade standing on street car platforms. In an action for negli-

under the police power for the protection of the public, is negligence per se. Platte, etc., C. & M. Co. v. Dowell, 17 Colo., 376; 30 Pac. Rep., 68.

⁵ Klipper v. Coffey, 44 Md., 117, 127.

Principle is well established, as in cases of trespass on railroad tracks. B. & O. R. R. Co. v. State, 33 Md., 542, 554; B. & O. R. R. Co. v. State, 36 Md., 366.

⁶ Steele v. Burkhardt, 104 Mass., 59, 61.

⁷ Davies v. Mann, 10 M. & W., 545.

8 Albert v. Bleecker Street Ry. Co., 2 Daly (N. Y.), 389; Wasmer v. D., L. & W. R. R. Co., 80 N. Y., 212. gence by one in such position it was held that mere violation of the statute in this respect did not bar the action.⁹

Evidence of the violation of an ordinance by plaintiff in an action for damages is admissible to show contributory negligence on his part.¹⁰ Thus in an early Massachusetts case plaintiff was traveling in violation of the statutes for the observance of the Lord's day. In an action for damages by reason of a defective highway the violation of the statute was not pleaded as a defense, but it was held that the defendant town could prove the violation of the statute.¹¹ So in the same state it was held that in an action for damages caused by a collision of two vehicles on a highway, evidence that plaintiff was traveling on the left side of the road in violation of a statute, when the collision occurred, was admissible in evidence to show negligence.¹²

9 Connolly v. Knickerbocker Ice Co., 114 N. Y., 104, 108; 21 N. E. Rep., 101.

¹⁰ Steele v. Burkhardt, 104 Mass., 59.

11 "In such cases, evidence that a party is guilty of a violation of law supports the issue of a want of proper care; nor can it be doubted that in these and similar actions the averment in the declaration of the use of due care, and the denial of it in the answer, properly and distinctly puts in issue the legality of the conduct of the party as contributing to the accident or injury which forms

the ground-work of the action. No specific averment of the particular unlawful act which caused or contributed to produce a result could, in such cases, be deemed necessary.

* * It is the disregard of the requirements of the statute by the plaintiff which constituted the fault or want of due care which is fatal to the action." Per Bigelow, C. J., in Jones v. Andover, 10 Allen (Mass.), 18, 20, 21, approving Bosworth v. Swansey, 10 Met. (Mass.), 363.

¹² Jones v. Andover, 10 Allen (Mass.), 18. See Kearns v. Snowden, 104 Mass., 63, note.

CHAPTER XIII.

OF ORDINANCES RELATING TO TAXATION AND LICENSE TAX.

- § 399. General nature of taxes.
 - 400. Taxation limited to municipal or corporate purposes.
 - 401. Power to levy taxes.
 - 402. Method of levying taxes.
 - 403. Municipal power to license and regulate trades, occupations, etc.
 - 404. Mode of delegation How power construed.
 - 405. Same Enumeration followed by general words.
 - 406. Power "to regulate" as power to license.
 - 407. Power "to regulate" as power to prohibit.
 - 408. Distinction between license to regulate and tax to raise revenue.
 - 409. License taxes distinguished from general taxes.
 - 410. License tax as a contract.
 - 411. License for municipal purpose.
 - 412. Power to license non-residents.
 - 413. License tax to be levied by ordinance.

- § 414. Delegation of power to license forbidden.
 - 415. Same—Consent of propertyowner.
 - 416. Same Permit to parade streets.
 - 417. License fee or tax must be uniform Discrimination forbidden.
 - 418. Reasonableness of amount of license.
 - 419. Application for license Granting.
 - 420. Revocation of license or permit.
 - 421. Method of enforcement of payment of license.
 - 422. License on dogs.
 - 423. License on lawyers.
 - 424. License on vehicles—Double taxation.
 - 425. License on saloons and liquor selling.
 - 426. Same subject-Conditions.
 - 427. License on street railways.
 - 428. License on miscellaneous trades, occupations, avocations, etc.
- § 399. General nature of taxes. Taxes are charges or burdens levied on persons or property for purposes public in their nature.¹ They may be imposed directly by the state through its legislature or indirectly by the municipal corporation under delegated powers. The state, having power to tax property for state purposes, may confer the power on municipal corpora-

¹ California—People v.McCreery, 34 Cal., 432, 456; Perry v. Washurn, 20 Cal., 318, 350.

Colorado—People v. Lathrop, 3 Colo., 428.

Maine—Opinion of Justices, 58 Me., 590.

Missouri—Glasgow v. Rowse, 43 Mo., 479, 489.

Pennsylvania — Philadelphia

tions to tax the same property for local purposes.² "A municipal corporation without the power of taxation would be a body without life, incapable of acting and serving no useful purpose." ³

The power possessed by local communities to assess and collect taxes for municipal or corporate purposes is in the nature of governmental authority, conferred by the state. Generally this power is exercised under constitutional authority and expressly granted by the state legislature. Constitutions frequently forbid-the legislature from imposing taxes upon municipal corporations for municipal purposes, but the state is authorized, by general law, to vest in the corporate authorities of municipal corporations the power to assess and collect taxes for such purposes.⁴ The constitutional provision is usual that the valuation of property for taxation shall not exceed the valuation of

Assn. v. Wood, 39 Pa. St., 73, 82; Hilbish v. Catherman, 64 Pa. St., 154, 159.

Wisconsin—Dalrymple v. Milwaukee, 53 Wis., 178, 184; 10 N. W. Rep., 141.

² St. Louis v. Bircher, 76 Mo., 431; Springfield v. Smith, 138 Mo., 645; 40 S. W. Rep., 757; Henderson Bridge Co. v. Henderson, 173 U. S., 592; 19 Supreme Ct. Rep., 553.

3 United States v. New Orleans, 98 U. S., 381, 393.

The power of the city to raise revenue is derived from the power of taxation. Lyon v. Elizabeth, 43 N. J. L., 158.

4 Const., art. 7, sec. 6, of Idaho, applies only to taxation proper, as distinguished from license tax. State v. Union Cent. Life Ins. Co. (Idaho, 1902), 67 Pac. Rep., 647; Const. of Mo., 1875, art. X, sec. 10.

Acts of the legislature providing for police courts, election boards and other boards and state officers, although exercising their functions within the particular locality, and permitting the revenue of the city derived from taxation to be ap-

plied to the maintenance of such boards and officers do not constitute the levy of municipal taxes by the state. State ex rel. v. Board of Education, 141 Mo., 45; 41 S. W. Rep., 924; State ex rel. v. Owsley, 122 Mo., 68; 26 S. W. Rep., 659; State ex rel. v. St. Louis County, 34 Mo., 546; St. Louis v. Shields, 52 Mo., 351, 354; State ex rel. Hawes v. Mason, 153 Mo., 23; 54 S. W. Rep., 524; Lucas v. Tippecanoe, 44 Ind., 524, where the question is fully discussed, leading cases are carefully considered and both views are presented.

Under such constitutional provision it is generally held that the legislature cannot delegate this power, e. g., to the police. Lovingston v. Wider, 53 Ill., 302; Wider v. East St. Louis, 55 Ill., 133; or to park commissioners. People ex rel. v. Detroit, 28 Mich., 228; People v. Mayor, etc., 21 Ill., 17. But see Contra, the Philadelphia City Hall Case, Perkins v. Slack, 86 Pa. St., 270, 278. Compare Ex parte Pfirrman, 134 Cal., 143; 66 Pac. Rep., 205.

the same property in the city for state purposes.⁵ So constitutional provisions are usual that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," and that all property subject to taxation shall be taxed in proportion to its value.⁶ Hence, a charter or ordinance provision that, lands within the city which have not been laid off into lots or blocks shall not be assessed otherwise than by the acre as agricultural lands, conflicts with such provisions. "The rate of taxation and the valuation for taxation are two distinct things." The percentage of taxes or the rate of taxation, when not otherwise established, is generally fixed by ordinance from time to time.⁸

§ 400. Taxation limited to municipal or corporate purposes. The authority of the local corporation to raise revenue by taxation is limited to taxation for municipal or corporate purposes. What is a corporate or municipal purpose is to be determined by the local laws and the facts in each particular case. If the object is beneficial to the inhabitants and directly connected with the local government it will be considered a corporate purpose. The establishment and regulation of schools has been declared a municipal purpose. So taxes imposed for

⁵ Const. of Mo., 1875, art. X, sec. 11.

⁶ Const. of Mo., 1875, art. X, secs. 3, 4.

⁷ State *ex rel.* v. O'Brien, 89 Mo., 631, 634; 1 S. W. Rep., 763; Benoist v. St. Louis, 15 Mo., 668; Lee v. Thomas, 49 Mo., 112; Walden v. Dudley, 49 Mo., 419.

8 St. Louis Charter, art. V, sec. 27; Municipal Code of St. Louis, p. 51.

⁹ Bates v. Bassett, 60 Vt., 530,534; 15 Atl. Rep., 200.

¹⁰ East Tennessee University v. Knoxville, 6 Baxt. (Tenn.), 166.

Corporate purposes mean for purposes and such only as are germane to the objects of the creation of the municipality, at least such as have a legitimate connection with those objects and manifest relation thereto. Livingston County Supervisors v. Weider, 64 Ill., 427.

¹¹ East Tennessee University v. Knoxville, 6 Baxt. (Tenn.), 166; Ballentine v. Pulaski, 83 Tenn. (15 Lea.), 633.

To provide a location or site for a state institution as a reform school has been held not to be a corporate purpose in Illinois. Livingston County Supervisors v. Weider, 64 Ill., 427.

A donation for a university held to be a corporate purpose within the meaning of the constitution of Illinois of 1848. Hensley Tp. v. People *ex rel.*, 84 Ill., 544.

Under a statute forbidding taxing a national bank for "municipal purposes," it was held that such bank might be taxed for school purposes, or to aid in the construction of a railroad, as such

the purposes of defraying the expenses of conducting municipal elections are assessed and collected for corporate purposes.¹²

- Power to levy taxes. Without authority conferred by law a municipal corporation possesses no power to levy taxes for any purpose.¹³ This power in this respect rests upon the same general principle of construction as other powers; therefore, although not given by the legislature in express terms, the power may arise by necessary implication.¹⁴ But the power will not ordinarily be inferred from a general grant of power.15
- Method of levying taxes. The method of levying taxes is controlled by the municipal charter and local laws applicable. The levy of taxes is usually discretionary with the municipal authorities, and ordinarily the courts will not interfere if the provisions of the law have been, in substance, observed. 16 Usually the levy is provided for by ordinance, 17 but

were not "municipal purposes." Root v. Erdelmeyer, 37 Ind., 225, 227: 1 Nat. Bank Cases, 432.

12 Wetherell v. Devine, 116 Ill., 631; 6 N. E. Rep., 24. See State ex rel. v. Owsley, 123 Mo., 68; 26 S. W. Rep., 659.

Taxes for park purposes are municipal purposes. Knowlton v. Williams, 174 Mass., 476; 55 N. E. Rep., 77: 47 L. R. A., 314.

Taxes for public purposes. Daggett v. Colgan, 92 Cal., 53; 28 Pac. Rep., 51: 14 L. R. A., 474; Pritchard v. Magoun, 109 Iowa, 364; 80 N. W. Rep., 512; 46 L. R. A., 381. 13 Bates v. Bassett, 60 Vt., 530; 15 Atl. Rep., 200.

14 United States v. New Orleans, 98 U.S., 381.

In Wisconsin it is said that where a city has power to contract a debt, by necessary implication, it has power to resort to the usual mode of raising money to pay it, which undoubtedly is taxation. State ex rel. v. Milwaukee, 25 Wis., 122, 133.

394; Minnesota Linseed Oil Co. v. Palmer, 20 Minn., 468, 475; In re Second Ave. Methodist Episcopal Church, 66 N. Y., 395; Jonas v. Cincinnati, 18 Ohio, 318.

Power to tax for street lighting, held not to include street improvements. Webster v. People, 98 Ill., 343.

16 Hyde Park v. Ingalls, 87 Ill., 11; People v. East Saginaw, 33 Mich., 164; Hope v. Deaderick, 8 Humph. (Tenn.), 1.

Immaterial irregularities disregarded. Purrington v. People, 79 Ill., 11; Taylor v. McFadden, 84 Iowa, 262; 50 N. W. Rep., 1070; People v. Wright, 68 Hun. (N. Y.), 264; 22 N. Y. Suppl., 961.

Failure to record votes, invalidates tax, when. Pontiac v. Axford, 49 Mich., 69; 12 N. W. Rep., 914.

Certiorari will lie-Validity of law authorizing, will be considered. State v. Bell, 91 Wis., 271; 64 N. W. Rep., 845.

17 SUFFICIENCY OF ORDINANCE. San Luis Obispo v. Pettit, 87 Cal., 499; 25 Pac. Rep., 694; Spring Val-15 Drake v. Phillips, 40 Ill., 388, ley Coal Co. v. People, 157 Ill., 543; 41 N. E. Rep., 874; People ex rel. v. Peoria, etc., R. R., 116 Ill., under some charters it may be by resolution.¹⁸ The time of making the levy, when fixed by law, should be observed.¹⁹ But if no time is prescribed it may be designated by the municipal authorities.²⁰ Charters usually require that the object of the levy of the tax must be specified.²¹

The power to levy and collect taxes is legislative in its nature, and involves the exercise of discretion and judgment; and like all other municipal powers must be exercised by the corpora-

410; 6 N. E. Rep., 459; People v. Lee, 112 Ill., 113; Frantz v. Jacob, 88 Ky., 525; 11 S. W. Rep., 654.

¹⁸ Resolution levying taxes; legal adoption presumed, when. Taylor v. McFadden, 84 Iowa, 262; 50 N. W. Rep., 1070.

¹⁹ Williamsport v. Kent, 14 Ind., 306.

Levy subsequent to time named. Peed v. Millikan, 79 Ind., 86; New Orleans v. Mechanics & T. Bank, 15 La. Ann., 107.

20 San Luis Obispo v. Pettit, 87
 Cal., 499; 25 Pac. Rep., 694; Harper v. Elberton, 23 Ga., 566;
 Benoist v. St. Louis, 19 Mo., 179.

Taxes to pay bonds may be levied in advance. Wright v. People, 87 Ill., 582.

Ordinance passed before tax list completed, held sufficient. Clayton v. Chicago, 44 Ill., 280.

21 Specification, sufficiency. Aurora v. Lamar, 59 Ind., 400; State v. Davenport, 12 Iowa, 335; Covington Gas Light Co. v. Covington, 84 Ky., 94; Boyce v. Peterson, 84 Mich., 490; 47 N. W. Rep., 1095; In re Cloquet Lumber Co., 61 Minn., 233; 63 N. W. Rep., 628.

Library tax. Spring Valley Coal Co. v. People, 157 Ill., 543; 41 N. E. Rep., 874.

An ordinance imposing a tax of a named amount for "permanent improvements," held sufficient. Clayton v. Chicago, 44 Ill., 280.

Water supply. Stiles v. Jones, 3 Yeates (Pa.), 491; Hixon v. Eagle River, 91 Wis., 649; 65 N. W. Rep., 366.

To pay interest and principal of bonds. Davis v. Brace, 82 Ill., 542. What constitutes a levy. Snell v. Ft. Dodge, 45 Iowa, 564; Meservey v. Webster County, 46 Iowa, 702; Bartemeyer v. Rohlfs, 71 Iowa, 582; 32 N. W. Rep., 673.

Amount of taxes. Fairfield v. People, 94 Ill., 244; People v. Lee, 112 Ill., 113.

Special levy denied, after insufficient levy for general purposes. State *ex rel.* v. Van Every, 75 Mo., 530.

REGULARITY. Mayor must approve resolution, to validate, when law so requires. O'Neil v. Tyler, 3 N. D., 47; 53 N. W. Rep., 434; Walker v. Burlington, 56 Vt., 131. See sec. 149, supra.

Ordinance need not be signed by presiding officer. Blanchard v. Bissell, 11 Ohio St., 96.

Veto by mayor of action of council in fixing tax rate denied. Truman v. San Francisco, 110 Cal., 128; 42 Pac. Rep., 421.

Assessment to conform to ordinance. Glass v. White, 5 Sneed (Tenn.), 475.

Passage of ordinance levying a tax is a legislative act. Merchants v. Memphis, 9 Baxter (Tenn.), 76.

APPORTIONMENT of taxes among the several municipal subdivisions is sometimes required. But this has been held to be a mere ministerial function. Shippy v. Mason, tion itself, through the legal body created for this purpose, and can in no manner be delegated.²²

§ 403. Municipal power to license and regulate trades, occupations, etc. It is usual to confer upon municipal corporations the power to levy and collect a license tax upon certain trades, occupations, etc., carried on within the corporate limits. Unless the state constitution forbids the state may, through its legislature, provide for imposing a charge upon any and all trades, occupations, avocations, professions, etc., and such power may be delegated to its municipal corporations, ²³ to be exercised either as a police regulation or for the purpose of raising revenue. ²⁴ And while the state may so delegate such

90 Mich., 45; 57 N. W. Rep., 353; Fay v. Wood, 65 Mich., 390; 32 N. W. Rep., 614.

22 Bellinger v. Gray, 51 N. Y.,
610; Robinson v. Dodge, 18 Johns.
(N. Y.), 351; Trumbull v. White,
5 Hill (N. Y.), 46.

Delegation of powers forbidden. Sec. 84, et seq., supra,; license, sec. 414, post; police power, sec. 438, post.

²³ Alabama—Van Hook v. Selma, 70 Ala., 361; Montgomery v. Knox, 64 Ala., 463; Ex parte Montgomery, 64 Ala., 463; Montgomery v. Shoemaker, 51 Ala., 114; Goldthwaite v. Montgomery, 50 Ala., 486; Carroll v. Tuskaloosa, 12 Ala., 173.

California—San Jose v. S. J. & S. C. Ry. Co., 53 Cal., 475, 481; Ex parte Hurl, 49 Cal., 557; Sacramento v. Crocker, 16 Cal., 119; Sacramento v. California Stage Co., 12 Cal., 134; People v. Coleman, 4 Cal., 46.

Georgia—Johnston v. Macon, 62 Ga., 645; Rome v. McWilliams, 52 Ga., 251.

Kansas—Newton v. Atchison, 31 Kan., 151; 1 Pac. Rep., 288; Tulloss v. Sedan, 31 Kan., 165; 1 Pac. Rep., 285; Fretwell v. Troy, 18 Kan., 271.

Missouri-St. Louis v. Bircher,

76 Mo., 431; Lamar v. Adams, 90 Mo. App., 35.

Nebraska—Magneau & Brunner v. Fremont, 30 Neb., 843; 47 N. W. Rep., 280; 9 L. R. A., 786.

North Carolina—State v. French, 109 N. C., 722; 14 S. E. Rep., 383; 26 Am. St. Rep., 590.

Ohio—Marmet v. State, 45 Ohio St., 63; 12 N. E. Rep., 463; State v. Gazlay, 5 Ohio, 14.

Oregon—Lent v. Portland (Oregon, 1903), 71 Pac. Rep., 645.

South Carolina—Charleston v. Oliver, 16 S. C., 47, 50; Information v. Oliver, 21 S. C., 318; State v. Hayne, 4 S. C., 403.

Texas—State v. Stephens, 4 Tex.,

Virginia—Woodall v. Lynchburg, 100 Va., 318; 40 S. E. Rep., 915.

IMPAIRING OBLIGATION OF CONTRACT. Where the city has entered into a contract with a party to supply the city with water and transferred to him certain water works, upon named conditions, and reserved no right to tax or license the business, an ordinance which attempts to impose a license on his business impairs the grant to him and is void. Stein v. Mobile, 49 Ala., 362; 20 Am. Rep., 283.

²⁴ Gundling v. Chicago, 176 Ill., 340; 52 N. E. Rep., 44; 48 L. R.

authority the power may be withdrawn at any time unless the right to do so is prohibited by the constitution.²⁵

§ 404. Mode of delegation—How power construed. As the power to tax and license as a means of raising revenue is not inherent in municipal corporations, it follows that such power must be expressly conferred in plain terms, or it must arise by necessary implication from powers expressly granted.²⁶ The exercise of the authority must be within the clear scope of the language of the law conferring the power. Grants of this nature are usually strictly construed against the exercise of the power and in favor of the public, especially where the sole purpose of the ordinance is to raise revenue.²⁷

§ 405. Same—Enumeration followed by general words. The

A., 230, affirmed 177 U. S., 183;
Hogan v. Indianapolis (Ind., 1902),
65 N. E. Rep., 525; Springfield v.
Smith, 138 Mo., 645; 40 S. W. Rep.,
757; State v. Columbia, 6 S. C., 1.
25 Wilkie v. Chicago, 188 Ill.,
444; 58 N. E., 1004; 80 Am. St.
Rep., 182.

When state statute supersedes charter provision. Mulcahy v. Newark, 57 N. J. L., 513; 31 Atl. Rep., 226; Elizabeth v. Durning, 58 N. J. L., 554; 34 Atl. Rep., 752.

Where the constitution forbids a local license imposed in a greater sum than that imposed by the state, and no license is required of traveling agents, none can be exacted by the city. New Orleans v. Graves. 34 La. Ann., 840.

The fact that a statute requires a license for the same thing does not forbid an ordinance exacting. Ex parte Siebenbauer, 14 Nev., 365.

²⁶ Welch v. Hotchkiss, 39 Conn., 140; Delcambre v. Clere, 34 La. Ann., 1050.

Power to license physicians denied. Savannah v. Charlton, 36 Ga., 460.

²⁷ Kniper v. Louisville, 7 Bush. (Ky.), 599; New Iberia v. Migues, 32 La. Ann., 923; St. Paul v.

Briggs, 85 Minn., 290; 88 N. W. Rep., 984, where strict rule of construction applied to license of peddlers.

"The authority to impose a tax or to exact a license must clearly appear and must be strictly construed. If there is a doubt as to the right, it must be resolved adversely to it." Chicago v. Collins, 175 Ill., 445; 67 Am. St. Rep., 224; 51 N. E. Rep., 907.

The power of a city to levy a tax depends upon the power conferred by its charter. Pullen v. Raleigh, 68 N. C., 451.

Where the power to tax occupations has not been conferred upon the city it cannot exercise it as a means of preventing huckstering. Mays v. Cincinnati, 1 Ohio St., 268.

When general power to tax is conferred the city can tax all subjects within its jurisdiction not withheld from taxation by the laws of the state, irrespective of the fact whether or not they are taxed by the state. Woodall v. Lynchburg, 100 Va., 318; 40 S. E. Rep., 915.

A charter, authorizing a municipal corporation to tax real and personal estate, does not, neces-

rule frequently invoked is that where power is given to enact ordinances in certain cases and for certain purposes the power is limited to the case and objects specified, all others being excluded by implication.²⁸ So, in construing the power to pass ordinances, the rule usually applied is that, where a specific enumeration is followed by general words the latter are restricted to the things specifically mentioned.²⁹ Thus power to license and regulate dram shops, public shows, theatrical and other amusements, will not be extended to include the power of licensing wagons run for hire, by virtue of a general clause at its close, granting power to pass other ordinances for the

sarily, confer the right to tax income. Savannah v. Hartridge, 8 Ga., 23.

License for revenue. In re Quong Woo, 13 Fed. Rep., 229.

License on broker upheld, as a license on an occupation. Braun v. Chicago, 110 Ill., 186.

A provision, giving power "to levy and collect a license on theatres, and on trades, professions, and business," etc., was held to confer authority to impose a license on a stage coach company whose office and place of business was in the city but whose business was that of carrying passengers from and to the city. Sacramento v. Stage Company, 12 Cal., 134.

Under the constitution of Texas a municipality cannot levy an occupation tax on an occupation or pursuit that has not been previously taxed as such by the state. So a city ordinance imposing an occupation tax upon the use of vehicles, where such pursuit has not been taxed by the state, is unconstitutional and void. Exparte Terrell, 40 Tex. Cr. App., 28; 48 S. W. Rep., 504.

EXCLUSIVE PRIVILEGES FORBIDDEN. Power to license, tax and regulate does not authorize the granting of exclusive privileges, as for example, the exclusive right to run omnibuses within the corporate limits. Logan v. Pyne, 43 Iowa, 524. This subject is considered in other sections. Sec. 190 et seq., supra.

NATIONAL BANKS cannot be licensed by ordinance. Carthage v. First Nat. Bank, 71 Mo., 508; 36 Am. Rep., 494; Macon v. First Nat. Bank, 59 Ga., 648; Second Nat. Bk. v. Caldwell, 13 Fed. Rep., 429; Nat. Bk. v. Mayor, etc., 8 Heisk. (Tenn.), 814.

EXEMPTIONS. A municipal corporation has no inherent power to exempt from license. Such power is incident to sovereignty. Thomas v. Snead, 99 Va., 613; 39 S. E. Rep., 586.

²⁸ New Orleans v. Philippi, 9 La. Ann., 44, 46.

For construction of Illinois constitution, as to enumeration, see Price v. People, 193 Ill., 114; 55 L. R. A., 588; 61 N. E. Rep., 844.

²⁹ Independence v. Clevéland, 167 Mo., 384; 67 S. W. Rep., 216; State v. Schuchmann, 133 Mo., 111; 33 S. W. Rep., 35; 34 S. W. Rep., 842; St. Louis v. Bowler, 94 Mo., 630, 633; 7 S. W. Rep., 434; State ex rel. Bersch, 83 Mo. App., 657.

police regulations of the corporation.³⁰ And under a general provision that the corporation may collect a tax on all subjects of taxation, which is followed by a specific enumeration of polls, real estate and personal property as subjects of taxation, and no enumeration is made of a tax on merchants, drummers of other occupations, it was held that the town had no power to levy a tax on trades or occupations.³¹ So charter authority "to tax or entirely suppress all petty grocers," does not confer power to grant licenses for retailing.³²

§ 406. Power "to regulate" as power to license. Ordinarily the power to tax for revenue will not be implied from a general grant of authority, as power "to regulate," or "to license and regulate." ³³ Thus power "to regulate and tax taverns and

⁸⁰ Knox City v. Thompson, 19 Mo. App., 523.

Under power given to pass such ordinances as are necessary for the government and welfare of the city, a license tax on places maintained for amusement is not authorized. Carbondale v. Vail, 2 Del. Co. Ct. R., 387.

The power to exercise must be conferred. Joplin v. Leckie, 78 Mo. App., 8.

Enumeration of occupations. St. Joseph v. Lung, 93 Mo. App., 626; 67 S. W. Rep., 697.

A city cannot impose a license tax on any business, avocations or calling, unless the same be especially named as taxable in its charter, or in state statute applicable. R. S., 1889, sec. 1900; Kansas City v. Grush, 151 Mo., 128; 52 S. W. Rep., 286; Kansas City v. Lorber, 64 Mo. App., 604. But the maxim, "expressio unius est exclusio alterius," is not to be so applied that the city cannot tax any calling not enumerated by its specific name. St. Louis v. Herthel, 88 Mo., 128, 130. The concluding words "all occupations, professions and trades heretofore enumerated, of whatever name or character," are so very comprehensive that the rule of *ejusdem generis* need not be invoked. St. Louis v. Bowler, 94 Mo., 630, 633; 7 S. W. Rep., 434.

31 Latta v. Williams, 87 N. C., 126.

32 "The word 'license' is used in this section of the charter in regard to other subjects, but is dropped when the subject is touched, and the word is again resumed in relation to other subjects; and hence we must conclude that the power to license was intended by the charter to be confined to the several subjects, and to those only, which are specifically named." Leonard v. Canton, 35 Miss., 189.

Where one pays such license he may recover it as for money had and received. Leonard v. Canton, 35 Miss., 189.

Rules of construction of municipal powers. Secs. 48 to 52, supra.

33 St. Louis v. Western Union
Tel. Co., 39 Fed. Rep., 59; Ottumwa
v. Zekind, 95 Iowa, 622; 64 N. W.
Rep., 646; 58 Am. St. Rep., 447;
29 L. R. A., 734; Burlington v.
Putnam Ins. Co., 31 Iowa, 102;
State v. Smith, 67 Conn., 541; 35
Atl. Rep., 506; 52 Am. St. Rep.,

houses for the public entertainment" has been held to confer no authority to license taverns for revenue.34 So power to regulate omnibuses, stage coaches, etc., gives no authority to license as a means of raising revenue.35 So power to make regulations as to hucksters, etc., does not include the power to exact a license for revenue purposes.³⁶ But many cases have invoked a more liberal construction and sustained license fees under the power to regulate which were levied in part for revenue.37 The distinctions elsewhere pointed out between the exercise of power to tax and police regulations are to be observed. Where the license is intended to serve as a means of raising revenue it is usually construed as a tax on the business or occupation itself, but where it is intended to serve as a regulation merely it will be usually construed as a police regulation and if the amount required to be paid is reasonable and does not exceed the sum necessary to pay for the granting of the license it will be sustained. However, the cases present some lack of harmony in view of the fact that they constitute con-

301; North Hudson Ry. Co. v. Hoboken, 41 N. J. L., 71, 78; Ex parte Graza, 28 Tex. App., 381; 13
S. W. Rep., 779; 19 Am. St. Rep., 845.

Construction of power "to regulate." Sec. 51, supra.

³⁴ Burlington v. Bumgardner, 42 Iowa, 673.

Contra. Under power given by a village charter to regulate victualing shops, it was held that the power to license was conferred. St. Johnsbury v. Thompson, 59 Vt., 300; 9 Atl. Rep., 571; 59 Am. Rep., 731.

35 Commonwealth v. Stodder, 2 Cush. (Mass.), 562, 572; Boston v. Schaffer, 9 Pick. (Mass.), 415; Charleston v. Pepper, 1 Rich. Law (S. C.), 364.

³⁶ Dunham v. Rochester, 5 Cowan (N. Y.), 462, 466.

37 Kinsley v. Chicago, 124 Ill.,
359; 16 N. E. Rep., 260; Dennehy
v. Chicago, 120 Ill., 627; 12 N. E.
Rep., 227; Wiggins Ferry Co. v.
East St. Louis, 102 Ill., 560.

When power to license and regulate occupations may be exercised for revenue. San Jose v. S. J. & S. C. Ry. Co., 53 Cal., 475; Ex parte Frank, 52 Cal., 606; Charity Hospital v. Stickney, 2 La. Ann., 550; Boston v. Schaffer, 9 Pick. (Mass.), 415; Cincinnati v. Bryson, 15 Ohio, 625, 644.

Under the power to regulate, the city may license and charge a reasonable fee, but not for revenue. Ft. Smith v. Ayers, 43 Ark., 82.

The power to regulate the sale of an article includes the power to require a license to authorize the sale thereof. Gundling v. Chicago, 176 Ill., 340; 52 N. E. Rep., 44; 48 L. R. A., 230; Farwell v. Chicago, 71 Ill., 269; Commonwealth v. Plaisted, 148 Mass., 375; 19 N. E. Rep., 224; 2 L. R. A., 142; 12 Am. St. Rep., 566.

So the requiring of a license for the sale of an article is a legitimate means of regulating its sale. Chicago Packing & P. Co. v. Chicago, 88 Ill., 221. structions of particular charter provisions, and are oftentimes the result of the legislative policy of the particular state.³⁸ Illustrations appear from the cases in the note.³⁹

§ 407. Power "to regulate" as power to prohibit. The power "to regulate" is not usually construed as conferring power to prohibit, unless in exceptional cases where it is necessary to be exercised as a police power, in order to preserve the public health or morals. The power of prohibition cannot be

38 United States—The Laundry License Case, 22 Fed. Rep., 701.

Arkansas—Russellville v. White, 41 Ark., 485.

Minnesota—St. Paul v. Traeger, 25 Minn., 248.

Ohio—Marmet v. State, 45 Ohio St., 63; 12 N. E. Rep., 463; Cincinnati v. Bryson, 15 Ohio, 625; Cincinnati v. Buckingham, 10 Ohio, 257, 261.

Wisconsin—Fire Department v. Helfenstein, 16 Wis., 136.

Cost of License. Under the power to regulate the city may require the payment of a fee from those who engage in the business regulated, such as will cover the labor and expense of issuing such license. St. Paul v. Dow, 37 Minn., 20; 32 N. W. Rep., 860; 5 Am. St. Rep., 811.

39 INSPECTION AND REGULATE. Under power given the city to provide for the inspection and to regulate the sale of meats, power to tax for revenue the occupation of selling them is not given, but such fees and charges as are necessary to cover the cost of inspection and police supervision may be imposed. Jacksonville v. Ledwith, 26 Fla., 163; 7 So. Rep., 885; 23 Am. St. Rep., 558; 9 L. R. A., 69.

AMUSEMENTS. Power to license, regulate and restrain amusements authorizes the requirement of the payment of a named sum for the privilege. Hodges v. Nashville, 2

Humph. (Tenn.), 61; Boston v. Schaffer, 9 Pick. (Mass.), 415.

PACKING HOUSES. In the exercise of the power conferred upon cities to direct the location and regulate the management of packing houses, the city may license such establishments, as one means of regulating them. Chicago Packing and Provision Co. v. Chicago, 88 III.. 221.

BILLIARD TABLES. In the exercise of the power granted "to suppress and restrain billiard tables," the city has power to license the same, under proper conditions. Smith v. Madison, 7 Ind., 86; Burlington v. Lawrence, 42 Iowa, 681; In re Snell, 58 Vt., 207; 1 Atl. Rep., 566; Winooski v. Gokey, 49 Vt., 282.

FERRIES. Power "to regulate ferries" does not confer power to prohibit without license is obtained. Duckwall v. New Albany, 25 Ind., 283.

Markets. Power to regulate gives authority to impose a license fee as reasonable compensation for the expense of regulation. Atkins v. Phillips, 26 Fla., 281; 8 So. Rep., 429; 10 L. R. A., 158; Kinsley v. Chicago, 124 Ill., 359; 16 N. E. Rep., 260; Ash v. People, 11 Mich., 347.

License to sell hay denied. Kip v. Paterson, 26 N. J. L., 298.

Sale of milk cannot be licensed, when. State v. Smith, 67 Conn.,

used to suppress useful occupations.⁴⁰ Thus an exorbitant license cannot be required which amounts in effect to a prohibition of the business.⁴¹ In other words, the license cannot be so high as to destroy the business.⁴² The license tax "must be reasonable," considering the nature of the business and not so high as to prohibit the carrying on of the business.⁴³

§ 408. Distinction between license to regulate and tax to raise revenue. The distinction between a license fee, or a license "to regulate," and a tax imposed for the purpose of revenue is not always clearly made in the statutes and ordinances providing therefor, and in judicial utterances.⁴⁴ The nature of

541; 35 Atl. Rep., 506; 52 Am. St. Rep., 301.

In the exercise of the power given by the charter "to establish public markets and other public buildings, and make rules and regulations for the government of the same," etc., it was held that an ordinance which prohibited every farmer, gardener or person producing vegetables, from selling the same in and along the street, without first procuring an annual license and paying therefor the sum of \$25.00, was void. St. Paul v. Traeger, 25 Minn., 248.

SALOONS. Power to restrain, prohibit and suppress, confers power to license. Mt. Carmel v. Wabash County, 50 Ill., 69; Emporia v. Volmer, 12 Kan., 622, 630, per Brewer, J.; Keokuk v. Dressell, 47 Iowa, 597.

LAUNDRIES. Power to "control and regulate" wash houses and public laundries confers authority to license. *In re* Wan Yin, 22 Fed. Rep., 701.

DRAYMEN, HACKMEN, ETC. Power "to license, tax and regulate," etc., gives authority to license. Joyce v. East St. Louis, 77 Ill., 156; Farwell v. Chicago, 71 Ill., 269; Exparte Gregory, 20 Tex. App., 210; 54 Am. Rep., 516.

HOTEL DRUMMERS. General pow-

er confers authority to license as a means of regulating. Fayetteville v. Carter, 52 Ark., 301; 12 S. W. Rep., 73; 6 L. R. A., 509.

PLUMBERS. Power to license denied. Wilkie v. Chicago, 188 Ill., 444; 58 N. E. Rep., 1004; 80 Am. St. Rep., 182.

⁴⁰ *In re* Quong Woo, 13 Fed. Rep., 229.

Municipal corporations have not the power under the usual provisions to levy and collect licenses and taxes on businesses and professions, to impose upon a useful and legitimate business (as lending money on household and kitchen furniture and wearing apparel) a prohibitory tax. Morton v. Macon, 111 Ga., 162; 36 S. E. Rep., 627.

- 41 Ex parte Burnett, 30 Ala., 461. 42 Lyons v. Cooper, 39 Kan., 324;
- 18 Pac. Rep., 296.
- ⁴³ Caldwell v. Lincoln, 19 Neb., 569; 27 N. W. Rep., 647. see sec. 418, *post*.
- 44 Quartlebaum v. State, 79 Ala., 1; Paton v. People, 1 Colo., 77; Wiley v. Owens, 39 Ind., 429.

ALL LICENSE FEES REGARDED AS A TAX. Santa Barbara v. Stearns, 51 Cal., 499; State v. Citizens' Bank, 52 La. Ann., 1086; 27 So. Rep., 709.

License tax upon a lottery and

the grant of power to enact the ordinance and the purpose of the enactment will generally determine the precise character of the exaction.45 The license fee or tax is imposed by virtue of delegated power, sometimes as an exercise of the police power alone, sometimes solely for revenue purposes and sometimes for both objects.46 The license is the authority to conduct the business or pursue the calling; the right conferred by the public agency which renders the pursuit lawful, and without which it would be unlawful. The law exacting the license, when observed, legalizes the conduct of the business or practice of the profession and constitutes a non-observance an illegal act. The various methods of delegating the power, as evidenced by municipal charters, and the somewhat diveroccupations, held to be a tax. The court said, "That a license is a

tax, is too palpable for discussion, and comes within the terms of the law, unless there is something in the idea that it is a political or police regulation intended to preserve, maintain and regulate the lottery system." Lucas v. Lottery Comms., 11 Gill & Johns (Md.), 490, 506.

When levied for revenue alone, license fees are taxes. Ward v. Maryland, 12 Wall. (U. S.), 418; St. Louis v. Spiegel, 75 Mo., 145; Wilmington v. Macks, 86 N. C., 88; Lightburne v. Taxing Dist., 4 Lea (Tenn.), 219; Ould v. Richmond, 23 Gratt (Va.), 464.

45 Where the power to license. has been granted, in order to determine whether it is given for the purpose of revenue or for regulation alone, the terms of the grant must be examined, and if there is nothing in the grant which indicates with certainty that it was given for the purpose of raising revenue, it will be construed to be given for the purpose of regulation. Kniper v. Louisville, 7 Bush. (Ky.), 599; St. Louis v. Boatmen's Ins. & Trust Co., 47 Mo., 150: Gettysburg v. Zeigler, 2 Pa. Co. Ct. Rep., 326.

46 Hogan v. Indianapolis (Ind., 1902), 65 N. E. Rep., 525; Rochester v. Upman, 19 Minn., 108.

REVENUE. Power to levy and collect a "license tax" on specified occupations "was designed for purposes of revenue rather than police regulation." Fretwell v. Troy, 18 Kan., 271; Lamar v. Adams, 90 Mo. App., 35.

An ordinance having no provisions of regulation, held to be a tax ordinance, designed to raise revenue. State ex rel. v. Boyd, 63 Neb., 829; 89 N. W. Rep., 417.

A license when imposed for revenue is not a police regulation but a tax, and can only be upheld under the power of taxation. Kansas City v. Corrigan, 18 Mo. App.,

Police Regulations. Under the charter provision giving a city power to pass ordinances for the good government of the city, and among other things "to grant license to and regulate auctions and auctioneers," the power is conferred to license only as a police regulation, not for purposes of revenue, and a license of \$300 was held to be unreasonable as a police regulation. Mankato v. Fowler, 32 Minn., 364; 20 N. W. Rep., 361.

gent judicial views respecting the necessity of police regulation of certain occupations, has resulted in some confusion in judicial expressions, as well as apparent or real conflict in the decisions. The cases on this subject are numerous, but a large majority of them are chiefly of local application.

The general statement is often made that occupation taxes are imposed for revenue and license taxes or fees for police regulation. When imposed for the latter purpose the rule generally obtains that the amount demanded should be reasonable and not in excess of the sum required for issuing the license providing necessary or desirable police regulations.47 Express charter power confers authority to exact a license tax from those pursuing useful occupations, avocations or professions within the corporate limits, which are in themselves beneficial to the community. Accurately speaking, it would seem that this should be regarded as a tax. However, it is often spoken of as a "license" or "privilege" for carrying on the business. Undoubtedly such fee is collected for the purpose of revenue, but where a money payment is exacted for the privilege of pursuing occupations, looked upon as more or less injurious to society or which require careful police supervision (as the liquor traffic, theaters, dance houses, certain kinds of amusements, as circuses and the like) or trades which may become detrimental to health or become public nuisances (as slaughter houses, bone and rendering factories, garbage reduction plants, stone quarries, dairies and cow stables, laundries, wash houses and dyeing establishments), this is usually designated a license tax levied by virtue of the police power. In construing the power to levy such exactions courts are usually quite liberal. If charter power exists in such cases, the exaction may be made both for revenue and police protection, but if it is levied by virtue of general power, as power "to regulate," or under the general welfare clause, the amount, as stated, must not exceed what is reasonably required for police protection.48

A city cannot in the exercise of its police power levy a tax. Pitts v. Vicksburg, 72 Miss., 181; 16 So. Rep., 418.

A license to authorize the retailing of spirituous liquors held to be a police regulation. *Ex parte* Marshall, 64 Ala., 266.

A license to sell liquor is not a tax nor is it governed by the rate of uniformity required in levying taxes. East St. Louis v. Wehrung, 46 Ill., 392.

47 Sec. 418, post.

48 LICENSE FOR REVENUE, AND LICENSE FOR POLICE REGULATION.

§ 409. License taxes distinguished from general taxes. Generally speaking, the power to license is a police power, but the exaction of license fees for revenue purposes is the exercise of the power of taxation.49 A license tax is not a tax upon property, but is a burden imposed for the right to exercise a franchise or privilege, which could be withheld or forbidden altogether,⁵⁰ and the sum to be charged is merely used as a mode of computing the amount to be paid for the exercise of the privilege.51 Thus an ordinance which imposes a license fee of twenty-five cents per wagon, and an additional license tax of two dollars for each six months is, as a matter of law, an ordinance for revenue purposes.⁵² "The imposition of a license tax is in the nature of a sale of a benefit, or privilege, to a party who would not otherwise be entitled to the same. The imposition of an ordinary tax is in the nature of a requisition of a contribution from that which the party taxed already rightfully possesses in the state." 53 "A tax is a rate or sum of money assessed on the person, property, etc., of the citizen, while a license confers a privilege, and makes the doing of something legal, which, if done without it, would be illegal." 54 "The distinction between the power to license, as a police regulation, and the same power when conferred for revenue purpose, is of the utmost importance. If the power be granted with a view of revenue, the amount of the tax, if not limited by the charter, is left to the discretion and judgment of the municipal authorities, but if it be given as a police power for regulation merely, a much narrower construction is adopted; the power must then be exercised as a means of regulation, and cannot be used as a source of revenue."

A reasonable license fee should be intended to cover the expense of issuing it, and services of officers and other expenses directly or indirectly imposed. Unless the amount is manifestly unreasonable the court will not adjudge it a tax. Mankato v. Fowler, 32 Minn., 364; 20 N. W. Rep., 361.

North Hudson County Ry. Co. v.

Hoboken, 41 N. J. L., 71, 81.

To justify a license fee for police protection alone the regulation must be directed against a business or practice which is of itself harmful or in some manner injuriously affects the peace, good order, health, morals or safety of society. Such will be sustained to regulate property or persons engaged in interstate and foreign commerce. Sec. 260, supra.

49 North Hudson County Ry. Co. v. Hoboken, 41 N. J. L., 71.

50 Savannah v. Charlton, 36 Ga., 460; Wilkie v. Chicago, 188 Ill., 444; 58 N. E. Rep., 1004; 80 Am. St. Rep., 182.

51 People v. Thurber, 13 Ill., 554,

52 Knox City v. Thompson, 19 Mo. App., 523; St. Louis v. Green, 7 Mo. App., 468; St. Louis v. Boatmen's Ins. & Trust Co., 47 Mo., 151.

53 Leavenworth v. Booth, Kan., 627.

54 Savannah v. Charlton, 36 Ga., 460.

"Where a municipal corporation has power to prohibit the doing of a thing, and also the power to license the same thing to be done, the license fee demanded by ordinance for the doing of such thing is not a tax, but is a price paid for the privilege of doing such thing." 55 "The object of a license is to confer a right that does not exist without a license, and consequently a power to license involves, in the exercise of it, a power to prohibit under a pain or penalty without a license."56 A license tax within the meaning of the constitution is not a burden on property, but on that which results from its enjoyment, or the conduct of the business or calling.⁵⁷ The imposition of a tax upon a trade, occupation or profession cannot be made to operate as a tax upon the personal property used in, or as the instrumentality of such trade, occupation or profession. If a license tax is imposed upon a business it must be in addition to, and not in lieu of, an ad valorem tax upon the property employed in the business.⁵⁸ The constitutional provision requiring that property shall be assessed at its true value, does not apply to license fees for the privilege of transacting business, although such power be exercised for revenue purposes.59

§ 410. License tax as a contract. A municipal occupation license tax is not a contract within the protection of the federal or state constitution. "A license tax, as such, does not

⁵⁵ Craw v. Tolono, 96 Ill., 255, 261.

56 Chilvers v. People, 11 Mich., 43.

LICENSE TAX distinguished from general tax. A license is not a tax in the constitutional sense of that term. East St. Louis v. Wehrung, 46 Ill., 392.

57 Levi v. Louisville, 97 Ky., 394;
30 S. W. Rep., 973; 28 L. R. A., 480.
58 Levi v. Louisville, 97 Ky., 394;
30 S. W. Rep., 973; 28 L. R. A., 480.

An ordinance which requires that persons shall take out a separate license for each place where business is carried on at different places in the city, held valid. Rohr v. Gray, 80 Md., 274; 30 Atl., 632. Johnson v. Asbury Park, 58 N.
J. L., 604; 33 Atl., 850; Information v. Oliver, 21 S. C., 318; 53 Am.
Rep., 681; Adams v. Somerville, 39 Tenn. (2 Head), 363.

A per cent on receipts of premiums or insurance policies required to be paid by insurance agents of foreign companies, was held not to be a tax, but a sum paid for a license to transact the business. Walker v. Springfield, 94 Ill., 364; Ducat v. Chicago, 48 Ill., 172; Illinois Mutual Fire Insurance Co. v. Peoria, 29 Ill., 180; People v. Thurber, 13 Ill., 554.

OCCUPATION TAX. Under power to impose an occupation license tax, authority to use it as a mode of taxation for revenue is not create any contract right.''60 Under the police power certain occupations may be prohibited during the term for which they are licensed.⁶¹ Although a license is a privilege, yet it has been held that it is equivalent to a contract right to the extent that it cannot be abrogated at any time without sufficient cause.⁶²

§ 411. License for municipal purpose. Laws relating to license taxes on persons engaged in trades, businesses or professions within the particular corporation are regulations of purely municipal character, but, as considered elsewhere, provisions requiring commercial agents in offering merchandise for sale by sample, to take out and pay such license, is a regulation of interstate commerce, so far as applicable to persons soliciting the sale of goods on behalf of individuals or firms doing business between the states, ⁶³ and it is not within the constitutional power of Congress to delegate such authority, for example, to the District of Columbia, for it is not a municipal purpose. ⁶⁴

§ 412. Power to license non-residents. An occupation tax given. State v. Bean, 91 N. C., 60 Bishoff v. Tampa Waterworks Co. (Fla., 1901), 30 So. Rep., 808.

Authority in the charter to license particular employments does not confer power to tax such employments for revenue purposes. St. Louis v. Boatmen's Ins. & Trust Co., 47 Mo., 150.

PERMIT TO TAP SEWERS. A municipal corporation may by general rules, independent of its general taxing power, regulate the use of sewers and fix the price at which any private person may tap them. Fisher v. Harrisburg, 2 Grant's Cas. (Pa.), 291, 296.

LICENSE PERMIT TO BUILD VAULT. Under the charter power to regulate the building of vaults, etc., an ordinance requiring that applicants shall be assessed a certain amount for the privilege of building vaults in front of their dwellings, was held to be without authority and void, and not within the usual police powers given the city. State (Benson) v. Hoboken, 33 N. J. L., 280.

60 Bishoff v. Tampa Waterworks Co. (Fla., 1901), 30 So. Rep., 808. 61 But whether the city may not then be under a duty to return the

then be under a duty to return the license fee is left an open question. St. Charles v. Hackman, 133 Mo., 634; 34 S. W. Rep., 878.

⁶² State ex rel. Shaw v. Baker, 32 Mo. App., 98; Hannibal v. Guyott, 18 Mo., 515; McElhany v. Mc-Henry, 26 Mo., 174.

Transfer of License. A license to erect and maintain a stationary engine was held to be transferable to another company to whom the business and property was transferred. Quinn v. Middlesex Elec. Light Co., 140 Mass., 109; 3 N. E. Rep., 204.

63 Sec. 253, et seq., supra.

64 Stoutenburgh v. Hennick, 129
 U. S., 141, 144.

"MUNICIPAL" has been defined to be that which belongs to a corporation or city, and to include the rules by which a particular district, community or nation, is governed. It may also mean local,

may be imposed on a non-resident.65 General power to make by-laws, rules and ordinances respecting streets, lanes, carriages, wagons, carts, drays, etc., as deemed expedient and necessary, is wide enough to authorize an ordinance providing that a non-resident who employs a wagon for hire within the city shall take out a license.66 But under a charter confining the taxing power (1) to inhabitants of the corporation (2) to taxable property within the corporate limits of non-residents, and (3) to income of non-residents from professions carried on in the city, a license by ordinance on carriages, horses and drivers of non-residents, used in going to and from their places of business in the city is void.67 So under charter power "to levy and collect a license tax on * * * attorneys at law residing in such city," an ordinance cannot legally levy such tax upon attorneys having offices in the city, and doing business therein, but who do not reside there. "As to some persons, the locality of their business in the city determines whether they are to be taxed, or not; as to wagons and other vehicles, their use for pay in the city, determines whether they are to be taxed or not, but as to attorneys at law and physicians, their residence in or out of the city determines whether they are to be taxed or not." 68 Under a law giving a municipal corporation power to direct the location and regulate the management and

particular, independent. Horton v. Mobile School, 43 Ala., 598, 607. So it has been described as "an agency for carrying out a part of the administrative duties of the city," as commissioners to fill up certain slough ponds of city. St. Louis v. Shields, 62 Mo., 247, 251.

65 Gunn v. Macon, 84 Ga., 365; 10 S. E. Rep., 972.

Member of a commercial firm doing business in city. State v. Houghton, 6 La. Ann., 783.

Resident of city whose business is outside of limits is not subject to license tax. Bates v. Mobile, 46 Ala., 158.

Non-resident of state, "agent" construed. Stewart v. Kehrer, 115 Ga., 184; 41 S. E. Rep., 680.

License applies to all who pack and ship fish. Edenton v. Capeheart, 71 N. C., 156. 66 Charleston v. Pepper, 1 Rich.Law (S. C.), 364, 367.

For use of streets with vehicles. Mason v. Cumberland, 92 Md., 451; 48 Atl. Rep., 136.

Tax on non-resident wagons hauling in and out of city, held void. St. Charles v. Nolle, 51 Mo., 122.

Ordinance license applied to nonresident butcher, doing business in city. State *ex rel*. Wilkinson v. Charleston, 2 Speers (S. C.), 623.

License on wagon of non-resident butcher, sustained. Frommer v. Richmond, 31 Gratt (Va.), 646; 31 Am. Rep., 746.

⁶⁷ State ex rel. Adger v. Charleston, 2 Speers (S. C.), 719.

68 Garden City v. Abbott, 34Kan., 283, 284; 8 Pac. Rep., 473.

construction of packing houses, etc., within its limits and to a specified distance beyond, and as one means of regulation, to license such establishments, it has been held, the fact that a packing house has been licensed by a town where it is located, but within the prescribed limits of the city, does not exempt the same from an ordinance of that city requiring it to pay a license to that municipality. Both the city and town may exercise the license power over the establishment.⁶⁹ As a rule, all ordinances operate upon all property within the corporate limits,⁷⁰ and the rule generally applies to license taxes;⁷¹ however, where such exactions interfere with or attempt to regulate interstate or foreign commerce, the levy and collection of them will be condemned as unconstitutional.⁷²

§ 413. License tax to be levied by ordinance. The general rule is that the power of a municipal corporation to license can be exercised only by ordinance and not by resolution. The nature of the subject requires legislation of a permanent character. Thus where the power to license is conferred in general terms the license and the amount thereof must be imposed by ordinance. Failure to fix the amount in the ordinance cannot be remedied by resolution or motion, for the general rule is that an ordinance cannot be amended, repealed or suspended by mere resolution. It has been held to be a sufficient observance of the charter to provide by ordinance that there shall "be levied on every license granted" such sum as the council may, by resolution, declare from time to time.

69 Chicago, P. & P. Co. v. Chicago, 88 Ill., 221; 30 Am. Rep., 545;
Albia v. O'Harra, 64 Iowa, 297; 20
N. W. Rep., 444.

Licensing beyond corporate limits. Van Hook v. Selma, 70 Ala., 361; 45 Am. Rep., 85; Emerich v. Indianapolis, 118 Ind., 279; 20 N. E. Rep., 795.

70 Sec. 24, supra.

71 Sec. 25, supra.

72 Sec. 253, et seq., supra.

Peddlers and itinerant vendors. Sec. 256, supra.

78 People *ex rel. v.* Mount, 186 Ill., 560; 58 N. E. Rep., 360; Memphis v. Bing, 94 Tenn. (10 Pickle),

644; 30 S. W. Rep., 745. Secs. 2 to 5, supra.

74 People ex rel. Conlon v. Mount, 186 Ill., 560; 58 N. E. Rep., 360. Sec. 210, supra; sec. 427, post.

75 Burlington v. Putnam Ins. Co., 31 Iowa, 102.

License fee may be fixed by resolution, under general ordinance imposing the license. Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark., 370; 19 S. W. Rep., 1053.

One council cannot, by ordinance, bind its successors to a given line of policy, or prevent free legislation by them in matters of municipal government. So an ordinance that no license to retail liquor should be granted for less

ordinance should specify who shall issue the licenses, the length of time they shall run, the sum to be paid by the applicant, the time and manner of payment. A resolution simply fixing the amount to be paid and the time of payment is not sufficient.⁷⁶

§ 414. Delegation of power to license forbidden. The rule that powers vested in particular officers, boards or councils cannot be delegated, 77 applies with full force to the exercise of the power of granting license, etc. 78 The exercise of this power involves the necessity of determining with reasonable certainty both the extent and duration of the license and the amount of money to be paid therefor. Under most charters, the power must be exercised exclusively by the legislative authority and cannot be delegated, in whole or in part, to any other person or authority whatever. The ordinance should provide all of the terms under which the license is to be issued and prescribe a uniform rule applicable to all of the class to which it is intended to apply, without discrimination, or delegation of power to the officer or board empowered to receive and pass upon the application which will permit unreasonable discrimination. Thus an ordinance requiring a license for carrying on the business of roller skating which provides that the license shall be issued upon the payment into the city treasury of a specified sum, "as the mayor or common council shall determine in each particular case," is void, as conferring upon the mayor or council discretion to fix the fee. 79 So an ordinance permitting the licensee to determine the time that the license will be in force is void.80 So an ordinance, regulating peddling, and delegating to the mayor the power to fix the

than \$500 per annum until the expiration of those for which that sum was paid, was void. Williams v. West Point, 68 Ga., 816.

Where the price of a license to sell liquor has been lowered before the one held by a dealer has expired, he cannot repudiate the license and recover the amount paid for it. Williams v. West Point, 68 Ga., 816.

78 People v. Crotty, 93 Ill., 180; Quincy v. Bull, 106 Ill., 337, affirming Bull v. Quincy, 9 Ill. App., 127.

PERMIT to erect a wooden building, by resolution of council, with-

out approval of mayor, held void. Eichenlaub v. St. Joseph, 113 Mo., 393; 21 S. W. Rep., 8; 18 L. R. A., 590

Immaterial defect in title of ordinance does not invalidate it. Morgan v. State (Neb., 1902), 90 N. W. Rep., 108.

77 See sec. 84, et seq., supra.

⁷⁸ State v. Fiske, 9 R. I., 94; Hennepin County v. Robinson, 16 Minn., 381.

79 Bills v. Goshen, 117 Ind., 221;
20 N. E. Rep., 115; 3 L. R. A., 261.
80 Darling v. St. Paul, 19 Minn.,
389, 392.

license at not less than one dollar nor more than one hundred dollars for six months, is an illegal delegation of power and is void.81 But an ordinance providing that the mayor shall issue the license, conferring upon him no discretion, is not an illegal delegation of power.82 So it is not an unlawful delegation of power to grant the license where the council by ordinance grants license to a class of persons upon certain conditions and authorizes the mayor to issue the license when the conditions for its issue have been duly observed.83 So an ordinance providing for licensing drivers of carts and wagons which vested the power of license in the mayor and board of aldermen, after describing the persons to whom the license should be granted, added "to such persons as the mayor may deem proper, " was held not invalid as a delegation of power.84 So an ordinance which requires the application for the license to be indorsed by five persons, where, under the law the mayor, president of the council and chief of police pass upon the applicant's moral character, is valid, since the provision only relates to the mode of applying for the license.85 But similar ordinances have been condemned. Thus an ordinance permitting the board of aldermen to exercise discretion in granting or refusing the permit for the erection of a building within a fire district was held void.86 And where permission to erect a slaughter house or dairy was required by the council the regulation was held void.87

81 State Center v. Barenstein, 66 Iowa, 249; 23 N. W. Rep., 652; Trenton v. Clayton, 50 Mo. App., 535.

But see Decorah v. Dustan Bros., 38 Iowa, 96, where an ordinance authorizing the mayor to fix the amount of license for auction sales within a specified sum was held valid. *In re* Christensen, 43 Fed. Rep., 243.

82 Bradley v. Rochester, 54 Hun. (N. Y.), 140; 7 N. Y. Suppl., 237; Commonwealth v. Sotkley, 12 Phila. (Pa.), 316; State v. Redmon, 43 Minn., 250; 45 N. W. Rep., 232. 83 Gundling v. Chicago, 176 Ill., 340,; 52 N. E. Rep., 44; 48 L. R. A., 230; Swarth v. People, 109 Ill., 621.

84 Brooklyn v. Breslin, 57 N. Y., 591.

Anordinance passed power given by charter to make laws licensing and regulating hackney carriages, carts and other vehicles, giving to the mayor and board of aldermen power to grant license in their discretion, and giving to the mayor power to revoke any license so granted was held to be valid. Child v. Bemus, 17 R. I., 230; 21 Atl. Rep., 539; 12 L. R. A., 57. Contra held in State v. Fiske, 9 R. I., 94.

85 In re Bickerstaff, 70 Cal., 35;11 Pac. Rep., 393.

86 Newton v. Belger, 143 Mass.,598; 10 N. E. Rep., 464.

87 Slaughter house. Barthet v.

Same—Consent of property owners. An ordinance of the City of St. Louis requiring any person desiring to erect a livery stable, before a building permit will be granted him. to obtain in writing the consent of owners of one-half the ground in the block, was declared invalid, since it makes the issue of the permit depend upon the consent of the property owners, and is a delegation of the power to issue the permit.88 Similar ordinances in force in Chicago have been sustained in Illinois.⁸⁹ A law requiring the granting of a liquor license on a petition of a majority of the legal voters is void where the power to grant the license is vested in certain officials.90 But the Supreme Court of Illinois sustained an ordinance adopted in Chicago which required the consent of two-thirds of the freeholders of a block in which there was no saloon, before a license to keep such saloon in the block should be issued.91 An ordinance which required recommendations of not less than ten citizens and taxpayers in the block in which a laundry is proposed to be established was condemned as a delegation of power, or as making the exercise of the power depend upon the consent of others.92

§ 416. Same—Permit to parade streets. In Illinois an ordi-

New Orleans, 24 Fed. Rep., 563. Dairy. State v. Mahner, 43 La. Ann., 496; 9 So. Rep., 480.

Ordinance requiring mayor to give permission to use steam boilers, held void. Baltimore v. Radecke, 49 Md., 217.

Delegating to board of engineers power to examine as to qualification to act as stationary engineer and to grant licenses, held proper police regulation. St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo., 560; 41 S. W. Rep., 244; 61 Am. St. Rep., 474.

License of plumbers to water company. Franke v. Paducah Water Supply Co., 88 Ky., 467; 11 S. W. Rep., 432, 718; 4 L. R. A., 265.

Permit to remove building. Day v. Green, 4 Cush. (58 Mass.), 433. Liquor license as delegation. East St. Louis v. Wehrung, 50 Ill., 28; Kinmundy v. Mahan, 72 III.,462; In re Wilson, 32 Minn., 145;19 N. W. Rep., 723.

88 St. Louis v. Russell, 116 Mo., 248; 22 S. W. Rep., 470; 20 L. R. A., 721.

This case in effect overrules State v. Beattie, 16 Mo. App., 131. See also Chillicothe v. Brown, 38 Mo. App., 609, and Kansas City v. Cook, 38 Mo. App., 660, where State v. Beattie was cited and approved.

89 Secs. 86 and 87, supra; sec. 450, post.

90 Jones v. Hilliard, 69 Ala., 300; Groesch v. State, 42 Ind., 547; House v. State, 41 Miss., 737.

91 Martens v. People ex rel., 186
Ill., 314; 57 N. E. Rep., 871, relying on Chicago v. Stratton, 162
Ill., 494; 44 N. E. Rep., 853; 35 L.
R. A., 84.

92 In re Quong Woo, 13 Fed., 229.

nance of Chicago which delegated to the police department the power to grant permits for parades and processions was declared void, as a delegation of the legislative power of granting or refusing the permit.93 In Michigan an ordinance prohibiting any person or association or organization from marching, parading or driving, in or upon its streets, with musical instruments, etc., without having obtained the consent of the mayor or common council, was held void. The court said: "This bylaw is unreasonable because it suppresses what is in general perfectly lawful, and because it leaves the power of permitting or restraining processions and their course to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legal provisions operating generally and impartially." ⁹⁴ In Kansas a similar ordinance prohibiting parades and processions without consent of the mayor or other designated officer was held void. The conditions of the ordinance were such that it did not operate upon all of the same class alike, and, moreover, it delegated the issuing of the permit to an unregulated official discretion.95 In Massachusetts, under sufficient legislative authority, it has been held that the city council of Boston had power to delegate to the board of police the authority to adopt rules for the regulation of itinerant musicians in the streets and public places within the corporate limits and under such delegation the police board could require the taking out of a license for which a small fee must be paid for the privilege of playing musical instruments upon the streets.96 An ordinance, making it unlawful for any person

93 Chicago v. Trotter, 136 Ill.,430; 26 N. E. Rep., 359 (affirming33 Ill. App., 206).

94 In re Frazee, 63 Mich., 396; 30
 N. W. Rep., 72.

95 Anderson v. Wellington, 40Kan., 173; 19 Pac. Rep., 719; 2 L.R. A., 110.

96 Commonwealth v. Plaisted,
148 Mass., 375; 19 N. E. Rep., 224;
2 L. R. A., 142. See Roderick v.
Whitson, 51 Hun. (N. Y.), 620; 4
N. Y. Suppl., 112.

A member of a religious organization while playing on a cornet without a license in a street parade, and creating no actual dis-

turbance, was held to be an itinerant musician and not exempt under the rules requiring a license, because the act was a matter of religious worship. Commonwealth v. Plaisted, 148 Mass., 375; 19 N. E. Rep., 224; 2 L. R. A., 142.

Musicians. It is no defense to the violation of an ordinance requiring a license to be procured by every person who shall play upon any musical instrument upon the street, that the person was engaged in religious worship and was not creating any disturbance of the peace. State v. White, 64 N. H., 48; 5 Atl. Rep., 828; Com-

or organization to parade certain streets, shouting, singing, or beating drums or tambourines, or playing on any other instrument, without first having obtained written permission from the mayor, but excepting from its provisions funerals, fire companies, state militia and political parties having state organizations, was held void in Wisconsin, because of the unreasonable and unjust discrimination which it makes and which it gives the mayor arbitrary power to make in violation of the fourteenth amendment of the federal constitution.⁹⁷

§ 417. License fee or tax must be uniform—Discrimination forbidden. Constitutional provisions requiring that taxation shall be equal and uniform throughout the state have no application to the taxation of trades, professions and occupations, but apply only to direct taxation on property as such. However, the rule is that all persons engaged in the same occupation, profession or class of business must be taxed equally and

monwealth v. Plaisted, 148 Mass., 375; 19 N. E. Rep., 224; 2 L. R. A., 142.

97 State ex rel. v. Dering, 84
 Wis., 585; 19 L. R. A., 858; 54 N.
 W. Rep., 1104. See ch. VI, Of Reasonableness of Ordinances. Sec. 466. post.

98 Arkansas — Ft. Smith v. Scruggs, 70 Ark., 549; 69 S. W. Rep., 679.

California—Ex parte Hurl, 49 Cal., 557; People v. Coleman, 4 Cal., 46; 60 Am. Dec., 581; People v. Naglee, 1 Cal., 232; 52 Am. Dec., 312.

Georgia—Stewart v. Kehrer, 115 Ga., 184; 41 S. E. Rep., 680; Rome v. McWilliams, 52 Ga., 251; Weaver v. State, 89 Ga., 639; 15 S. E. Rep., 840; Home Ins. Co. v. Augusta, 50 Ga., 530.

Indiana—Bright v. McCullough, 27 Ind., 223.

Kansas—Leavenworth v. Booth, 15 Kan., 627.

Louisiana—New Orleans v. Pontchartrain R. Co., 41 La. Ann., 519; 7 So. Rep., 83; Walters v. Duke, 31 La. Ann., 668. Michigan—Ash v. People, 11 Mich., 347.

Missouri—Kansas City v. Richardson, 90 Mo. App., 450.

Montana—State v. French, 17 Mont., 54; 41 Pac. Rep., 1078; 30 L. R. A., 415.

Nevada—Ex parte Robinson, 12 Nev., 263; 28 Am. Rep., 794.

New Jersey—Standard Underground Cable Co. v. Attorney General, 46 N. J. Eq., 270; 19 Atl. Rep., 733; 19 Am. St. Rep., 394.

North Carolina—Gatlin v. Tarboro, 78 N. C., 119.

Pennsylvania—Hadtner v. Williamsport, 15 Wkly. N. Cas., 138.

Wisconsin—Morrill v. State, 38 Wis., 428; 20 Am. Rep., 12.

Wyoming—State v. Willingham, 9 Wyo., 290; 62 Pac. Rep., 797; 52 L. R. A., 198.

LICENSE NOT A TAX. A license fee imposed by a city, in pursuance of power granted by charter, upon certain avocation, trades, business and occupations is not a tax, in the constitutional sense of that term. Distilling Co. v. Chicago, 112 Ill., 19; Braun v. Chicago, 110 Ill., 186.

uniformly.⁹⁹ Hence, an ordinance which imposes a license on non-residents of the city and exempts persons in the business within the city limits is void for discrimination.¹ And the rule is uniformly enforced that any discrimination, as to persons of a class, in the ordinance imposing the license will invalidate the legislation and render the collection of the license fee void. The numerous cases in the notes illustrate fully the judicial

UNIFORM ON SAME CLASS. Under the provision of the constitution requiring occupation taxes to be equal and uniform upon all in the same class, the enforcement of payment by criminal proceedings against some persons and not against others is an evasion of the constitution. Hoefling v. San Antonio, 85 Tex., 228; 20 S. W. Rep., 85; 16 L. R. A., 608.

99 United States—Singer Mfg. Co.v. Wright, 33 Fed., 121.

Georgia—Cutliff v. Albany, 60 Ga., 597; McGhee v. State, 92 Ga., 21; 17 S. E. Rep., 276.

Illinois—Braun v. Chicago, 110 Ill., 186.

Indiana—Terre Haute v. Kersey (Ind., 1902), 64 N. E. Rep., 469.

Kentucky—Bullitt v. Paducah, 8 Ky. Law Rep., 870; 3 S. W. Rep., 802.

Louisiana—Browne v. Selser, 106 La., 691; 31 So. Rep., 290; McClellan v. Pettigrew, 44 La. Ann., 356; 10 So. Rep., 853; Hodgson v. New Orleans, 21 La. Ann., 301; New Orleans v. Staiger, 11 La. Ann., 68; Municipality No. 2 v. Dubois, 10 La. Ann., 56; State v. Rebassa, 9 La. Ann., 305.

Missouri—St. Louis v. Bowler, 94 Mo., 630; 7 S. W. Rep., 434; Am. Union Ex. Co. v. St. Joseph, 66 Mo., 675; 27 Am. Rep., 382; Glasgow v. Rowse, 43 Mo., 479.

Nebraska—Rosenbloom v. State (Neb., 1902), 89 N. W. Rep., 1053; 57 L. R. A., 922; Magneau v. Fremont, 30 Neb., 843; 47 N. W. Rep., 280; 27 Am. St. Rep., 436; 9 L. R. A., 786.

North Carolina—State v. Carter, 129 N. C., 560; 40 S. E. Rep., 11; Rosenbaum v. New Bern, 118 N. C., 83; 24 S. E. Rep., 1; 32 L. R. A., 123; State v. Powell, 100 N. C., 525; 6 S. E. Rep., 424.

Pennsylvania—Mechanicsburg v. Koons, 18 Pa. Super. Ct., 131.

South Carolina—Information v. Oliver, 21 S. C., 318; State v. Columbia, 6 S. C., 1.

Tennessee—Columbia v. Beasly, 1 Hump. (20 Tenn.), 232.

Texas—Ex parte Williams, 31 Tex. Cr. App., 262; 20 S. W. Rep., 580; 21 L. R. A., 783.

¹ Georgia—Gould v. Atlanta, 55 Ga., 678.

Illinois—Lucas v. Macomb, 49 Ill. App., 60.

Indiana—Indianapolis v. Bieler, 138 Ind., 30; 36 N. E. Rep., 857.

Michigan—Saginaw v. Circuit Judge, 106 Mich., 32; 63 N. W. Rep., 985; Brooks v. Mangan, 86 Mich., 576; 49 N. W. Rep., 633; 24 Am. St. Rep., 137.

Missouri—St. Louis v. Consolidated Coal Co., 113 Mo., 83; 20 S. W. Rep., 699.

New Jersey—Thompson v. Camp Meeting Assn., 55 N. J. L., 507; 26 Atl. Rep., 798; Morgan v. Orange, 50 N. J. L., 389; 13 Atl. Rep., 240. Ohio—Radereaugh v. Plain City,

11 Ohio Dec., 612.

Pennsylvania—Sayre v. Phillips, 148 Pa. St., 482; 24 Atl. Rep., 76; 33 Am. St. Rep., 842; 16 L. R. A., view and the application of the doctrine.² Where the license fee is fixed at a given sum the fact that under the power given by the charter a license may be withheld from one who might be deemed unsuitable to conduct the business, because of immorality, want of qualifications, etc., is not discriminations be-

49; Shamokin v. Flannigan, 156 Pa. St., 43; 26 Atl. Rep., 780; Burgess v. Fennel, 3 Del. Co. R., 354; West Pittson v. Dymond, 8 Kulp. (Pa.), 12.

Tennessee—Nashville v. Althrop, 5 Cold. (Tenn.), 554.

Wyoming—Clements v. Casper, 4 Wyo., 494; 35 Pac. Rep., 472.

Canada—Jones v. Gilbert, 5 S. C. (Canada), 356.

DISCRIMINATING LICENSE TAX between persons and products of different states is void. Sec. 259, supra.

DISCRIMINATING AGAINST NON-RESIDENTS. So where a license is required of non-residents of the state it is void, being an interference with interstate commerce. Pacific Junction v. Dyer, 64 Iowa, 38; 19 N. W. Rep., 862; Easton City v. Easton Beef Co., 5 Pa. Co. Ct. R., 68; Pullman Palace-Car Co. v. State, 64 Tex., 274; 53 Am. Rep., 758; Simrall v. Covington, 90 Ky., 444; 14 S. W. Rep., 369; 29 Am. St. Rep., 398; 9 L. R. A., 556; Daniel v. Richmond, 78 Ky., 542.

This subject is fully treated in Chapter VIII., Of the Constitutionality of Ordinances, § 252 et seq.

² AUCTIONEERS, classification of, held valid. Stull v. De Mattos, 23 Wash., 71; 62 Pac. Rep., 451; 51 L. R. A., 892.

Brokers. Designating two classes, held valid. Pittsburg v. Coyle, 165 Pa. St., 61; 30 Atl. Rep., 452.

An occupation tax of \$250 on brokers in a town of 5,000 and a tax of \$50 on the same occupation in towns of less population, held valid. Texas Banking and Ins. Co. v. State, 42 Tex., 636; Blessing v. Galveston, 42 Tex., 641.

DRAM SHOPS. Discriminating license ordinance, held void. Zanone v. Mound City, 11 Ill. App., 334; 103 Ill., 552.

EMIGRANT AGENTS, license on, held void for want of uniformity. State v. Moore, 113 N. C., 697; 18 S. E. Rep., 342; 22 L. R. A., 472.

Farmers Selling Their Own Produce. Where an ordinance imposes a license on all persons selling meats within the city whether from stalls or by peddling on the streets, it is not a discrimination to exempt farmers selling their own produce. Davis & Co. v. Macon, 64 Ga., 128; 37 Am. Rep., 60.

HOTEL. Exempting hotels of less than ten rooms from payment of license, held valid. Fulgum v. Nashville, 76 Tenn. (8 Lea), 635.

INTELLIGENCE OFFICE. An ordinance which requires the payment of \$150 for a license to conduct the business of an intelligence office, "until the 1st day of January next following the date of the application" is void, the fee charged not being uniform nor equal. Moore v. St. Paul, 61 Minn., 427; 63 N. W. Rep., 1087; Moore v. St. Paul, 48 Minn., 331; 51 N. W. Rep., 219.

Insurance. An ordinance which requires an insurance company to pay a license on the basis of the amount of premiums received is unequal and void. New Orleans v. Home Mut. Ins. Co., 23 La. Ann.,

449. Compare State v. Liverpool, etc., Ins. Co., 40 La. Ann., 463; 4 So. Rep., 504.

LAUNDRY license based on the number of persons engaged in the business held to be uniform. Such license is not a tax within the constitutional sense of uniformity. State v. French, 17 Mont., 54; 41 Pac. Rep., 1078; 30 L. R. A., 415.

Lawyers. A uniform license on all lawyers without reference to the value of the practice of each lawyer held valid. St. Louis v. Sternberg, 69 Mo., 289. As to classification of lawyers, see Sec. 423, post.

MERCHANTS may be classified. Clark v. Titusville, 184 U. S., 329; 22 Sup. Ct. Rep., 382.

A tax of \$2 on merchants with a stock of less than \$1,000 and of \$3 on merchants with a greater stock is not violative of the constitution requiring taxes to be uniform. Aurora v. McGannon, 138 Mo., 38; 39 S. W. Rep., 469.

An ordinance imposing a license on merchants who use "trading stamps," held discriminating and void. The trading stamp device is not in the nature of a lottery. Exparte McKenna, 126 Cal., 429; 58 Pac. Rep., 916; but compare contra, Humes v. Ft. Smith, 93 Fed. Rep., 857.

SELLING BY SAMPLE. An ordinance imposing a license which discriminates against merchants selling by sample and in favor of others is void. Nashville v. Althrop, 45 Tenn. (5 Cold.), 554. Tax on sample merchants held not a discrimination in favor of merchants. Ex parte Thornton, 12 Fed. Rep., 538; 4 Hughes, 220.

ITINERANT MERCHANT. An ordinance which requires itinerant merchants to procure a license and exempts persons coming into the city with produce, and commercial travelers, makes a discrimination between persons and is void. Peoria v. Gugenheim. 61 Ill. App., 374.

TRANSIENT MERCHANTS. An ordinance requiring transient merchants to pay license, was held not to be a discrimination in favor of residents, "Transient" having reference to the nature of the business and not the residence. Ottumwa v. Zekind, 95 Iowa, 622; 64 N. W. Rep., 646; 58 Am. St. Rep., 447; 29 L. R. A., 734 (distinguishing Pacific Junction v. Dyer, 64 Iowa, 38; 19 N. W. Rep., 862).

MILK ORDINANCE, classifying herds of animals, taking counties as the basis, held void. State v. Elofson, 86 Minn., 103; 90 N. W. Rep., 309.

PEDDLERS. An ordinance which imposes a license of \$75 on a peddler of meats from a vehicle, and \$10 on other peddlers is valid, since they do not deal in the same commodities. Ex parte Heylman, 92 Cal., 492; 28 Pac. Rep., 675.

An ordinance requiring a license from peddlers of milk, and not requiring any license from peddlers of bread, fish and oysters, is not within the provision of the constitution requiring uniform taxation and is valid. Danville v. Weaver, 17 Pa. Co. Ct. R., 17; 4 Pa. Dist. R., 768.

An ordinance passed under authority given by charter, prohibiting the peddling of vegetables without a license, was held not to be a discrimination in favor of other forms of peddling for which no license was required. Bradley v. Rochester, 54 Hun. (N. Y.), 140; 7 N. Y. Suppl., 237.

Powder Magazines. An ordinance requiring persons who keep

tween persons.³ So an ordinance which merely discriminates between different localities of the corporation according to the advantage they may present for the business for which license is sought, leaving all persons at equal liberty to apply for license in whatever locality they think proper and making no distinction between persons, but between places only, is open to no objection.⁴ So a license imposed on the occupiers of private markets, although no license was charged for selling meats and vegetables in the public markets was held valid.5 But an ordinance requiring a license of one hundred dollars

a powder magazine in quantities of 50 lbs. or over to procure a license and requiring no license from persons keeping a less quantity is void. Parish of Orleans v. Cochran, 20 La. Ann., 373.

Charter authorized VEHICLES. the borough to require all vehicles "using the paved streets of the borough to be registered, and a moderate license to be paid for them." The ordinance imposed a specific on all vehicles "passing through the street," etc., and excepted travelers and also farmers "bringing their own produce to the market," and finally declared that the ordinance should apply to "all vehicles passing through the borough on their way to Pittsburgh or elsewhere, on their ordinary business." Held void. The act only authorized a tax on vehicles of citizens, and vehicles of persons carrying on some branch of business or occupation within the town by means of them. Bennett v. Birmingham, 31 Pa. St., 15.

A TAX ON DRAYMEN, fixed according to the capacity of the dray, that is, one rate for one horse and another for two horse drays, is Johnston v. Macon, 62 Ga., 645; Smith v. Louisville, 9 Ky. Law Rep., 779; 6 S. W. Rep., 911.

Ann., 663; Cullinan v. New Orleans, 28 La. Ann., 102.

MISCELLANEOUS INSTANCES. following cases illustrate particular methods, which have been sustained, of fixing the amount and graduating the license according to the amount of business done. Sacramento v. Crocker, 16 Cal., 119; Rankin v. Henderson, 9 Ky. Law Rep., 861; 7 S. W. Rep., 174; State v. Traders' Bank, 41 La. Ann., 329; 6 So. Rep., 582; State v. Applegarth, 81 Md., 293; 31 Atl. Rep., 961; 28 L. R. A, 812; Gatlin v. Tarboro, 78 N. C., 119; Allentown v. Gross, 132 Pa. St., 319; 19 Atl. Rep., 269; Williamsport v. Wenner, 172 Pa. St., 173; 33 Atl. Rep., 544.

NOT UNIFORM. A license tax graduated according to the amount of sales held not to be uniform in a particular instance. Johnston v. Macon, 62 Ga., 645.

A tax on persons engaged in purchasing tobacco of fifteen cents on each one thousand pounds of tobacco without regard to value is unequal and void. Danville v. Shelton, 76 Va., 325.

3 Mason v. Lancaster, 4 Bush. (Ky.), 406.

4 East St. Louis v. Wehrung, 46 111., 392.

5 New Orleans v. Dubarry, 33 La. Contra, State v. Endom, 23 La. Ann., 481; 39 Am. Rep., 273.

to conduct a meat shop in one part of the city and twenty-five dollars in another was declared unfairly discriminating and void.⁶ So an ordinance providing for a liquor license which imposed different rates on different streets was declared void.⁷ So an ordinance which exacts a license for selling goods and fixes one rate for selling goods which are within the corporate limits, or in *transitu* to the city and another much larger license for selling goods which are not in the city or in *transitu* to it, was held invalid as unjust, unequal, partial, oppressive and in restraint of trade.⁸

§ 418. Reasonableness of amount of license. Where the exaction is imposed under the power to regulate or in the exercise of the police power, as distinguished from the power to tax for revenue, as heretofore explained, the general rule obtains that the sum levied cannot be excessive or more than reasonably necessary to cover the costs of granting the license and proper police regulation. The nature of the business sought to be controlled and the necessity and character of police regulations are the dominating elements in determining the reasonableness of the sum to be paid. The sound judicial view is that much should be left to the discretion of the municipal authorities. The courts will presume the amount demanded to be reasonable. Where under undoubted charter power, the tax is im-

6 St. Louis v. Spiegel, 75 Mo.,
145, reversing 8 Mo. App., 478; St.
Louis v. Spiegel, 90 Mo., 587; 2 S.
W. Rep., 839.

⁷ Harrodsburg v. Renfro, 22 Ky. Law Rep., 806; 58 S. W. Rep., 795. ⁸ Ex parte Frank, 52 Cal., 606; 28 Am. Rep., 642.

9 Sec. 408, supra.

¹⁰ United States — Philadelphia v. W. U. Tel. Co., 40 Fed. Rep., 615; In re Laundry License Case, 22 Fed., 701.

Alabama—Van Hook v. Selma, 70 Ala., 361; Mobile v. Yuille, 3 Ala., 137.

Connecticut—State v. Glavin, 67 Conn., 29; 34 Atl. Rep., 708; New Haven v. New Haven Water Co., 44 Conn., 105.

Iowa-Ottumwa v. Zekind, 95

Iowa, 622; 64 N. W. Rep., 646; 58 Am. St. Rep., 447; 29 L. R. A., 734.

Massachusetts — Commonwealth v. Stodder, 2 Cush. (Mass.), 562; Boston v. Schaffer, 9 Pick. (Mass.), 415.

Michigan—Ash v. People, 11 Mich., 347; Chilvers v. People, 11 Mich., 43.

New Jersey—State v. Hoboken, 33 N. J. L., 280; Kip v. Paterson, 26 N. J. L., 298; Freeholders v. Barber, 7 N. J. L., 64.

Ohio—Cincinnati v. Bryson, 15 Ohio, 625.

Texas—Ex parte Gregory, 20 Tex. App., 210, 222; 54 Am. Rep., 516.

¹¹ Alabama—Van Hook v. Selma, 70 Ala., 361.

posed for revenue alone, or for police regulation and revenue, the amount thereof is usually a matter for determination by the legislative branch of the municipal government.¹² Ordinarily the courts will decline to interfere on the ground that the amount is oppressive or unreasonably large.¹³ Many instances of the reasonableness of the amount of the license will appear from the cases in the note.14

Arkansas-Fayetteville v. Carter, 52 Ark., 301; 12 S. W. Rep., 573; 6 L. R. A., 509.

Iowa—Burlington v. Putnam Ins. Co., 31 Iowa, 102.

Michigan-Van Baalen v. People, 40 Mich., 258,

The question of amount is one of law for the court. Iowa City v. Newell, 115 Iowa, 55; 87 N. W. Rep., 739.

Reasonableness of an ordinance is a question of law for the court. Section 185, supra.

GRADUATED PRICE. As a police regulation the price of a license may be graduated by the populousness of the community in which the privilege is to be exercised, and the profitableness of the business. Ex parte Marshall, 64 Ala., 266.

12 St. Paul v. Colter, 12 Minn., 41; 90 Am. Dec., 278; State v. Harrington, 68 Vt., 622; 35 Atl. Rep., 515.

13 United States—Cooper v. District of Columbia, 11 D. C. (4 Mc-Arth. & M.), 250.

Illinois-Kinsley v. Chicago, 124 III., 359; 16 N. E. Rep., 260; United States Distilling Co. v. Chicago, 112 Ill., 19; 1 N. E. Rep., 166.

Iowa—Burlington v. Putnam Ins. Co., 31 Iowa, 102.

Kansas-In re Martin, 62 Kan., 638; 64 Pac. Rep., 43.

Kentucky-Mason v. Lancaster, 4 Bush. (Ky.), 406; Kniper v. Louisville, 7 Bush. (Ky.), 599.

land, 92 Md., 451; 48 Atl. Rep., 136. Michigan-Kitson v. Ann Arbor, 26 Mich., 325.

GRADUATED ACCORDING TO STOCK of merchants, held valid. In re Martin, 62 Kan., 638; 64 Pac. Rep.,

14 AUCTIONEERS. An ordinance of the city of Chicago requiring auctioneers to pay a license of \$200 per annum, and to give bond in the sum of \$1,000 was held reasonable and valid. Wiggins v. Chicago, 68 Ill., 372. Discretionary. United States Distilling Co. v. Chicago, 112 Ill., 19; 1 N. E. Rep., \$5 per day held reasonable. Fretwell v. Troy, 18 Kan., 271.

\$50 annually on each bank held reasonable. Oil City v. Oil City Trust Co., 11 Pa. Co. Ct. Rep., 350.

BUTCHERS. An ordinance regulating and licensing butcher shops and vendors of fresh or butcher's meat and fixing the price of the license at \$200, was held to be valid, and its passage being authorized by the legislature, if oppressive the remedy is with the legislature or council. St. Paul v. Colter, 12 Minn., 41; 90 Am. Dec., 278.

\$500 per year, in DRUGGISTS. town of 1,600 held unreasonable. Lyons v. Cooper, 39 Kan., 334; 18 Pac. Rep., 296.

ITINERANT VENDORS. An act requiring "itinerant vendors" to deposit with the state treasurer \$500 and to take out a state license and Maryland-Mason v. Cumber- in addition to obtain a local li§ 419. Application for license—Granting. It is not essential to the validity of a license that there should be a previous

cense in each town or city, was held valid, and that whether the law was oppressive was not a question for the court to decide. State v. Harrington, 68 Vt., 622; 35 Atl., 515.

A license fee of \$200 per month on an itinerant merchant is unreasonable and void. Peoria v. Gugenheim, 61 Ill. App., 374.

An ordinance imposing a license fee of \$10 per day on itinerant merchants, making no discrimination on account of the extent of the business or the length of time during which it is carried on, would seem to be unnecessarily burdensome in such a case, in general restraint of trade and prohibitory of the business. Carrollton v. Bazette, 159 Ill., 284; 42 N. E. Rep., 837.

Market. \$10 per month for market license, held unreasonable under particular circumstances. Chaddock v. Day, 75 Mich., 527; 42 N. W. Rep., 977; 13 Am. St. Rep., 468; 4 L. R. A., 809.

MEAT MARKET. Biloxi v. Borries, 78 Miss., 657; 29 So. Rep., 466.

PAWN BROKER. Seattle v. Barto, (Wash., 1903), 71 Pac. Rep., 735. A license of \$50 annually and a bond for \$5,000 for a pawnbroker held not unreasonable. Grand Rapids v. Braudy, 105 Mich., 670; 64 N. W. Rep., 29; 55 Am. St. Rep., 472; 32 L. R. A., 116.

PEDDLERS. Three dollars per day for hawker and peddler not excessive. In re White, 43 Minn., 250; 45 N. W. Rep., 232. \$10 per month on peddlers, held unreasonable. State v. Angelo, 71 N. H., 224; 51 Atl. Rep., 905.

A license of \$15 a year or \$3 a

day to peddle clothes wringers is not excessive. People v. Russell, 49 Mich., 617; 14 N. W. Rep., 568; 43 Am. Rep., 478.

PERMIT to open street, fee required, held unreasonable in particular instance. New Haven v. New Haven Water Co., 44 Con., 105.

SKIFFS AND Row BOATS. A license fee of \$5 per annum on skiffs and row boats, kept for hire, held not unreasonable. Poyer v. Des Plaines, 22 Ill. App., 576.

TELEGRAPH POLES. \$5 per pole for the first year and \$1 per pole thereafter, was held to be reasonable. Western Union Tel. Co. v. Philadelphia (Pa., 1888), 12 Atl. Rep., 144. See Sec. 261, supra.

Vehicle. \$2.50 per year for onehorse vehicle is not unreasonable. Mason v. Cumberland, 92 Md., 451; 48 Atl. Rep., 136.

WASH HOUSES. \$20 a year for conducting a wash house held to be in excess of the amount necessary for purpose of regulation and therefore void. *In re* Wan Yin, 22 Fed. Rep., 701.

EXORBITANT PRICE required for license, held invalid. Walker v. New Orleans, 31 La. Ann., 828.

CONSTITUTIONAL LIMIT exceeded by license tax, invalid. Ex parte Slaren, 3 Tex. App., 662.

Particular Instances where the license fee imposed has been held not to be invalid nor excessive. Duluth v. Krupp, 46 Minn., 435; 49 N. W. Rep., 235; Littlefield v. State, 42 Neb., 223; 60 N. W. Rep., 724; 47 Am. St. Rep., 697; 28 L. R. A., 588.

MISCELLANEOUS INSTANCES, in which ordinances imposing a li-

application in writing.15 Where the party applying for a license to sell liquor has complied with all the requirements of the ordinance, by paying the license fee and giving bond, he will be protected in selling, although the clerk neglected to give him a license. 16 A license issued to a firm will hold good for the term, notwithstanding one of the members thereof retires from the co-partnership before the expiration of the license.17 The granting of a municipal license is, in general, discretionary with the corporation. But when the elements of discretionary action have been eliminated by acts of the parties the question resolves itself into one of legal duty, which may be enforced by mandamus. 18 Thus where a board of engineers created by ordinance to examine and pass upon the qualifications of stationary engineers, withholds a license from caprice or whim, mandamus will lie to compel the board to perform its legal duty.¹⁹ Ordinance provisions as to application for license, as a rule, are mere matters of detail.20 Thus an ordinance requiring that one hauling garbage shall first obtain a license from the proper officer, and prohibiting the latter from granting it unless the applicant furnishes a certificate to the board of health to the effect that he has filed with the board the required statement, is not invalid as delegating

cense have been held void for unreasonableness in the amount of the license fee imposed.

Iowa—Ottumwa v. Zekind, 95
Iowa, 622; 64 N. W. Rep., 646; 58
Am. St. Rep., 447; 29 L. R. A., 734
Maryland—Vansant v. Harlem
Stage Co., 59 Md., 330

Michigan—Brooks v. Mangan, 86 Mich., 576; 49 N. W. Rep., 633; 24 Am. St. Rep., 137.

Nebraska—Caldwell v. Lincoln, 19 Neb., 569; 27 N. W. Rep., 647.

Ohio—Sipe v. Murphy, 49 Ohio St., 536; 31 N. E. Rep., 884; 17 L. R. A., 184; Glaser v. Cincinnati, 31 Wkly. Law Bul. (Ohio), 243.

Texas—Hirshfield v. Dallas, 29 Tex. App., 242; 15 S. W. Rep., 124. ¹⁵ Swarth v. People, 109 Ill., 621. ¹⁶ Prather v. People, 85 Ill., 36. ¹⁷ St. Charles v. Hackman, 133 Mo., 634; 34 S. W. Rep., 878.

18 State ex rel. Shaw v. Baker, 32
 Mo. App., 98; St. Louis v. Weitzel,
 130 Mo., 600; 31 S. W. Rep., 1045.

¹⁹ St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo., 560; 41 S. W. Rep., 244.

Mandamus to compel mayor to sign license. Where the mayor is not satisfied that a person applying for a license as a common victualler, has complied with all the provisions, mandamus will not lie to compel him to sign the license which has been granted by the board of aldermen. Deehan v. Johnson, 141 Mass., 23; 6 N. E. Rep., 240.

²⁰ St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045.

the taxing power to the board of health.²¹ So an ordinance which requires the application for the license to be indorsed by five persons, where, under the law the mayor, president of the council and chief of police pass upon the applicant's moral character, is valid, since the provision only relates to the mode of applying for the license.²²

§ 420. Revocation of license or permit. Usually the power to license, regulate, etc., confers authority to provide reasonable terms and conditions under which the business licensed shall be conducted.²³ The ordinance providing for the granting of the license may also prescribe reasonable conditions under which the license may be revoked by the municipal authorities.²⁴ A license accepted under an ordinance providing that it may be revoked at pleasure or within the discretion of a specified municipal officer or board is binding on the licensee.²⁵

The power to revoke permits depends upon their nature, the terms under which they were issued, the public necessity and the effect of such action upon contract and property rights. Usually a permit, as one for the erection of a wooden building, may be revoked legally upon breach of condition by the contractor.²⁶ But after a permit to erect a frame building has been duly granted, and the work of construction has begun and material therefor has been purchased, a revocation of such

²¹ St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045.

²² In re Birkerstaff, 70 Cal., 35;
 11 Pac. Rep., 393.

Notice—appearance, held waiver. Quinn v. Middlesex Electric Light Co., 140 Mass., 109; 3 N. E. Rep., 204.

Form for steam engine building. Alter v. Dodge, 140 Mass., 594; 5 N. E. Rep., 504.

²³ Conditions allowing withdrawing may be imposed. Towns v. Tallahassee, 11 Fla., 130; Child v. Bemus, 17 R. I. 230; 21 Atl. Rep., 539; 12 L. R. A., 57.

Building permit. Harper v. Jonesboro, 94 Ga., 801; 22 S. E. Rep., 139.

To clean privies. Boehm v. Baltimore, 61 Md., 259.

Forfeiture denied. State v. Washington, 44 N. J. L., 605.

Power to inflict penalty of forfeiture, § 170, supra.

²⁴ Wiggins v. Chicago, 68 Ill., 372.

25 Schwuchow v. Chicago, 68 Ill.,
444; Wiggins v. Chicago, 68 Ill.,
372; Com. v. Kinsley, 133 Mass.,
578; Child v. Bemus, 17 R. I., 230;
12 L. R. A., 57; 21 Atl. Rep., 539.

The taking out of a new license before the old one expires cannot affect the validity of the new license, and this is so where the license was taken out in anticipation of the passage of an ordinance increasing the rate of license. Swarth v. People, 109 Ill., 621.

26 Harper v. Jonesboro, 94 Ga.,801; 22 S. E. Rep., 139.

permit, without notice and public necessity, will not be sustained.²⁷

- § 421. Method of enforcement of payment of license. The charter method of enforcement of the payment of the license must be observed.²⁸ Only such penalties as are authorized may be inflicted. Forfeiture of the license cannot be imposed as punishment unless expressly sanctioned by law.²⁹ The usual method of enforcing ordinances is by action to recover the penalties provided.³⁰ If no method is prescribed by charter, debt is the appropriate form of action.³¹
- § 422. License on dogs. The regulation of the keeping of dogs is within the police power.³² Ordinances requiring dogs kept within the corporation to be registered, licensed, etc., are

²⁷ Buffalo v. Chadeayne, 7 N. Y. Suppl., 501.

²⁸ Sec. 169, *supra*. Blanchard v. Bristol, 100 Va., 469; 41 S. E. Rep., 948

An ordinance imposing an occupation tax which provides an illegal method of enforcing payment will be held void. German American Fire Ins. Co. v. Minden, 51 Neb., 870, 877; 71 N. W. Rep., 995.

But if it also provides a method of enforcing payment which is legal, the ordinance will not be declared void in toto, but so much of it as is unaffected by the void portion will be sustained. Templeton v. Tekamah, 32 Neb., 542; 49 N. W. Rep., 373; Magneau v. Fremont, 30 Neb., 843, 854; 47 N. W. Rep., 280.

In Nebraska the courts have held that the payment of an occupation tax imposed by a city cannot be enforced by requiring its payment as a condition precedent to doing business, or by the imposition of a criminal punishment for doing business without payment. German Amer. Fire Ins. Co. v. Menden, 51 Neb., 870, 877; 71 N. W., 995; Templeton v. Tekamah, 32 Neb., 542; 49 N. W. Rep., 373;

State v. Green, 27 Neb., 64; 42 N. W. Rep., 913.

Payment cannot be made a condition precedent to the issuing of a license to sell liquor. State v. Bennett, 19 Neb., 191; 26 N. W. Rep., 714.

²⁹ Sec. 170 et seq., supra.

Where the charter authorizes a penalty of fine or imprisonment for breach of ordinances, à penalty of a fine and forfeiture of license is illegal. Staates v. Washington, 44 N. J. L., 605.

30 Chapter X., § 303, supra.

31 Philadelphia v. Atlantic & P. Tel. Co., 109 Fed. Rep., 55.

City may enforce penalty for violating ordinances, exacting licenses, etc. St. Louis v. Sternberg, 69 Mo., 289; St. Louis v. Green, 70 Mo., 562.

Excess of amount paid may be recovered. Harrodsburg v. Renfro, 22 Ky. Law Rep., 806; 58 S. W. Rep., 795; 51 L. R. A., 897; Bruner v. Stanton, 102 Ky., 459; 43 S. W. Rep., 411.

But if license money has been paid under a mistake of law it cannot be recovered. Taber v. New Bedford, 177 Mass., 197; 58 N. E. Rep., 640.

32 Section 469, post.

uniformly sustained.³³ Thus charter power to "tax, regulate, restrain and prohibit the running at large of dogs" and to provide for the impounding or destruction of them "when found running at large contrary to ordinance," authorizes a per capita tax upon dogs by way of a license. Such tax is an exercise of the police power, and is not forbidden by the constitutional provision requiring all property to be taxed in proportion to its value. A reasonable penalty may be imposed upon the owner for failure to observe the ordinance.³⁴ An ordinance requiring a dog to wear a collar and tag and making it unlawful for any dog to run at large without them, with authority to any person to kill the same, does not authorize any one but an officer to kill a dog.³⁵ The fact the dog was under the immediate care of its owner does not exempt it from the operation of the law.³⁶

§ 423. License on lawyers. Where the power is expressly granted by the charter a municipal corporation may impose a tax on lawyers for the privilege of practicing their profession within the city.³⁷ But authority to levy a license on attorneys residing within the city, does not give power to tax

33 Faribault v. Wilson, 34 Minn., 254; 25 N. W. Rep., 449; Ex parte Cooper, 3 Tex. App., 489; State v. Brown, 72 Vt., 410; 48 Atl. Rep., 652; State v. Smith, 72 Vt., 140; 47 Atl. Rep., 390; Carter v. Dow, 16 Wis., 298; Tenney v. Lenz, 16 Wis., 566.

34 Carthage v. Rhodes, 101 Mo.,
 175; 14 S. W. Rep., 181; Van Horn v. People, 46 Mich., 183; 9 N. W. Rep., 246; Holst v. Roe, 39 Ohio St., 340; Cole v. Hall, 103 Ill., 30.

The license is not a tax for revenue. Com. v. Markham, 7 Bush. (70 Ky.), 486.

The penalty is not a special tax. Mitchell v. Williams, 27 Ind., 62.

Dog held to be property. Harrington v. Miles, 11 Kan., 480.

An ordinance requiring a license to keep a dog, held illegal. A dog may be taxed like other property, but the owner cannot be subjected to criminal punishment for failure to pay the tax. Washington v. Meigs, 1 McArther (D. C.), 53.

35 Lowell v. Gathright, 97 Ind., 313.

The dog cannot be pursued into the dwelling of owner, even after refusal to surrender the dog. Kerr v. Seaver, 11 Allen (Mass.), 151.

An officer may lawfully enter upon premises of owner. Blair v. Forehand, 100 Mass., 136; 97 Am. Dec., 82.

³⁶ Tower v. Tower, 18 Pick. (Mass.), 262.

37 Alabama—Ex parte Montgomery, 64 Ala., 463; Goldthwaite v. Montgomery, 50 Ala., 486.

Florida—Young v. Thomas, 17 Fla., 169; 35 Am. Rep., 93.

Georgia—Wright v. Hill, 54 Ga., 645; Savannah v. Hines, 53 Ga., 616.

Missouri—St. Louis v. Sternberg, 69 Mo., 289; 4 Mo. App., 453.

North Carolina—Wilmington v. Macks, 86 N. C., 88; 41 Am. Rep., 443; Holland v. Isler, 77 N. C., 1.

Texas—Languille v. State, 4 Tex. App., 312.

attorneys not residing in the city, who have offices and do business within the city.³⁸ A tax which is uniform upon all attorneys is valid.³⁹ In Virginia it has been held that the city council of Richmond had power to lay a tax upon lawyers and to provide that they should be divided into six classes and those in each class pay a certain sum.⁴⁰ Each member of a law firm may be taxed separately under power given to tax all persons exercising any profession.⁴¹ But provision may be made in the ordinance imposing the license that a firm shall pay but one tax.⁴² In Kentucky the constitutional provision empowered a municipal corporation to impose "license fees" on occupations and professions, authorized a license tax on lawyers for the purpose of raising revenue. Such ordinance is not void as impairing a contract between the state and lawyer.⁴³

§ 424. Vehicle license-Double taxation. Charter power to

Virginia—Blanchard v. Bristol, 100 Va., 469; 41 S. E. Rep., 948; Petersburg v. Cocke, 94 Va., 244; 26 S. E. Rep., 576; Ould v. Richmond, 23-Gratt. (Va.), 464.

Power to regulate attorneys does not give power to license. Sonora v. Curtin, 137 Cal., 583; 70 Pac. Rep., 674.

THE LEGISLATURE may impose such tax. State v. Waples, 12 La. Ann., 343; State v. Fellows, 12 La. Ann., 344; State v. King, 21 La. Ann., 201; Simmons v. State 12 Mo., 268; 49 Am. Dec., 131; St. Louis v. Laughlin, 49 Mo., 559.

Not Unconstitutional. Egan v. Court, 3 Har. & McH. (Md.), 169; State v. Gazlay, 5 Ohio, 14, 21; Ex parte Williams, 31 Tex. Cr. App., 262; 20 S. W. Rep. 580; 21 L. R. A., 783; Trezvant v. State (Tex. Cr. App., 1892), 20 S. W. Rep., 582; Hart v. State, 21 Tex. App., 318; 17 S. W. Rep., 127.

IN MISSOURI municipal corporations cannot impose a license tax on attorneys and others following professions. R. S. Mo., 1899, sec. 5262. Tax on attorneys held void In re Lawyer's Tax Cases, 55 Tenn. (8 Heisk.), 565.

38 Garden City v. Abbott, 34Kan., 283; 8 Pac. Rep., 473.

39 State v. King, 21 La. Ann.,201; St. Louis v. Sternberg, 69 Mo.,289; 4 Mo. App., 453.

40 Ould & Carrington v. Richmond, 23 Gratt. (Va.), 464.

41 Jones v. Page, 44 Ala., 657; Blanchard v. State, 30 Fla., 223; 11 So. Rep., 785; 18 L. R. A., 409; Lanier v. Macon, 59 Ga., 187; Wilder v. Savannah, 70 Ga., 760; 48 Am. Rep., 598.

⁴² Savannah v. Hines, 53 Ga., 616.

48 Baker v. Lexington, 21 Ky. Law Rep., 809; 53 S. W. Rep., 16; Ould v. Richmond, 23 Gratt. (Va.), 464, 468.

The amount of tax authorized by the constitution and laws of the state has no reference to specific taxes which may be imposed upon occupations and privileges and the power to tax occupations and privileges in accordance with the power to license them. Goldsmith v. Huntsville, 120 Ala., 182; McCaskell v. State, 53 Ala., 510.

license vehicles is usually expressly conferred, but unless the power exists the tax cannot be imposed.⁴⁴ A license is authorized by most charters on the occupation or use to which the vehicle is put, as hacks, cabs, etc., carrying passengers for hire, and drays, etc., carrying goods, merchandise, etc., as a business.⁴⁵ But discriminations are not permitted in the im-

44 New Iberia v. Migues, 32 La. Ann., 923; Plaquemine v. Roth, 29 La. Ann., 261.

Where the power authorizing the city to impose licenses does not refer to vehicles, an ordinance imposing a license on vehicles is invalid. Millerstown v. Bell, 123 Pa. St., 151; 16 Atl. Rep., 612; 23 Wkly. Notes Cas., 78.

A license on hack drivers, held not authorized under the power given to tax callings, and not within the police power of the city. Jackson v. Newman, 59 Miss., 385; 42 Am. Rep., 367.

License on milk wagon held invalid. Reading v. Bitting, 167 Pa. St., 21; 31 Atl. Rep., 359.

Under power "to license and regulate hackmen, draymen, expressmen, and all other persons engaged in carrying passengers, baggages or freight," no power is conferred to license any one who does not come within that class, and it does not apply to one who hires out teams and vehicles to persons who have property to transport. State v. Robinson, 42 Minn., 107; 43 N. W. Rep., 833; 6 L. R. A., 339.

⁴⁵ Indiana—Scudder v. Hinshaw, 134 Ind., 56; 33 N. E. Rep., 791.

Massachusetts — Commonwealth v. Page, 155 Mass., 227; 29 N. E. Rep., 512.

New Jersey—Belmar v. Barkalow, 67 N. J. L., 504; 52 Atl. Rep., 157.

Pennsylvania—Gibson v. Caraopolis, 22 Pittsb. Leg. J. (N. S.), 64.

Texas—Ex parte Gregory, 20 Tex. App., 210; 54 Am. Rep., 516. United States — Washington v. Wheaton, 29 Fed. Cas. No. 17, 239; 1 Cranch C. C., 318.

As the charter empowers the city to impose a tax on vehicles for street use and also a tax on occupations, it may require the payment of a license tax on vehicles used in particular occupations, in addition to that imposed for street use. St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045.

SPRINKLING CARTS. One engaged in sprinkling streets for compensation, and using tanks mounted on wheels for that purpose, is subject to a license tax, as such cart is a public vehicle. St Louis v. Woodruff, 71 Mo., 92; 4 Mo. App., 169.

STAGE COACHES may be licensed. Belmar v. Barkalow, 67 N. J. L., 504; 52 Atl. Rep., 157.

ALL VEHICLES used for business purposes whether as common carriers or by merchants for the purpose of delivering goods to their customers have been held subject to license. Johnson v. Macon, 114 Ga., 426; 40 S. E. Rep., 322.

FOR FEE. An ordinance requiring a license on wagons which run for "fee or reward," does not apply to wagons used by a coal merchant in delivering coal to his customers. Henderson v. Marshall, 22 Ky. Law Rep., 671; 58 S. W. Rep., 518.

Delivery Wagons. Kansas City v. Smith, 93 Mo. App., 217.

HACKNEY COACHES and cabs not

position and collection of such license tax.⁴⁶ An ordinance dividing vehicles and teams into different classes and imposing an occupation tax on the separate classes has been sustained. The exaction is not a personal tax on property, and, though imposed for revenue, is in the nature of a license, being a privilege

using public stands. New York v. Reesing, 79 N. Y. Suppl., 331.

AUTOMOBILE. An electric carriage or automobile, held not to be included in enumeration of vehicles to be licensed. Washington Electric Vehicle Transp. Co. v. District of Columbia, 19 App. D. C., 462.

PLEASURE — PRIVATE. Authority to license only vehicles used for pay does not include wagons used for pleasure. Mt. Olive v. Hozelbart, 26 Pittsb. L. J. (Pa. N. S.), 400.

Under the power to license "other vehicles" following a special enumeration of vehicles which may be licensed (such enumeration including vehicles used for pecuniary profit only) the city cannot impose a license tax on vehicles used exclusively for private purposes. St. Louis v. Grone, 46 Mo., 574; Hannibal v. Price, 29 Mo. App., 280.

MISCELLANEOUS ILLUSTRATIONS. Business within and without the city. Cairo v. Adams Express Co., 54 Ill. App., 87; Gartside v. East St. Louis, 43 Ill., 47.

The legislature cannot give to a city power to impose a license tax upon wagons of outside residents engaged in hauling into and out of the city. St. Charles v. Nolle, 51 Mo., 122. See Wells v. Weston, 22 Mo., 384; Cameron v. Stephenson, 69 Mo., 372; Corn v. Cameron, 19 Mo. App., 573.

Water carts held not to be included. Lafferranderie v. New Orleans, 3 La., 246.

Where the purpose of the ordinance is to impose a license upon the business or occupation, one who may occasionally haul goods for another, which is not in his calling, is not subject to license. Collinsville v. Cole, 78 Ill., 114.

Under power to license vehicles engaged in certain business a vehicle temporarily and accidentally in the city, on business of that nature, is not subject to license. Cary v. North Plainfield, 49 N. J. L., 110; 7 Atl. Rep., 42; North Plainfield v. Cary, 50 N. J. L., 176; 17 Atl. Rep., 1103.

A LICENSE PLATE may be required to be attached to a vehicle licensed for use in a particular occupation, notwithstanding such vehicle already has a license plate for street use attached, and the reasonable expense for furnishing such special license plate may be charged. St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045. Compare Walker v. New Orleans, 31 La. Ann., 828.

Mandamus. Where the requirements specified by law for procuring a license have been complied with and the officer in whom authority is lodged refuses to issue it, he may be compelled to do so, by mandamus. St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045.

EXCESSIVE LICENSE. If the tax exceeds the constitutional limit, it is void. *Ex parte* Slaren, 3 Tex. App., 662.

⁴⁶ State v. Finch, 78 Minn., 118; 80 N. W. Rep., 856; 46 L. R. A., 437.

connected with property and is not in violation of the constitution providing that all property shall be taxed in proportion to its value.47 Charters are construed ordinarily as conferring power to impose a tax for the use of streets by vehicles, 48 even though not used thereon for hire.49 But the Chicago "wheel tax" ordinance exacting a license on all wheeled vehicles using the streets, was held void in the absence of express charter power authorizing such tax.⁵⁰ And as the same vehicles were taxed for general purposes at their value, as personal property, the additional license tax for the use of the streets was declared to be double taxation and for this reason also void. However, it has been laid down that imposing a license tax upon the business or occupation, in addition to an ad valorem tax upon the property as such used in the business is not double taxation.51 In Indiana a license tax may be imposed under

⁴⁷ Kansas City v. Richardson, 90 Mo. App., 450.

Classification sustained in Terre Haute v. Kersey (Ind., 1902), 64 N. E. Rep., 469.

⁴⁸ Ft. Smith v. Scruggs, 70 Ark., 549; 69 S. W. Rep., 679; 91 Am. St. Rep., 100.

Power "to license, tax and regulate vehicles." Terre Haute v. Kersey (Ind., 1902), 64 N. E. Rep., 469; Mason v. Cumberland, 92 Md., 451; 48 Atl. Rep., 136, applied to non-residents.

49 St. Louis v. Green, 70 Mo.,
562; 7 Mo. App., 468; 6 Mo. App.,
591; Kansas City v. Richardson,
90 Mo. App., 450.

50 If a right exists to impose a license fee, by way of tax, on every person using a wheeled vehicle on the streets, in like maner such license fee may be imposed for such use of the streets in every other manner of locomotion or travel, and reach the man on horseback or the pedestrian walking along the same. Chicago v. Collins, 175 Ill., 445; 67 Am. St. Rep., 224; 51 N. E. Rep., 907.

51 Ex parte Mirande, 73 Cal.,

365; 14 Pac. Rep., 888; Carson v. Forsythe, 94 Ga., 617; 20 S. E. Rep., 116; Covington v. Woods, 98 Ky., 344; 33 S. W. Rep., 84; St. Louis v. Green, 6 Mo. App., 591; 7 Mo. App., 468; 70 Mo., 562.

Bank is not exempt from municipal license, because of having paid a state license. State v. Columbia, 6 S. C., 1.

An ordinance requiring those who have paid their license tax on vehicles to obtain at an exorbitant price certain plates for identification, is, in effect, another license, and, therefore, void. Walker v. New Orleans, 31 La. Ann., 828. Compare St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045.

A PRIVATE WAGON, not employed in hauling for hire, can not be taxed a second time for such business. Johnson v. Macon, 62 Ga., 645.

So a license of \$3 on family vehicles already subject to an advalorem tax was held void, as a double tax. Livingston v. Paducah, 80 Ky., 656.

Ordinance held not to impose a double tax. Bishoff v. State ex

the police power on vehicles used for the transportation of passengers and freight, and a second license tax under the taxing power may be imposed on the same vehicle.⁵²

§ 425. License on saloons and liquor selling. The regulation and control of saloons, dram shops and liquor selling is clearly within the police power of the state. This power may be exercised directly by the state, or it may be committed, in whole or in part, to its municipal corporations.⁵³ The power and manner of its exercise by the local authorities is governed by the local laws applicable. The license may be imposed as an occupation tax, in addition to the amount paid to sell liquor;⁵⁴ or it may be imposed for revenue, or as a police regulation, or for both purposes.⁵⁵

rel. Tampa Waterworks Co. (Fla., 1901), 30 So. Rep., 808.

⁵² Hogan v. Indianapolis (Ind., 1902), 65 N. E. Rep., 525.

BICYCLES. General power to control and manage streets, and power to pass ordinances under the general welfare clause, held to give no authority to pass an ordinance imposing a license on bicycles as a condition to use the streets. State v. Bruce, 23 Wash., 777; 63 Pac. Rep., 519; Collins v. Chicago, 175 Ill., 445; 67 Am. St. Rep., 224; 51 N. E. Rep., 907; 29 Chicago Leg. News, 426; 4 Detroit Leg. News, No. 20; Densmore v. Erie City, 7 Pa. Dist. Rep., 355.

Bicycle held to be a carriage within the meaning of a law permitting the collection of tolls. Geiger v. Perkiomen & Reading Turnpike Road, 167 Pa. St., 582; 31 Atl. Rep., 918.

Contra. Murfin v. Detroit & Erie Plank Road Co., 113 Mich., 675; 71 N. W. Rep., 1108; Williams v. Ellis, 5 Q. B. Div., 175. See sec. 465, post.

53 A power to license places for the sale of fermented liquors granted to a city where such places were unrestrained by general law, coupled with the general power to pass ordinances for promoting the peace and good order of the city, justifies an ordinance which forbids any sale of such liquors in unlicensed places. Hershoff v. Beverly, 45 N. J. L., 288; Clintonville v. Keeting, 4 Denio (N. Y.), 341.

License for selling liquor may be exacted by both city and county. Los Angeles County v. Eikenberry, 131 Cal., 461; 63 Pac. Rep., 766; Ex parte Mansfield, 106 Cal., 400; 39 Pac. Rep., 775; In re Lawrence, 69 Cal., 608; 11 Pac. Rep., 217. If there be a conflict between the city ordinance and the county regulation respecting the exercise of the police power the ordinance has superior force within the corporate limits of the city. Ex parte Roach. 104 Cal., 272; 37 Pac. Rep., 1044; Ex parte Mansfield, 106 Cal., 400, 403; 39 Pac. Rep., 775.

54 State v. Bennett, 19 Neb., 191;26 N. W. Rep., 714.

⁵⁵ California—Ex parte Hurl, 49 Cal., 557.

Illinois—East St. Louis v. Trustees of Schools, 102 Ill., 489; King v. Jacksonville, 2 Scam. (Ill.), 305; Goddard v. Jacksonville, 15

§ 426. Same subject—Conditions. Ordinances regulating the granting of saloon licenses, often impose conditions to be complied with before the license will be issued, such as requiring the applicant to present a petition signed by a certain number of citizens, property owners, etc., and, as a rule, the courts have held such conditions valid, and not a delegation of the power to grant the license, as, usually, these conditions relate only to the mode of applying for the license. The reasons for such conditions are found in the nature of the business, making

III., 588; Byers v. Olney, 16 III., 35; O'Leary v. Cook, 28 III., 534; Block v. Jacksonville, 36 III., 301; Kettering v. Jacksonville, 50 III., 39; Strauss v. Pontiac, 40 III., 301; Ashton v. Ellsworth, 48 III., 299; Gunnarssohn v. Sterling, 92 III., 569; Harvey v. Dean, 62 III. App., 41.

Indiana—Moore v. Indianapolis, 120 Ind., 483; 22 N. E. Rep., 424; Wagner v. Garrett, 118 Ind., 114; 20 N. E. Rep., 706; Linkenhelt v. Garrett, 118 Ind., 599; 20 N. E. Rep., 708.

Kansas—Franklin v. Westfall, 27 Kan., 614.

Michigan—Kitson v. Ann Arbor, 26 Mich., 325; Wolf v. Lansing, 53 Mich., 367; 19 N. W. Rep., 38.

Minnesota—State v. Priester, 43 Minn., 373; 45 N. W. Rep., 712.

Missouri—State v. Willard, 39 Mo. App., 251; St. Louis v. Smith, 2 Mo., 113.

New Hampshire—State v. Clark, 28 N. H., 176.

Pennsylvania—In re Durach, 62 Pa. St., 491.

South Carolina — Charleston v. Heisembritte, 2 MacMullen (S. C.), 233.

Power to License. Power to tax and restrain the sale of liquor includes power to grant licenses. Schweitzer v. Liberty, 82 Mo., 309. The right to keep a dramshop is not a legal right, but is a munic-

ipal privilege. State v. Hudson, 13 Mo. App., 61; Austin v. State, 10 Mo., 591; State ex rel. v. Holt Co. Ct., 39 Mo., 521; State ex rel v. Meyers, 80 Mo., 601; Bean v. Barton County Court, 33 Mo. App., 635. Who is dramshop keeper, see State ex rel. v. Schweickardt, 109 Mo., 496; 19 S. W. Rep., 47. Where a city is authorized by its charter to collect a license tax for the sale of intoxicating liquor, the power to punish for selling liquor without a license is implied. Warrensburg v. McHugh, 122 Mo., 649; 27 S. W. Rep., 523. A single sale is sufficient to support a conviction. Springfield v. Ford, 40 Mo. App., 586; State v. Andrews, 27 Mo., 267; State v. Small, 31 Mo., 197; Kansas City v. Muhlback, 68 Mo., 638. Cases relating to dramshops, State ex rel. v. Francis, 95 Mo., 44; 8 S. W. Rep., 1; State v. Binder, 38 Mo., 450; State v. Winkelmeier, 35 Mo., 103; State v. Jamison, 23 Mo., 330; Cameron v. Middough, 57 Mo. App., 312.

Municipal corporations sometimes have power to license wholesale as well as retailers in liquors. Roberson v. Lambertville, 38 N. J. L., 69.

Power conferred by charter "to license, regulate and restrain" the sale of liquor, denied, where place of business was two or three miles remote from settled portion of city—where there were no streets, lots

it necessary that the applicant shall show himself to be a suitable person to carry on the business in such a way that it shall not threaten or become dangerous to the social order of the community. Thus an ordinance providing that an applicant shall, before receiving a license, produce the written recommendation of four of his nearest neighbors, was held to be

or blocks, in the neighborhood of the business. Salt Lake City v. Wagner, 2 Utah, 400.

Where the city by its charter has power to enact any ordinance or by-law not inconsistent with the constitution and laws of the state, it has power by ordinance to prohibit persons not licensed tavern keepers and physicians from vending and retailing any ardent spirits or other intoxicating liquors, for such ordinance is not inconsistent with the constitution and laws of the state and is therefore valid. Markle v. Akron, 14 Ohio, 586.

Under the general welfare clause in a charter, providing that "the mayor and municipal assembly shall have power to pass all ordinances that they may consider necessary to the peace, good order, health, prosperity, comfort and security of the city and the citizens thereof," etc., a city may not pass an ordinance making it penal for one who has lawfully purchased liquors without the limits of the city to receive the same in the city without paying a tax for so doing, and, notwithstanding the sale of liquor is absolutely forbidden in the city. Such ordinance is also invalid as a tax measure because it is neither ad valorem nor uniform. Henderson v. Heyward, 109 Ga., 373; 34 S. E. Rep., 590; 47 L. R. A., 366.

AMOUNT OF LICENSE.

Arkansas—Drew County v. Bennett, 43 Ark., 364.

California — Merced County v. Fleming, 111 Cal., 46; 43 Pac. Rep., 202

Georgia — Williams v. West Point, 68 Ga., 816.

Illinois—Swarth v. People, 109 Ill., 621; Dennehy v. Chicago, 120 Ill., 627; 12 N. E. Rep., 227.

Indiana—Cheny v. Shelbyville, 19 Ind., 84; Wiley v. Owens, 39 Ind., 429; Sweet v. Wabash, 41 Ind., 7.

Louisiana—Jones v. Grady, 25 La. Ann., 586; Goldsmith v. New Orleans, 31 La. Ann., 646,

New York—People v. Medberry, 39 N. Y. Supp., 207; 17 Misc. Rep., 8.

Wisconsin — McGuigan v. Belmont, 89 Wis., 637; 62 N. W. Rep., 421.

REASONABLENESS OF AMOUNT OF LICENSE. A license of \$50 per month sustained. Ex parte Hurl, 49 Cal., 557; In re Guerrero, 69 Cal., 88; 10 Pac. Rep., 261.

Thirteen dollars per month held reasonable. Los Angeles v. Eikenberry, 131 Cal., 461; 63 Pac. Rep., 766.

One hundred and fifty dollars per month sustained. Ex parte Felchlin, 96 Cal., 360; 31 Pac. Rep., 224; 31 Am. St. Rep., 223.

AMOUNT NOT A JUDICIAL QUESTION. The fee charged for a whole-sale liquor license is not a tax, but is the price of a privilege which may be denied altogether. The reasonableness of the amount of license is not a question for the court. Dennehy v. Chicago, 120

legal.⁵⁶ So a statute requiring the applicant to file a petition signed by himself and a majority of the qualified resident voters of the ward, city or town, in which the applicant resides, was held to be constitutional and not a delegation of legislative power.⁵⁷ So an ordinance requiring the applicant to file with his application a certificate of five respectable citizens of the neighborhood in which the business is to be conducted, as to his character, was held not to be an unreasonable condition.⁵⁸ Laws referring to the people of the locality in which the proposed saloon is to be located, the question whether license should be granted therein to sell intoxicating liquors have been sustained.⁵⁹ But an ordinance delegating to the mayor the power to designate the districts in the city in which liquor might be sold under license, was condemned as a delegation of the power to the mayor to regulate the business.⁶⁰ So where a bond was required and its approval was left to the discretion of an approving board, who might reject the bond, if the prin-

Ill., 627; 12 N. E. Rep., 227; Distilling Co. v. Chicago, 112 Ill., 19.

PROHIBITORY. An ordinance fixing a saloon license at \$1,000 is in its nature prohibitory and therefore void. *Ex parte* Burnett, 30 Ala., 461; Craig v. Burnett, 32 Ala., 728.

SUFFICIENCY OF ORDINANCE. State v. Andrus, 11 Neb., 523; 10 N. W. Rep., 410.

Ordinance void in part. State v. Hardy, 7 Neb., 377.

56 Whitten v. Covington, 43 Ga.,

57 Groesch v. State, 42 Ind., 547; House v. State, 41 Miss., 737; Jones v. Hilliard, 69 Ala., 300; State v. Brown, 19 Fla., 563.

Ordinance requiring written consent of property owners of block, held valid. Kansas City v. Flanders, 71 Mo., 281.

58 In re Bickerstaff, 70 Cal., 35;11 Pac. Rep., 393.

Requiring that the petition shall be signed by a majority of the male citizens over twenty-one years, and a majority of the female citizens over eighteen years of age, was sustained. Rohrbacher v. Jackson, 51 Miss., 735.

Requiring the applicant to secure a permit from the board of police commissioners as a condition to the issue of the license was held not to be a delegation of authority to issue the license. *In re* Guerrero, 69 Cal., 88; 10 Pac. Rep., 261.

⁵⁹ Connecticut—State v. Wilcox, 42 Conn., 364.

Kentucky — Anderson v. Commonwealth, 13 Bush. (Ky.), 485.

Massachusetts — Commonwealth v. Bennett, 108 Mass., 27; Commonwealth v. Dean, 110 Mass., 357.

New Jersey—Paul v. Gloucester County, 50 N. J. L., 585; 15 Atl. Rep., 272; State v. Court, 36 N. J. L., 72.

Pennsylvania — Locke's Appeal, 72 Pa. St., 491.

60 State v. Kantler, 33 Minn., 69;
21 N. W. Rep., 856; *In re* Wilson,
32 Minn., 145; 19 N. W. Rep., 723.

cipal was known to be a person whose character and habits would render him an unfit person to conduct the business of selling liquor, this was held to be, in effect, a delegation of the power to reject or approve the bond, and for that reason invalid.61 Where the state authorizes municipalities to create excise boards, the creation of an excise board by the city, with power to regulate the traffic in intoxicating drinks is held not to be a delegation of the power by the city, but the board receives its power from the state under the act providing for its creation.62 But one of the federal courts held that an ordinance requiring that no license be issued to sell liquor, unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county of San Francisco, was void and in violation of the constitution, in forbidding a license to be issued unless upon the arbitrary and uncontrolled written consent of a certain designated number of persons.63

§ 427. License on street railways and cars. The right of the municipal corporation to levy and collect a license tax on street railways and cars depends upon the local laws and the terms under which the franchise to maintain the tracks in the streets and to run cars thereon were granted. It is competent for the state to levy an excise tax upon a railroad corporation for the privilege of exercising the corporation franchise within the

61 Robison v. Miner & Houg, 68
Mich., 549; 37 N. W. Rep., 21.
62 Riley v. Trenton, 51 N. J. L.,
498; 18 Atl. Rep., 116.

The power to grant the license cannot be delegated by the council to the mayor. Winants v. Bayonne, 44 N. J. L., 114.

Recommendation of at least ten freeholders required to be furnished by the applicant. Winants v. Bayonne, 44 N. J. L., 114.

63 In re Christensen, 43 Fed., 243.

The court followed the decision in Yick Wo v. Hopkins, 118 U. S., 356; 6 Sup. Ct. Rep., 1064, where it was held that an ordinance making the granting of a license to carry on a laundry de-

pend upon obtaining the consent of a certain number of persons, was void.

Where the ordinance requires the applicant to obtain the consent of a majority of the board of police commissioners, and being unable to do so, a writ of mandamus to compel the collector of licenses to issue the license was refused, upon the ground that if the act is constitutional he must comply with its requirements before he can demand a license, and if unconstitutional, the collector had no power to issue licenses at all. Purdy v. Sinton, 56 Cal., 133.

Vesting the discretion of granting or refusing a license to sell liquors by the court in the com-

state. 64 And this power may be delegated by the state to municipalities, giving to them power to impose a license fee upon street railroads and other corporations for the privilege of using and enjoying the corporate franchise within its limits.65 Where the franchise does not grant the privilege of using and exercising the right of way for a street railroad, free from any license, the exaction of one does not impair the obligation of the contract. 66 Under most municipal charters as elsewhere stated, legislative action, usually by ordinance is required to impose license tax, fix the terms thereof and the manner of its payment.⁶⁷ But where the charter provides for the payment of license fees to the local corporation and the amount is fixed such fees may be collected without an ordinance.68 An ordinance requiring street railway companies to pay an annual license fee of so much per car may be enforced against all companies whose charters provide that they shall be subject to the payment of license fees. In one case the charter, granting the right to construct and operate the road, was made subject "to the payment to the city of the same license fee an-

missioners of roads and revenue, held valid. Mayson v. Atlanta, 77 Ga., 662; Thorn v. Atlanta, 77 Ga., 661.

64 Main v. Grand Trunk Ry. Co.,
 142 U. S., 217; 35 L. Ed., 994.

65 Byrne v. Chicago General Ry. Co., 63 Ill. App., 438, affirming right of Chicago to exact a license

An ordinance fixing a tax of \$50 upon every railroad running through the city was held to be valid and within the power of the city to pass under the authority given it by the state; being a tax imposed upon the business in the town and not a tax on the property of the railroad company. Richmond & Danville Ry. Co. v. Reidsville, 101 N. C., 404; 8 S. E. Rep., 124; 2 L. R. A., 284.

A license on "each and every street railway company," in addition to an ad valorem tax on the railroad property, sustained, as not unequal taxation. Newport News

& O. P. Ry. & E. Co. v. Newport News, 100 Va., 157; 4 Va. Sup. Ct. Rep., 31; 40 S. E. Rep., 645.

66 New Orleans v. Railroad Co., 40 La. Ann., 587; 4 So. Rep., 512; State v. Herod, 29 Iowa, 123.

Right to license denied under condition of grant. Philadelphia v. Empire Pass. Ry. Co., 177 Pa. St., 382; 35 Atl. Rep., 721.

AFTER EXPIRATION OF FRANCHISE. After the expiration of the term for which the franchise of a street railroad company was granted, if not renewed, it is not liable for the license tax during the time it occupies the streets after the expiration of the franchise, it being a mere trespasser on the streets. Cincinnati Incline Pl. Ry. Co. v. Cincinnati, 52 Ohio St., 609; 44 N. E. Rep., 327.

67 Sec. 413, supra.

68 New York v. Broadway & Seventh Ave. Ry. Co., 97 N. Y., 275, 284.

nually for all cars run thereon as is now paid by other city railroads in said city." At the time two railroads paid a license fee of \$50 per car, one paid \$20 per car, and three paid no license. Here it was held that a license fee of \$50 per car could be legally levied and collected. Where the local corporation is given power to grant franchises to street railroad companies and to stipulate the conditions upon which they may exercise the privilege, it has authority to impose a license fee as a condition to the granting of the franchise. Such license fee may be fixed by virtue of special provisions in the municipal charter or it may be stipulated in the franchise that the license fee thereafter to be fixed by the council shall be paid. The license fee may be imposed for revenue or for police rgulation.

69 New York v. Broadway & Seventh Ave. Ry. Co., 97 N. Y., 275.

70 New York v. Eighth Avenue
 Ry. Co., 118 N. Y., 389; 23 N. E.
 Rep., 550; New York v. Broadway
 Seventh Ave. Ry. Co., 97 N. Y., 275.

71 New York v. Eighth Avenue
Ry. Co., 118 N. Y., 389, 398; 23 N.
E. Rep., 550; New York v. Broadway & Seventh Ave. Ry. Co., 97
N. Y., 275.

ORDINANCE IMPOSING PENALTY. The fact that the council has passed an ordinance imposing a penalty for failure of a street railway company to procure a certificate for a license, does not prevent the city from maintaining an action to recover the license fee. New York v. Eighth Ave. Ry. Co., 118 N. Y., 389; 23 N. E. Rep., 550.

Statutes sometimes authorize cities to exact a certain per cent of the gross earnings of the street railroad company as a condition of the granting the franchise. 3 Heydecker's Gen. Laws N. Y. (2d Ed.), 3314; Cincinnati St. Ry. Co. v. Cincinnati, 8 Ohio N. P., 80; New York v. Twenty-third Street Ry. Co., 79 N. Y. Suppl., 323.

72 Both an ad valorem tax and the tax upon the use of the company's cars as street railroad cars can be exacted. Kansas City v. Corrigan, 18 Mo. App., 206; Aurora v. McGannon, 138 Mo., 38; 39 S. W. Rep., 469; Springfield v. Smith, 138 Mo., 645; 40 S. W. Rep., 757; St. Louis v. Green, 70 Mo., 562, and 7 Mo. App., 468; St. Louis v. Ernst, 95 Mo., 360; 8 S. W. Rep., 558.

Such power may be exercised by the city as a police regulation or for the purpose of raising revenue within the constitutional limitations. Springfield v. Smith, 138 Mo., 646; 40 S. W. Rep., 757.

A contract on the part of the city not to levy and collect a tax from a railroad company thereafter, is *ultra vires* and void. Springfield v. Smith, 138 Mo., 645; 40 S. W. Rep., 757; State v. H. & St. J. Ry. Co., 75 Mo., 208.

As to exemption from license fee, see State v. Herod, 29 Iowa, 123.

An ordinance taxing a street railway \$10 for each car operated by it, and imposing a fine on the company for operating its cars operated by a street railroad company within the corporate limits was held to be a valid exercise of the police power.⁷³ And it has been held that authority to license hackmen, draymen, omnibus drivers, etc., and all others pursuing like occupations and to prescribe their compensation, gives power to license street railways.⁷⁴ Unless restricted by law the license fee may be increased from time to time.⁷⁵

without having paid such license tax, is yalid, and a conviction of the manager for violating such ordinance was proper. Springfield v. Smith, 138 Mo., 645; 40 S. W. Rep., 757.

73 Allerton v. Chicago, 6 Fed. Rep., 555.

74 Allerton v. Chicago, 6 Fed. Rep., 555.

The tax may be imposed under an ordinance relating to a license on omnibuses, carriages, hacks and other vehicles used in carrying passengers. North Braddock v. Second Ave. Tract. Co., 28 Pittsb. L. J., 27.

The operating of a street railroad by horse and steam is a business, within the meaning of the law, giving the city power to levy a license tax. New Orleans v. Railroad Co., 40 La. Ann., 587; 4 So. Rep., 512.

Police Regulation. Johnson v. Philadelphia, 60 Pa. St., 445; Frankford & Phila. Ry. Co. v. Philadelphia, 58 Pa. St., 119; Harrisburg v. East Harrisburg Pass. Ry. Co., 4 Pa. Dist. R. (Com. Pl.), 683; Harrisburg v. Citizens' Pass. Ry. Co., 4 Pa. Dist. R. (Com. Pl.), 687.

LICENSE FOR REVENUE DENIED. A provision in the charter of the city granting power "to license and regulate," does not authorize the city to exact license fees for revenue purposes from a street railway company. North Hudson Ry. Co. v. Hoboken, 41 N. J. L., 71;

New York v. Second Ave. Ry. Co., 32 N. Y., 261.

The imposition of a license on the passenger cars of a street railway company to raise revenue would be an invasion of the chartered right, but a charge for a license as a police regulation, although it may incidentally add to the receipts of the city, is valid. Johnson v. Philadelphia, 60 Pa. St., 445.

A license on passenger railroad cars for revenue purposes only is not an ordinance for police and internal government. Hence, under general power, without special authority, an ordinance imposing annual tax on passenger railroad cars running into cities is valid. New York v. Second Avenue R. R. Co., 32 N. Y., 261; New York v. Third Ave. Ry. Co., 33 N. Y., 42.

These cases considered and limited in New York v. Broadway & Seventh Ave. R. R. Co., 97 N. Y., 275

A license for revenue cannot be imposed where the franchise authorizes the company to operate its cars without any other conditions than the payment of a certain percentage of its receipts. New York v. Twenty-third Street Ry. Co., 79 N. Y. Suppl., 323.

75 R. R. Co. v. Philadelphia, 101
U. S., 528; Johnson v. Philadelphia, 60 Pa. St., 445; State ex rel.
Cream City R. Co. v. Hilbert, 72
Wis., 184; 39 N. W. Rep., 326.

METHOD OF CALCULATING LICENSE

§ 428. License on miscellaneous trades, occupations, avocations, etc. A license under various charter provisions of the following trades, occupations, avocations, etc., has been sustained: Auctioneers, ⁷⁸ second-hand dealers, ⁷⁹ junk dealers, ⁷⁸ pawn brokers, ⁷⁹ laundry and wash houses. ⁸⁰ hotels and board-

Tax. Under an ordinance requiring a street railroad company to pay \$4 per lineal foot for every car, and in addition $2\frac{1}{2}$ % of the gross earnings, it was held that in calculating the amount due at \$4 per lineal foot the company was not entitled to any allowance for the time when the cars were not in use. Cincinnati St. Ry. Co. v. Cincinnati, 8 Ohio N. P., 80.

Under an ordinance imposing a tax of \$2.50 on each working horse in the city it was held that a street railway company was liable for this sum upon each horse in addition to a stipulated license upon each car. Montreal Street Ry. Co. v. Montreal, 23 S. C. (Can.), 259,

76 Carroll v. Tuskaloosa, 12 Ala., 173; Port Jervis v. Close, 6 N. Y. Supp., 211; Iowa City v. Newell, 115 Iowa, 55; 87 N. W. Rep., 739; White v. Kent, 11 Ohio St., 550; Stull v. De Mattos, 23 Wash., 71; 62 Pac. Rep., 451; 51 L. R. A., 892.

Power to license must exist. Fowle v. Alexandria, 3 Pet. (28 U. S.), 398; 7 L. Ed., 719.

One licensed as auctioneer cannot delegate his authority to sell to another. Stone v. State, 12 Mo., 400.

An auctioneer in the city of St. Louis was formally compelled to obtain a license from the state as well as from the city. Simpson v. Savage, 1 Mo., 359.

A person may be guilty under the act to license auctioneers of exercising a trade or business of a public auctioneer without a license, although he may receive no compensation for the act of selling. State v. Rucker, 24 Mo., 557.

77 Atlantic City v. Goldstein, 67
 N. J. L., 517; 51 Atl. Rep., 471.

One who buys and sells as a mere incident to a general business is not a second-hand dealer. Eastman v. Chicago, 79 Ill., 178.

⁷⁸ A Junk Shop is a place where old metals, ropes, rags, etc., are bought and sold. Duluth v. Bloom, 55 Minn., 97; 21 L. R. A., 689; 56 N. W. Rep., 580; Charleston v. Goldsmith, 12 Rich. Law (S. C.), 470.

One who buys, to sell again, from a certain number of carriage manufacturers, who are customers of his, the odds and ends of new iron which have been left from larger pieces used in the manufacture of carriages and which are not available for further use in that line, is not a junk dealer. "The reasons for requiring junk dealers to take out licenses do not apply to such a business." Per Morton, J., in Com. v. Ringold, 182 Mass., 308; 65 N. E. Rep., 374.

79 Power to license must be conferred. Shuman v. Ft. Wayne, 127 Ind., 109; 28 N. E. Rep., 560; 11 L. R. A., 378.

The power to license is usually conferred by charter.

Colorado—Soloman v. Denver, 12 Colo. App., 179; 55 Pac. Rep., 199.

Georgia—Phillips v. Atlanta, 78 Ga., 773; 3 S. E. Rep., 431.

Illinois—Launder v. Chicago, 111 Ill., 291; 53 Am. Rep., 625;

ing houses,⁸¹ cattle and horse dealers,⁸² livery stables,⁸³ architects,⁸⁴ printing,⁸⁵ stationary engineers,⁸⁶ railroad engineers,⁸⁷

Kuhn v. Chicago, 30 III. App., 203. Michigan — Grand Rapids v. Braudy, 105 Mich., 670; 64 N. W. Rep., 29; 55 Am. St. Rep., 472: Van Baalen v. People, 40 Mich., 258.

Minnesota—St. Paul v. Lytle, 69 Minn., 1; 71 N. W. Rep., 703.

Missouri—St. Joseph v. Levin, 128 Mo., 588; 31 S. W. Rep., 101; 49 Am. St. Rep., 577.

Under a grant of power "to license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, and to revoke such license at pleasure," the court said, "It is a matter purely discretionary with the city authorities whether they will license and regulate the business of pawnbrokers, or wholly prohibit and suppress the business by them within the city. In such case, if the city grants a license, it may impose such conditions and burdens as it may see fit. latitude of power grows out of the fact that it is discretionary to prohibit the business, or license it on terms as the city may choose." Launder v. Chicago, 111 Am. Rep., 625; III., 291; 53 Schwuchow v. Chicago, 68 III., 444; Wiggins v. Chicago, 68 Ill., 372.

80 St. Joseph v. Lung, 93 Mo. App., 626; 67 S. W. Rep., 697; State v. Camp Sing, 18 Mont., 128; 56 Am. St. Rep., 551; 32 L. R. A., 635; 44 Pac. Rep., 516.

81 St. Louis v. Bircher, 76 Mo.,431, affirming 7 Mo. App., 169.

82 St. Louis v. Knox, 6 Mo. App., 247.

83 License is on the occupation. Municipality No. 2 v. Dubois, 10 La. Ann., 56; State v. Powell, 100 N. C., 525; 6 S. E. Rep., 424.

License tax based on the num-

ber of carriages kept for hire, sustained. Howland v. Chicago, 108 Ill., 496.

⁸⁴ A license tax may be imposed upon architects under power in the city charter to license trades, avocations and professions. Cook v. Memphis, 94 Tenn., 692; 30 S. W. Rep., 742.

Architects, as members of a liberal profession, are *ejusdem generis* with lawyers, doctors and artists of like professions. St. Louis v. Herthel, 88 Mo., 128, affirming 14 Mo. App., 467.

85 PRINTING OFFICE. An ordinance imposing a license fee of \$25 on job printing office sustained. New Orleans v. Clark, 15 La. Ann., 614.

Under the law imposing a license tax on "manufacturing companies," a company publishing a newspaper was held not to be within the law. Evening Journal Assn. v. Board of Assessors, 47 N. J. L., 36; 54 Am. Rep., 114.

But a company doing job printing, engraving, electrotyping, was held to be within the meaning of the law. Ib.

86 St. Louis v. Meyrose Lamp
Mfg. Co., 139 Mo., 560; 41 S. W.
Rep., 244; 61 Am. St. Rep., 474;
St. Louis v. Tamm Bros. Glue Co.,
139 Mo., 572; 41 S. W. Rep., 1100,
distinguishing Baltimore v. Radecke, 49 Md., 217.

The city is not liable for negligence in the inspection of boilers, although a city ordinance under the charter imposed a penalty on any person using such boiler before inspection. Mead v. New Haven, 40 Conn., 72.

87 Statute requiring all railroad engineers engaged in running a

city weighers,⁸⁸ city scavengers,⁸⁹ express companies,⁹⁰ foreign corporations,⁹¹ brokers,⁹² real estate agents and brokers,⁹³

train of cars or engine to be examined and licensed, held to be valid as a police regulation. McDonald v. State, 81 Ala., 279; 2 So. Rep., 829; 60 Am. Rep., 158.

88 Hoffman v. Jersey City, 34 N. J. L., 172.

A city has power to provide for the measuring or weighing of hay, wood, or any other article for sale within its limits. But such charges must be reasonable and cannot be directed to the end of raising a revenue. Taylor, Cleveland & Co. v. Pine Bluff, 34 Ark., 603.

89 License to haul garbage and requiring a certificate of character from the board of health held valid. St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045.

An ordinance providing for licensing persons to clean privy vaults and remove dirt and filth from the city was held to be a lawful and proper exercise of the power "to preserve the health of the city and to prevent and remove nuisances." Boehm & Loeber v. Baltimore, 61 Md., 259, distinguishing Baltimore v. Radecke, 49 Md., 217; 33 Am. Rep., 239.

So by-law prohibiting any person not duly licensed therefor, from removing house dirt and offal from the city was held not to be in restraint of trade and valid. *In re* Vandine, 6 Pick. (Mass.), 187.

But an ordinance providing for city scavengers, prescribing the duties and regulations governing the same, providing a license therefor, being an attempt to authorize the creation of a monopoly of a lawful calling, is in restraint of trade and void. *In re* Lowe, 54 Kan., 757; 39 Pac. Rep., 710.

90 Adams Exp. Co. v. Owensboro, 85 Ky., 265; 3 S. W. Rep., 370.

City may impose an ad valorem tax upon the gross annual receipts of an express company from its business done in the city. Such tax does not violate the constitution which requires uniformity and equality because different from that imposed upon merchants. The tax is valid where all persons engaged in the same business are taxed alike. American Exp. Co. v. St. Joseph, 66 Mo., 675; St. Louis v. Sternberg, 69 Mo., 289. See Kansas City v. Corrigan, 18 Mo. App., 206.

Power to license denied. Southern Express Co. v. Tuscaloosa (Ala., 1902), 31 So. Rep., 450.

A license on express companies is unconstitutional if it constitutes an exaction, interference with, or attempt to regulate, interstate or foreign commerce. Southern Exp. Co. v. Ensley, 116 Fed. Rep., 756. Sec. 262, supra.

91 Calculated on basis of business done in city. New Orleans v.
Penn. Mut. Life Ins. Co., 106 La.
Ann., 31; 30 So. Rep., 254; Com.
v. Milton, 12 B. Mon. (51 Ky.), 212; 54 Am. Dec., 522.

92 Street brokers may be licensed. Walton v. Augusta, 104
 Ga., 757; 30 S. E. Rep., 964.

One who buys claims for himself, held not to be a broker. Gast v. Buckley, 23 Ky. Law Rep., 992; 64 S. W. Rep., 632.

Railway ticket broker. Hirsh-field v. Dallas, 29 Tex App., 242; 15 S. W. Rep., 124.

Tax on the business of money and exchange brokers held not to be a tax on foreign exchange. Nathan v. Louisiana, 8 How. (U. dealer in "futures," 94 occupiers of market stands and stalls, 95 butchers and keepers of meat shops, 96 bakers, 97 mechanical trades, 98 merchants, 99 manufacturers, 1 peddlers, 2

S.), 73. Tax on foreign bill of lading is tax on exports. Fairbank v. U. S., 181 U. S., 283.

Brokers representing foreign principals, license tax on as interference with foreign and interstate commerce, see section 258, supra.

93 Wiltse v. State, 8 Heisk. (Tenn.), 544; Blackford v. State, 8 Heisk. (Tenn.), 538.

Question discussed. Rounds v. Alee, 116 Iowa, 345; 89 N. W. Rep., 1098.

Ordinance providing for the licensing of real estate agents and brokers, held valid against contention that they violated the bill of rights of the state constitution. St. Louis v. McCann, 157 Mo., 301; 57 S. W. Rep., 1016.

94 Persons engaged in the business of buying or selling produce or other products for future delivery may be required to pay a license tax. Alexander v. State, 86 Ga., 246; 12 S. E. Rep., 408; 10 L. R. A., 859; Memphis Brokerage Ass'n v. Cullen, 79 Tenn. (11 Lea), 75.

95 Ash v. People, 11 Mich., 347.

The power to establish and regulate markets authorizes an ordinance requiring persons occupying stands in the market to pay the sum of twenty-five cents. Cincinnati v. Buckingham, 10 Ohio, 257.

Regulation of markets, § 481 et seq., post.

96 St. Louis v. Freivogal, 95 Mo.,533; 8 S. W. Rep., 715.

Meat vendor. St. Paul v. Colter, 12 Minn., 41, 90; Am. Dec., 278.

Butchers' wagons. Frommer v. Richmond, 31 Gratt. (Va.), 646.

Cannot be imposed as a police

regulation, when. Chaddock v. Day, 75 Mich., 527; 42 N. W. Rep., 977; 4 L. R. A., 809; 13 Am. St. Rep., 468.

97 Power "to license and regulate the weight and price of bread, and prohibit the baking for sale, except by those licensed," gives authority to license bakers and fix the weight of loayes, and the power was held not to be unconstitutional. Mobile v. Yuille, 3 Ala., 137.

98 Under an ordinance imposing a license tax on every individual carrying on the business of master builder, a contractor who employs workmen in executing his contracts is not exempt from the payment of a license tax. New Orleans v. O'Neil, 43 La. Ann., 1182; 10 So. Rep., 245. But one who constructs and shapes material with his own hands will be exempted from the license, although he employs other mechanics who work with him. New Orleans v. Lagman, 43 La. Ann., 1180; 10 So. Rep., 244.

99 Cape Girardeau v. Riley, 72 Mo., 220; St. Louis v. Knox, 6 Mo. App., 247.

Charter power "to license, tax and regulate * * * transient merchants," etc., authorizes an ordinance taxing such merchants. Mt. Pleasant v. Clutch, 6 Iowa, 546.

ADDITIONAL TAX. Tuscaloosa v. Halczstein, 134 Ala., 636; 32 So. Rep., 1007.

A MERCHANT is one who traffics or carries on trade; he is a trafficker as well as a trader. To traffic is to pass goods from one person to another for an equivalent in goods or money. Kansas City v. Vindquest, 36 Mo. App., 584. Sec. 1900, R. S. M., 1889, provides that, "No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business, avocation, pursuit or calling be specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute." It has been expressly held that the above provision applies to Kansas City. notwithstanding was framed under constitutional provisions. Kansas City v. Lorber, 64 Mo. App., 604; St. Joseph v. Porter, 29 Mo. App., 605.

Under the Kansas City charter the term merchant has been held to mean dealers of every kind in commercial commodities, including produce dealers. Kansas City v. Lorber, 64 Mo. App., 604. See Kansas City v. Johnson, 78 Mo., 661. So, an ice dealer falls within the term of merchant. Kansas City v Vindquest, 36 Mo. App., 584.

The term merchant, as used in the charter of St. Joseph, was held sufficiently generic to include one who is "engaged in the business of selling fresh meats at wholesale from cars." St. Joseph v. Dye, 72 Mo. App., 214.

Payment of taxes on a different stock of goods as a merchant during a given fiscal year is no defense to an action for the tax of a merchant legally imposed upon a stock of wares and merchandise which he had been engaged in selling as a merchant on the 1st day of January of that year and for three months preceding that day. Kansas City v. Johnson, 78 Mo., 661. See State ex rel. v. Tracy, 94 Mo., 217; 6 S. W. Rep., 709; Aurora v. McGannon, 138 Mo., 38; 39

S. W. Rep., 469; St. Louis v. Sternberg, 69 Mo., 289; State v. Whittaker, 33 Mo., 457; State v. West, 34 Mo., 424; State v. Cox, 32 Mo., 566; State v. Willis, 37 Mo., 192; State v. Jacobs, 38 Mo., 379.

A PRODUCE DEALER who is clearly a merchant may be taxed as a merchant under the provision which authorizes the city to "license, tax or regulate merchants." Kansas City v. Grush, 151 Mo., 128; 52 S. W. Rep., 286. Uniformity, Aurora v. McGannon, 138 Mo., 38; 39 S. W. Rep., 469. As to difference between wholesale merchant and manufacturer under Kansas City charter, see Kansas City v. Butt, 88 Mo. App., 237.

MERCANTILE AGENT. Brookfield v. Kitchen, 163 Mo., 546; 63 S. W. Rep., 825.

¹ Manufacturer. One who conducts a business of slaughtering hogs and converts them into lard and cured meats is subject to a tax as a manufacturer. Engle v. Sohn, 41 Ohio St., 691; 52 Am. Rep., 103.

Denied. Thomas v. Snead, 99 Va., 613; 39 S. E. Rep., 586.

² For selling commodities. *In* re Nightingale, 11 Pick. (Mass.), 168.

Hucksters. Dunham v. Rochester, 5 Cowen (N. Y.), 462.

Hawkers and peddlers. State ex rel. v. Noonan, 59 Mo. App., 524.

Under a charter authorizing the city to "restrain" hawking and peddling, an ordinance requiring a license to be procured by any one pursuing the occupation of peddler is valid. Huntington v. Cheesbro, 57 Ind., 74.

License of two dollars and fifty cents on hawkers, sustained. Cherokee v. Fox, 34 Kan., 16; 7 Pac. Rep., 625.

Express power necessary. St.

house to house canvassers,³ sewing machine agents,⁴ billiard halls and pool rooms,⁵ theaters, theatrical exhibitions,⁶ horse

Paul v. Stultz, 33 Minn., 233; 22 N. · W. Rep., 634.

PEDDLER DEFINED. "A peddler, within the general accepted meaning of the word, is a small retail dealer, who carries his merchandise with him, traveling from place to place, and from house to house, exposing his goods for sale and selling them." There are five elements which constitute a peddler:

- He should have no fixed place of dealing, but should travel from place to place.
- 2. He should carry with him the wares he offers for sale, not merely samples thereof.
- 3. He should sell them at the time he offers them, not merely enter into an executory contract for future sale.
- 4. He should deliver the goods then and there, not merely contract to deliver them in the future.
- 5. The sales made by him should be to consumers and not confined exclusively to dealers in the articles sold by him. "The fact that the sales are to dealers and not to consumers, is the distinguishing feature."

Agent of wholesale shoemakers' supplies who sold and delivered such goods to dealers only, and not to consumers, held not a peddler. Ordinance definition too broad. Per Bram, J., in St. Paul v. Briggs, 85 Minn., 290; 88 N. W. Rep., 984, quoting from and approving article in 34 Am. Law Reg., 569, citing South Bend v. Martin, 142 Ind., 31; 29 L. R. A., 531; 41 Cent. L. J., 400; 41 N. E. Rep., 315.

The word "peddler," as used in a particular ordinance, held to be employed as defined by statute.

Moberly v. Hoover, 93 Mo. App., 663; 67 S. W. Rep., 721.

"Peddlers or itinerant retailers of goods." West v. Mt. Sterling, 23 Ky. Law Rep., 1670; 65 S. W. Rep., 120.

² Book Canvasser. Warren v. Greer, 117 Pa. St., 207; 11 Atl. Rep., 415.

A license tax imposed upon persons going from house to house to sell goods is a tax upon the privilege of conducting the business and not a tax on the goods. Temple v. Sumner, 51 Miss., 13.

Selling on streets or soliciting orders from house to house. Brownback v. North Wales, 194 Pa. St., 609; 45 Atl. Rep., 660.

⁴ A license tax on sewing machine companies and dealers in sewing machines is not void because not a uniform mode of taxation. Weaver v. State, 89 Ga., 639; 15 S. E. Rep., 840.

Tax on solicitors or canvassers of sewing machines sustained, against the objection that such tax conflicted with sec. 3 of art. X. of the state constitution (Missouri) and the 14th amendment of the federal constitution. St. Louis v. Bowler, 94 Mo., 630; 7 S. W. Rep., 434.

Morgan v. State (Neb., 1902),N. W. Rep., 108.

The license is on the occupation. Ex parte Bernert, 62 Cal., 524; Merriam v. New Orleans, 14 La. Ann., 318; New Orleans v. Turpin, 13 La. Ann., 56.

6 Charity Hospital v. Stickney, 2 La. Ann., 550; Charity Hospital v. De Bar, 11 La. Ann., 385.

"The levying of an excise has been practiced in regard to other occupations, and the constitutionality of it has never been doubted. races,⁷ row boats kept for hire,⁸ packing and canning oysters,⁹ dealers in pistols and cartridges,¹⁰ gift enterprises,¹¹ sale of cigarettes,¹² ferry boats, etc.,¹³ telegraph and telephone companies,¹⁴ insurance companies, foreign or domestic, and their agents doing business within the corporation.¹⁵

There can, therefore, be no objection to it in the present case, admitting theatrical entertainments to be as meritorious as other occupations. But it seems to be peculiarly proper in employments of this kind. They require to be Towns are put to exwatched. pense in preserving order, and it is proper they should be indemnified for inconveniences or injuries occasioned by employments of this nature." Boston v. Schaffer, 9 Pick. (Mass.), 415.

⁷ Horse Races exhibited within inclosures, where admission fee is charged the public, are shows and amusements within the statute conferring power upon cities to license, tax and regulate theatrical and other exhibitions. Webber v. Chicago, 148 Ill., 313; 36 N. E. Rep., 70.

8 Poyer v. Des Plaines, 22 Ill. App., 576.

⁹ Tax on occupation. State v. Applegarth, 81 Md., 293; 28 L. R. A., 812; 31 Atl. Rep., 961.

10 Browne v. Selser, 106 La., 691;31 So. Rep., 290.

11 GIFT ENTERPRISES, as premium stamps, periodical trading stamps and similar schemes and devices by means of which certain merchants, manufacturers and other persons engaged in lawful callings are advertised, etc. Humes v. Ft. Smith, 93 Fed. Rep., 857; Fleetwood v. Read, 21 Wash., 547; 58 Pac. Rep., 665. Compare Ex parte McKenna, 126 Cal., 429; 58 Pac. Rep., 916.

Gundling v. Chicago, 176 Ill.,
 340; 52 N. E. Rep., 44; 48 L. R. A.,

230, affirmed in 177 U. S., 183; 20 Sup. Ct. Rep., 633.

MISCELLANEOUS. "Raising, grazing and pasturing sheep" does not apply to one driving sheep through the county. Mono County v. Flanigan, 130 Cal., 105; 62 Pac. Rep., 293.

"Gross profits" construed. New Orleans v. Comptoir National d'Escompte de Paris, 104 La., 214; 28 So. Rep., 910.

18 Wiggins Ferry Co. v. East St. Louis, 107 U. S., 365; 102 Ill., 560; Chilvers v. People, 11 Mich., 43; Reddick v. Amelin, 1 Mo., 5; St. Louis v. Waterloo-Carondelet T. Co., 14 Mo. App., 216.

In granting the license charge for the round trip may be limited. State v. Sickmann, 65 Mo. App., 499.

The imposition of such charge does not contravene the commerce clause of the federal constitution. Section 266, 267, supra.

14 A reasonable license imposed upon telegraph companies for the privilege of transacting business within the corporation may be authorized. Western Union Tel. Co. v. Fremont, 39 Neb., 692; 58 N. W. Rep., 415; Western Union Tel. Co. v. Richmond, 26 Gratt. (Va.), 1.

Tax on property of telegraph company sustained. Sec. 262, supra.

So a reasonable license tax may be levied and collected for the privilege of erecting poles and stringing wires in the streets, etc. Sec. 261, supra.

An annual license on the poles

of a telephone company which is already established under an ordinance granting permission to erect its lines, is not a valid exercise of police power. New Orleans v. Great So. Tel. & Tel. Co., 40 La. Ann., 41; 3 So. Rep., 533; 8 Am. St. Rep., 502; Philipsburg v. Central Penn. Tel. & Sup. Co., 22 Wkly. Notes Cas., 572.

But license fees of this character cannot regulate or interfere with interstate or foreign commerce; this feature is treated elsewhere. Secs. 257, 264, supra.

¹⁵ Alabama—Clark v. Mobile, 67 Ala., 217.

Georgia—Home Ins. Co. v. Augusta, 50 Ga., 530.

Illinois—Illinois Mut. Fire Ins. Co. v. Peoria, 29 Ill., 180.

Kansas—Leavenworth v. Booth, 15 Kan., 627.

Missouri—St. Joseph v. Ernst, 95 Mo., 360; 8 S. W. Rep., 558; St. Louis v. Life Ass'n of Amer., 53 Mo., 466; St. Louis v. Independent Ins. Co., 47 Mo., 146.

Pennsylvania—Aetna Fire Ins. Co. v. Reading, 119 Pa. St., 417; 13 Atl. Rep., 451.

Virginia—Humphreys v. Nor-folk, 25 Gratt. (Va.), 97.

Wisconsin—Milwaukee Fire Department v. Heifenstein, 16 Wis., 136.

License tax as an interference with interstate commerce, see section 257, supra.

The license tax may be imposed on the company and the agents employed by it. Farmington v. Rutherford, 94 Mo. App., 328; 68 S. W. Rep., 83.

Power to tax "brokers" confers no power to license insurance agents. McKinney v. Alton, 41 Ill. App., 508.

So power to tax and regulate auctioneers, etc., is not sufficient. State v. Smith, 31 Iowa, 493.

Each agent may be taxed separately. Simrall v. Covington, 90 Ky., 444; 29 Am. St. Rep., 398; 9 L. R. A., 556; 14 S. W. Rep., 369.

Constitutional. An ordinance imposing an annual license tax on insurance companies having an office or doing business within a city is not in violation of that clause of the United States constitution which declares that, "no state shall pass any law impairing the obligation of contracts." Home Ins. Co. v. City Council of Augusta, 93 U. S., 116.

LICENSE TO REGULATE ONLY. The power given to the City of St. Louis to license insurance companies does not authorize the imposition of a tax for revenue. St. Louis v. Boatmen's Ins. & Trust. Co., 47 Mo., 150.

LICENSE FOR REVENUE SOLELY. Leavenworth v. Booth, 15 Kan., 627.

GROSS RECEIPTS. A foreign insurance company may be required to pay a certain percentage on the amount of its gross receipts for the privilege of doing business, and such payment is not a tax. Walker v. Springfield, 94 Ill., 364.

LICENSE AND TAX ON BUSINESS. Power to collect a revenue tax
both by way of license for conducting the business and a tax on
the income of foreign insurance
companies is not duplicate taxation. St. Joseph v. Ernst, 95 Mo.,
360; 8 S. W. Rep., 558.

IN ILLINOIS CITIES incorporated under the general law have no power to require foreign insurance companies to take out a license for the privilege of doing business. Chicago v. Phoenix Ins. Co., 126 Ill., 276; 18 N. E. Rep., 668 (affirming 26 Ill. App., 650).

IN NEBRASKA occupation tax may be imposed where it is uniform. German Amer. Fire Ins. Co. v. Minden, 51 Neb., 870; 71 N. W. Rep., 995; Templeton v. Tekamah, 32 Neb., 542; 49 N. W. Rep., 373; State v. Green, 27 Neb., 64; 42 N. W. Rep., 913. Insurance companies are not exempt from payment of a license tax on their occupation or business within the limits of the city. Columbus v. Hartford Ins. Co., 25 Neb., 83; 41 N. W. Rep., 140. A tax on the gross receipts of fire insurance companies for corporate purposes was held void. State v. Wheeler, 33 Neb., 563; 50 N. W. Rep., 770.

To Support Fire Department. The legislature of California having no power under the constitution to levy or impose a tax for local or municipal purposes cannot require of the agents of foreign insurance companies the payment of a certain per cent of the premium, and provide that the money

paid shall constitute a fireman's relief fund of the county or city in which the property insured is situated. San Francisco v. Insurance Co., 74 Cal., 113; 15 Pac. Rep., 380; 5 Am. St. Rep., 425.

A license fee of 2 per cent of the gross receipts of foreign insurance companies levied for the support of a city fire department is a privilege fee and may be levied in addition to the amount levied for the purpose of general taxation. Walker v. Springfield, 94 Ill., 364.

The power in the city to impose an occupation tax on fire insurance companies doing business within the city and to apply the proceeds of that tax to the maintenance of volunteer fire departments was sustained. German Amer. Fire Ins. Co. v. Minden, 51 Neb., 870; 71 N. W. Rep., 995.

CHAPTER XIV.

OF ORDINANCES RELATING TO MUNICIPAL POLICE POWERS.

AND HEREIN NUISANCES, PUBLIC HEALTH, SAFETY AND CONVENIENCE.

- 1. General nature, scope and exercise of police power.
- 2. Health and sanitary regulations-Nuisances.
- 3. Public safety—Streets—Buildings.
- 4. Offenses against public morals and decency.
- 5. Markets-Weights and measures.
 - 6. Miscellaneous regulations.

1. GENERAL NATURE. SCOPE AND EXERCISE OF POLICE POWER.

- of the police power.
 - 430. Same-Basis of police powe۳
- 431. Same-Extends to destruction of property.
- 432. Limitation of police power.
- 433. Exercise of police power by municipal corporations.
- 434. Same-Power under general welfare clause.

- 8 429. General nature and scope § 435. Exercise of police power within and without corporate limits.
 - 436. Municipal liability for failure to enact and enforce police regulations.
 - 437. Same subject—Exception— Nuisance.
 - 438. General requisites of valid police regulations.

2. HEALTH AND SANITARY REGULATIONS—NUISANCES.

- § 439. Health and sanitary regulations-Power to make and enforce.
 - 440. What constitutes a nuisance?
 - 441. Municipal power to declare and define nuisances.
 - 442. Same-Illustrative cases.
 - 443. Same-Doubt as to nuis-
 - 444. Power to abate nuisances.
 - 445. Contagious diseases, etc.-Quarantine.
 - 446. Burial of the dead-Cemeteries.
 - 447. Nuisances arising from trades, manufactures, etc.

- § 448. Slaughtering of animals-Slaughter houses.
 - 449. Dairies and cow stables.
 - 450. Livery stables.
 - 451. Hogs and hog pens.
 - 452. Dead animals, garbage, offal. etc.
 - 453. House dirt, rubbish, privy vaults, etc.
 - 454. Drains, sewers, ponds, stagnant water, pollution of water supply, etc.
 - 455. Wells.
 - 456. Emission of dense smoke as a public nuisance.
 - 457. Regulating sale of cigarettes.

3. PUBLIC SAFETY—STREETS—BUILDINGS.

- § 458. Regulating uses of streets, § 466. Regulating street parades. etc., and keeping same free from obstruction.
 - 459. Obstructions in public streets and highways as nuisance.
 - 460. Power to remove obstructions and nuisances.
 - 461. Awnings, signs and projections over streets.
 - 462. Regulation of lamp posts, poles, electric wires, underground conduits, gas pipes, etc.
 - 463. Billboards and structures for advertising.
 - 464. Riding and driving On streets.
 - 465. Regulation of bicycles and velocipedes.

- - 467. Distribution of handbills. circulars, advertising mat-
 - 468. Animals at large-Regulating driving of, through streets.
 - 469. Regulating dogs.
 - 470. Fire limits-Wooden buildings.
 - 471. Same—Building regulations -Permits.
 - 472. Gunpowder and explosives -Blasting.
 - 473. Power to regulate operation of locomotives, trains and cars in streets.
 - 474. Same-Enumeration of regulations.

4. OFFENCES AGAINST PUBLIC MORALS AND DECENCY.

- houses-Prostitution, etc.
 - 476. Gambling, gaming houses, lotteries, bowling alleys, billiard halls, etc.
- § 475. Lewd conduct Bawdy § 477. Regulating sale of intoxicating liquor.
 - 478. Public drunkenness.
 - 479. Observance of the Sabbath.
 - 480. Regulating hours of business.

5. MARKETS-WEIGHTS AND MEASURES.

- § 481. Markets Establishment § 483. Regulation of and regulation.
 - 482. Confining sales and purchases to public markets-Forbidding private markets.
- hucksters. hawkers, etc.
 - 484. Milk inspection and adulteration.
 - 485. Weights and measures.

MISCELLANEOUS REGULATIONS.

- § 486. Offenses affecting the public § 492. Pawnbrokers. order and peace.
 - 487. Same Disturbing the peace.
 - 488. Same—Carrying concealed weapons.
 - 489. Cruelty to animals.
 - 490. Vagrancy.
 - 491. Regulations of various occupations.

- - 493. Regulation of private property-Trespassing.
 - 494. Regulation of tenement houses, etc.
 - 495. Limiting day's work-Eight hour laws.
 - 496. Miscellaneous.

1. GENERAL NATURE, SCOPE AND EXERCISE OF POLICE POWER.

§ 429 General nature and scope of the police power. police power has been described as "that power under which everything necessary to the protection of the property of the citizen and the health and comfort of the public may be done." It is defined by Blackstone to be the power which concerns "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, to be decent, industrious and inoffensive in their respective stations." Chief Justice Shaw declares that, it is the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as the legislature shall judge to be for the good and welfare of the commonwealth and of the subjects of the same. He points out the distinction between this power and the right of eminent domain, which is the right of the government to appropriate private property when the public emergency requires it on condition of making proper compensation therefor. He affirms that it is much easier to perceive and realize the existence and source of this power than to mark its boundaries or prescribe limits to its existence.³ Upon it depend the security of social order, the life and health of the citizen, the comfort of and existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property.4 The extent of this power has never been defined with precision. Indeed, it seems to be practically impossible to do so because of the vast variety of condi-

and convenience of the community, which do not encroach upon the like power vested in congress by the federal constitution. Of that power, it may well be said that it is known when and where it begins; but not when and where it terminates. It is a power, in the exercise of which a man's property may be taken from him, where his liberty may be shackled, and his

¹ Harmon v. Chicago, 110 Ill., 400, 408.

^{2 4} Bl. Com., 162.

[&]quot;Com. v. Alger, 7 Cush. (Mass.), 53, 85; Com. v. Bearse, 132 Mass., 542, 546; 42 Am. Rep., 450.

⁴ POLICE POWER DESCRIBED. "It may be said to be the right of the state, or of a state functionary, to prescribe regulations for the good order, peace, protection, comfort

tions, and circumstances governing its application.⁵ As stated by the Supreme Court of the United States: "Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate." ⁶ The police power is sufficiently comprehensive to embrace new subjects as conditions demand.⁷

§ 430. Same—Basis of police power. The proposition cannot be denied that organized government has the inherent right to protect health, life and limb, individual liberty of action, private property and legitimate use thereof, and provide generally for the safety and welfare of its people. Not only does the right exist, but this obligation is imposed upon those clothed with the sovereign power. This duty is sacred and

person exposed to destruction, in cases of great public exigencies." Per Bermudez, C. J., in New Orleans Gas Light Co. v. Hart, 40 La. Ann., 474, 477; 4 So. Rep., 215; Bass v. State, 34 La. Ann., 494.

⁵ State v. Yopp, 97 N. C., 477, 479; 2 S. E. Rep., 458; 2 Am. St. Rep., 305.

⁶ Lottery case. Stone v. Mississippi, 101 U. S., 814.

The police power in its application to the sale of liquor. Kidd v. Pearson, 128 U. S., 1, following Mugler v. Kansas, 123 U. S., 623; Foster v. Kansas, 112 U. S., 201; Boston Beer Co. v. Massachusetts, 97 U. S., 25.

Slaughter house regulations. Butchers' Union Co. v. Crescent City, etc., Co., 111 U. S., 746.

Nuisance, Fertilizer Co. v. Hyde Park, 97 U. S., 659.

Gas regulations. New Orleans Gas Light Co. v. Louisiana Gas Light Co., 115 U. S., 650.

Warehouses; fixing charges for storage of grain therein. Munn v. Illinois, 94 U. S., 113.

Real estate broker; regulations concerning. Little Rock v. Barton, 33 Ark., 436.

Police power described. Stehmeyer v. Charleston, 53 S. C., 259; 31 S. E. Rep., 322; State v. Burgoyne, 7 Lea (75 Tenn.), 173; 40 Am. Rep., 60.

Statute requiring destruction of certain kinds of trees as nuisances. State v. Main, 69 Conn., 123; 37 Atl. Rep., 80; 61 Am. St. Rep., 30.

Statute regulating horse racing, held valid. State v. Roby, 142 Ind., 168; 41 N. E. Rep., 145; 51 Am. St. Rep., 174.

⁷ Harbison v. Knoxville Iron Co., 103 Tenn., 421; 53 S. W. Rep., 955, affirmed 183 U. S., 13.

Embraces all things in the state relating to internal affairs, as all laws establishing and enforcing duties of citizens to each other. Lacey v. Palmer, 93 Va., 159; 24 S. E. Rep., 930; 57 Am. St. Rep., 795.

Interstate and foreign commerce; local police power extends to subjects and objects of, sections 270, 271, supra.

cannot be evaded, shifted or bartered away without violating a public trust.8

Police regulations are based chiefly on the Latin maxims, salus populi suprema est lex—the welfare of the people is the first law—9 and sic utere two ut alienum non lædas—so use your own property as not to injure the rights of another. 10 "It has its foundation in that maxim of all well-ordered society which requires every one to use his own so as not to injure the equal

Quarantine laws. Secs. 272, 273, supra.

Harbor and wharf police regulation. Sec. 274, supra.

8 § 84, supra.

9 "Salus populi est suprema lex"
—The health of the people is the first law. 13 Coke, 139.

Salus populi suprema lex—That regard be had to the public welfare is the highest law. Bacon, Max., reg. 12; Deems v. Baltimore, 80 Md., 164, 173; 30 Atl. Rep., 648; 45 Am. St. Rep., 339.

"Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens and to the preservation of good order and the public They belong morals. emphatically to that class of objects which demand the application of the maxim, salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise." Per Mr. Justice Bradley, in Beer Co. v. Massachusetts, 97 U.S., 25, 33.

10 "As we understand it, the police power is the name given to that function of government by which is enforced the maxim, sic utere two ut alienum non lædas." In re Morgan, 26 Colo., 415, 423;

58 Pac. Rep., 1071; 77 Am. St. Rep., 269. This maxim "is that which lies at the foundation of the power." Cooley's Const. Lim. (6th Ed.), 208; Tiedeman, Lim. of Police Power, sec. 1.

"According to the maxim, sic utere two ut alienum non lædas, which being of universal application, it must of course be within the range of the legislative action to define the mode and manner in which every one may so use his own as not to injure others." Per Redfield, C. J., in Thorpe v. Rutland & Burlington R. R. Co., 27 Vt., 140, 153.

"It (the police power) is founded very largely in the maxim, sic utere tuo ut alienum non lædas. and also to some extent in that other maxim of public policy, salus populi suprema (est) lex, and it is of almost universal application in regulating the interests of society within the jurisdiction of the state. It is too well settled to admit of serious question that every person is subject to it in his person and property. And however absolute his right to and ownership of property may be, he holds it subject to the implied obligation that he will use it in such way as not to prevent others from having their property and enjoying the just use and benefit of it, and as will not destroy, abridge or injure the rights of the public." State v. Yopp, 97 N. C., 477, 479; 2 S. E. enjoyment of others having equal rights of property." ¹¹ Unwholesome trades, slaughter houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials and the burial of the dead may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors; and that private interests must be subservient to the general interests of the community. ¹²

Same-Extends to destruction of property. rights of property are held subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the constitution of the commonwealth, may think necessary for the prevention of injuries to the rights of others and the security of the public health. In the exercise of this power the legislature may not only provide that certain kinds of property (either absolute, or when held in such manner or under such circumstances as to be injurious, dangerous or noxious) may be seizéd and confiscated upon legal process after notice and hearing; but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner, as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration or the impending fall of the buildings themselves. throwing overboard decaying or infected food or abating other nuisances dangerous to health."13 Under the police power

Rep., 458; 2 Am. St. Rep., 305, per Merrimon, J.

¹¹ Slaughter House Cases, 16 Wall (U. S.), 36.

12 2 Kent's Com., 340.

The maxim, sic utere tuo ut alienum non lædas, applied in the following cases:

Illinois—Millett v. People, 117 Ill., 294; 7 N. E. Rep., 631.

Massachusetts—Austin v. Murray, 16 Pick. (Mass.), 121; Baker v. Boston, 12 Pick., 184.

New York—In re Jacobs, 98 N. Y., 98, 114; People v. Rosenberg, 67 Hun. (N. Y.), 52; 22 N. Y. Suppl., 56.

Pennsylvania — Godcharles v. Wigeman, 113 Pa. St., 431; 6 Atl. Rep., 354.

West Virginia—State v. Goodwill, 33 W. Va., 179, 185; 25 Am. St. Rep., 863; 10 S. E. Rep., 285; State v. Gilman, 33 W. Va., 146; 10 S. E. Rep., 283; State v. F. C. Coal & Coke Co., 33 W. Va., 188; 10 S. E. Rep., 288.

¹³ Per Gray, J., in Blair v. Forehand, 100 Mass., 136, 139, 140.

Property may be destroyed to prevent the spread of fire. Keller v. Corpus Christi, 50 Tex., 614; Conwell v. Emrie, 2 Ind., 35; Hale v. Lawrence, 21 N. J. L., 714; 47 property which constitutes a nuisance may be destroyed and diseased cattle ordered slaughtered.¹⁴ "The exercise of the police power by the destruction of property, which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value became depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law." ¹⁵

§ 432. Limitations of the police power. The legislature may determine the exigency, that is, the occasion for the exercise of the police power, but under our constitutional system, the judiciary determines what are the subjects and objects upon which the power is to be exercised and the reasonableness of that exercised. Both the federal and state constitutions protect life, individual liberty and private property from undue governmental encroachment, although arising by virtue of what is claimed to be within the police power. Thus laws, whatever may be the intent of the framers, which authorize the confiscation of private property for the mere protection of private

Am. Dec., 190; American Print Works v. Lawrence, 23 N. J. L., 9.

An ordinance of the City of Richmond, Va., directing the destruction of all liquor within the city and pledging the city for its payment, held *ultra vires*. The ordinance was passed on the eve of the evacuation of Richmond by the Confederate forces. Wallace v. Richmond, 94 Va., 204; 26 S. E. Rep., 586.

BAWDY HOUSE; house used for, cannot be destroyed. Welch v. Stowell, 2 Doug. (Mich.), 332.

14 Lawton v. Stelle, 152 U. S., 133.

ADULTERATED MILK offered for sale may be destroyed. Deems v. Baltimore, 80 Md., 164; 30 Atl. Rep., 648; 45 Am. St. Rep., 339; § 484, post.

DESTRUCTION OF INFECTED CLOTHING sanctioned. Boehm v. Baltimore, 61 Md., 259, 264; Train v. Boston Disinfecting Co., 144 Mass., 523; 11 N. E. Rep., 929; Newark &

O. H. C. Ry. Co. v. Hunt, 50 N. J. L., 308; 12 Atl. Rep., 697.

Nuisance. If use of property creates a nuisance the property may be destroyed. State v. Yopp, 97 N. C., 477; 2 S. E. Rep., 458; 2 Am. St. Rep., 305.

The property must be a nuisance in fact and so declared. Pieri v. Shieldsboro, 42 Miss., 493; Fields v. Stokley, 99 Pa. St., 306; 44 Am. Rep., 109; Miller v. Burch, 32 Tex., 208; 5 Am. Rep., 242.

Damaged Grain may be condemned and destroyed by the municipal authorities. Dunbar v. Augusta, 90 Ga., 390; 17 S. E. Rep., 907.

¹⁵ Per Mr. Justice Harlan, Mugler v. Kansas, 123 U. S., 623.

16 Colorado—In re Morgan, 26
 Colo., 415, 424; 58 Pac. Rep., 1071;
 77 Am. St. Rep., 269.

Illinois—Lake View v. Rose Hill Cemetery Co., 70 Ill., 191.

Michigan—Spry Lumber Co. v. Sault Savings Bank, 77 Mich., 199;

rights will be condemned as unconstitutional.¹⁷ So the legitimate exercise of the police power will not sustain undue interference with the conduct of a lawful business,¹⁸ or the deprivation of life, liberty or property without due process of law. But it is universally admitted that however broadly these constitutional principles may be expressed "there exists, ex necessitate rei, in every government, the power to impose restrictions upon individual life, liberty and property, which it is not within the meaning or intent of such provisions to prohibit or restrain. * * * So universal and long continued has been this construction of constitutional inhibitions against governmental deprivation of life, liberty and property of citizens that it may now be considered as written into every constitution." ¹⁹

§ 433. Exercise of the police power by municipal corporations. The police regulations of municipal corporations are usually enforced by ordinance. What police powers the local corporation may exercise and the manner in which they are to be enforced will depend upon its charter or legislative acts applicable, and the general policy of the state with respect thereto. Generally, cities may make and enforce within their

43 N. W. Rep., 778; People v. J. & M. P. R. Co., 9 Mich., 285, per Christiancy, J.

New York—People v. Gillson, 109 N. Y., 389; 17 N. E. Rep., 343.

Ohio—Palmer v. Tingle, 55 Ohio St., 423; 45 N. E. Rep., 313.

United States—Jones v. Great Southern, etc., Hotel Co., 86 Fed. Rep., 370.

Cooley Const. Lim. (6th Ed.), p. 208; Tiedeman Lim. Police Power sec. 3.

¹⁷ Colon v. Lisk, 153 N. Y., 188; 47 N. E. Rep., 302; 60 Am. St. Rep., 609.

18 As manufacture of cigars in tenement houses. In re Jacobs, 98 N. Y., 98, per Earl, J., fully treating the police power; or manufacture of oleomargarine. People v. Marx, 99 N. Y., 377; 2 N. E. Rep., 29, reversing 35 Hun. (N. Y.), 528. Contra. State v. Addington, 77 Mo., 110; 12 Mo. App., 214;

Powell v. Com., 114 Pa. St., 265; 7 Attl. Rep., 913, affirmed 127 U. S., 678.

Insurance business held to be a proper subject of police regulation. Com. v. Vrooman, 164 Pa. St., 306; 30 Atl. Rep., 217; 44 Am. St. Rep., 603.

¹⁹ State ex rel. Walker v. Judge, 39 La. Ann., 132; 1 So. Rep., 437, approved in State v. Schlemmer, 42 La. Ann., 1166, 1168; 8 So. Rep., 307.

"Every man holds his property subject to the maxim that he must so use it as not to injure his neighbor. Nothing in that amendment (14th U. S. Const.) has shorn the states of their police power to prohibit or regulate unwholesome trades and occupations. Nothing in the constitution of the United States or of this state secures to any man the right to maintain a nuisance to the discomfort and peril of the health of his

limits all such local police, sanitary and other regulations designed to promote the health, safety, comfort, convenience and welfare of the local community which are not in conflict with constitution or the general laws.20 Crowded urban populations require numerous police regulations which would be unreasonable in rural districts or sparsely populated territory. This difference was quickly recognized, and from the first establishment of local corporations, invested with civil government, the local community has been empowered to enact and enforce all sorts of such regulations which restrict more or less the liberty of the individual, his personal movements and the use of his property. These are absolutely essential to life in crowded centers. From the beginning their necessity has been sanctioned by the public authorities and they have been sustained generally by the courts.²¹ The police power primarily inheres in the state but if the state constitution does not forbid the legislature may delegate a part of such power to the municipal corporations of the state, either in express terms or by implication.22

§ 434. Same—Power under general welfare clause. Power "to ordain and publish such acts, laws and regulations, not inconsistent with the constitution and laws of the state as shall be needful to the good order of the city," authorizes the city to establish all suitable ordinances for administering the gov-

neighbor." Per Gantt, J., in St. Louis v. Fischer, 167 Mo., 654, 664; 67 S. W. Rep., 872. in sustaining dairy and cow stables ordinance regulations.

²⁰ Constitution, California, art. XI, sec. 11; Constitution, Washington, art. XI, sec. 11.

²¹ Carthage v. Frederick, 122 N. Y., 268; 25 N. E. Rep., 480; New York v. Dry Dock R. R. Co., 133 N. Y., 104; 28 Am. St. Rep., 609; 30 N. E. Rep., 563; Burckholter v. McConnellsville, 20 Ohio St., 308, 315; Trigally v. Memphis, 6 Coldw. (Tenn.), 382, 388; Boehm v. Baltimore, 61 Md., 259; State v. Hill, 126 N. C., 1139, 1147; 36 S. E. Rep., 326; 50 L. R. A., 473.

22 Colorado-Keilkopf v. Denver,

19 Colo., 325; 35 Pac. Rep., 535.

Georgia — Morris v. Columbus, 102 Ga., 792; 66 Am. St. Rep., 243; 30 S. E. Rep., 850; Cranston v. Augusta, 61 Ga., 572.

Illinois — McPherson v. Chebanse, 114 Ill., 46; 28 N. E. Rep., 454; 55 Am. Rep., 857; Harmon v. Chicago, 110 Ill., 400; 51 Am. Rep., 698; Roberts v. Ogle, 30 Ill., 459; 83 Am. Dec., 201.

Iowa—Des Moines Gas Co. v. Des Moines, 44 Iowa, 505; 24 Am. Rep., 756.

Indiana — Walker v. Jameson, 140 Ind., 591; 37 N. E. Rep., 402; 39 N. E. Rep., 869; Crawfordsville v. Braden, 130 Ind., 149; 28 N. E. Rep., 849; 30 Am. St. Rep., 214; Mt. Vernon First Nat. Bk. v. ernment of the city, the maintenance of peace and order, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits, and for the performance of the general duties required by law of municipal corporations.²³ Reasonable ordinances for these purposes are necessary, and they are generally sustained by the courts (as will clearly appear from the sections which follow), though passed by virtue of general charter power, or authority conferred by the general welfare clause.24

§ 435. Exercise of police powers within and without cor-The general rule is that the police powers of porate limits.

Sarlls, 129 Ind., 201; 28 N. E. Rep., 434; 28 Am. St. Rep., 185; Baumgartner v. Hasty, 100 Ind., 575; 50 Am. Rep., 830; Beiling v. Evansville, 144 Ind., 644; 42 N. E. Rep., 621; 35 L. R. A., 272.

Kentucky-McKee v. McKee, 8 B. Mon. (47 Ky.), 433; Com. v. Milton, 12 B. Mon. (51 Ky.), 212; 54 Am. Dec., 522.

Louisiana - Lamarque v. New Orleans, 1 McGloin (La.), 28.

Massachusetts-Com. v. Plaisted, 148 Mass., 375; 19 N. E. Rep., 224; 12 Am. St. Rep., 566; Bancroft v. Cambridge, 126 Mass., 438.

Michigan-People v. Hanrahan, 75 Mich., 611; 42 N. W. Rep., 1124; 4 L. R. A., 751.

Minnesota-St. Paul v. Colter, 12 Minn., 41; 90 Am. Dec., 278.

Missouri-Sanders v. Southern Electric R. R. Co., 147 Mo., 411, 427; 48 S. W. Rep., 855; Jackson v. K. C., Ft. S. & M. R. R. Co., 157 Mo., 621; 58 S. W. Rep., 32; State v. Cowan, 29 Mo., 330; State v. Gordon, 60 Mo., 383.

Nebraska-Chicago, etc., R. R. Co. v. State, 47 Neb., 549; 53 Am. St. Rep., 557; 66 N. W. Rep., 624.

New Hampshire-State v. Noyes, 30 N. H., 279.

North Carolina-Louisburg v. Harris, 52 N. C., 281.

South Carolina—Summerville v. Pressley, 33 S. C., 56; 11 S. E. Rep., the city may by ordinance prevent

545; 26 Am. St. Rep., 659; 8 L. R. A., 854.

Tennessee-Nashville v. Linck, 12 Lea (80 Tenn.), 499.

State may withdraw and rein-Pickles v. McLellan Dry vest. Dock, 38 La. Ann., 412; Harmon v. Chicago, 110 Ill., 400; 51 Am. Rep., 698.

As to powers possessed by municipal corporations and the method of their exercise, see chapter II.

As to municipal control of offenses against the state, see chapter XV.

23 Per Howard, J., in State v. Merrill, 37 Me., 329.

Oftentimes the power given by the general welfare clause is limited by other provisions of the charter. Mt. Pleasant v. Breeze, 11 Iowa, 399; Montgomery City Council v. Montgomery & W. Pl. R. Co., 31 Ala., 76.

24 Power under General Wel-FARE CLAUSE-ILLUSTRATIONS.

Cannot pass an ordinance in its nature prohibitive. Cosgrove v. Augusta, 103 Ga., 835; 31 S. E. Rep., 445; 68 Am. St. Rep., 149.

Venders of meat may be required to take out licenses under the general welfare clause. Kinsley v. Chicago, 124 III., 359; 16 N. E. Rep., 260.

Under the general welfare clause

a municipal corporation can be exercised only within its own territorial limits, and therefore, without special authorization, they can not be exercised outside of the municipal boundaries.²⁵ The right to exercise police power beyond the cor-

the feeding of cows on distillery slops and the vending of milk of cows so fed. Johnson v. Simonton, 43 Cal., 242.

Auctioneers may be required to obtain licenses. Goshen v. Kern, 63 Ind., 468.

Regulations under general welfare clause. Waters v. Leech, 3 Ark., 110; Buell v. State, 45 Ark., 336.

Indigent sick may be relieved; so the poor unable to work. The power declared to be inherent in every municipal corporation. Vionet v. First Municipality, 4 La. Ann., 42.

Under the general welfare clause St. Louis has power by ordinance to prohibit cruelty to dumb animals. St. Louis v. Schoenbusch, 95 Mo., 618; 8 S. W. Rep., 791.

May regulate billiard halls. Tarkio v. Cook, 120 Mo., 1; 25 S. W. Rep., 202.

May prohibit business on Sunday. St. Louis v. Cafferata, 24 Mo., 94.

May regulate laundries. Barbier v. Connolly, 113 U. S., 27; Soon Hing v. Crowley, 113 U. S., 703; Yick Wo v. Hopkins, 118 U. S., 356.

Vagrants. St. Louis v. Bentz, 11 Mo., 61.

Dramshops in parks. State ex rel. v. Schweickardt, 109 Mo., 496; 19 S. W. Rep., 47.

Abolish wells in streets. Ferrenbach v. Turner, 86 Mo., 416.

Ordinance imposing fine for carrying concealed weapons is valid. The "right" to carry, etc., is not

"protected by any constitutional guaranty." St. Louis v. Vert, 84 Mo., 204, 209.

So, ordinance prescribing removal by the mayor of an appointed officer as a penalty for misconduct in office is within the general welfare clause. State ex rel. Reid v. Walbridge, 119 Mo., 383, 393; 24 S. W. Rep., 457.

Rights recognized by the general law cannot be restrained by ordinance, without legislative grant, express or implied. Carey v. Washington, 5 Cranch. C. C., 13; 5 Fed. Cas. No. 2,404. See chapters VII and XV.

Unless authorized, ordinance cannot create offenses. Adams v. Albany, 29 Ga., 56; Owensboro v. Sparks, 99 Ky., 351; 36 S. W. Rep., 4.

Ordinances cannot interfere with private property. Mitchell v. Rockland, 45 Me., 496; sec. 39, supra.

Workhouse cannot be established by ordinance, without charter power. Ordinance of St. Paul establishing the House of Good Shepherd, held void. Farmer v. St. Paul, 65 Minn., 176; 67 N. W. Rep., 990; 33 L. R. A., 199. See sec. 57, supra.

General and Implied Powers of municipal corporations are fully treated in chapter II.

25 Strauss v. Pontiac, 40 Ill., 301;
 Ex parte Deana, 2 Cranch C. C.,
 125; 7 Fed. Cas., No. 3, 712.

Territorial operation of ordinances. Sec. 26, supra.

LAND. City possesses no control

porate limits must be derived by legislative grants which expressly or impliedly permits it.²⁶ It is not unusual to grant to cities the right to exercise police regulations beyond their limits.²⁷ Cities often are permitted to purchase, condemn and otherwise acquire, within and without their limits, all necessary lands for water works, gas works, electric lighting plants, hospitals, work houses, poor houses, asylums, pest houses, cemeteries, etc., and extend their police jurisdiction over such lands and property.²⁸ Cities are also often given the power to direct the location and regulate the management and construction of packing houses, rendering establishments, soap and bone factories, and the like, within their limits and to specified distance beyond, generally ranging from one to three miles. As one means of regulation, the power to license such establishments is sometimes conferred.²⁹

§ 436. Municipal liability for failure to enact and enforce police regulations. The liability of municipal corporations to

or rights over land outside city limits without special authorization. Duncan v. Lynchburg (Va., 1900), 34 S. E. Rep., 964; 48 L. R. A., 331; Coldwater v. Tucker, 36 Mich., 474, 477; 24 Am. Rep., 601; Denton v. Jackson, 2 Johns Ch. (N. Y.), 320, 336.

Held, under charter of Lynchburg, relating to right to purchase and hold and sell real estate, the city was not authorized to operate a rock quarry outside the city limits. Duncan v. Lynchburg (Va., 1900), 34 S. E. Rep., 964; 48 L. R. A., 331.

CEMETERIES. City has no power to prohibit establishment of cemeteries or burying grounds outside of the city limits, nor can it control them when so established. Begein v. Anderson, 28 Ind., 79.

Car Fares. Ordinance regulating fares to be collected beyond city limits held void. South Pasadena v. Los Angeles, etc., R. Co., 109 Cal., 315; 41 Pac. Rep., 1093. ²⁶ Coldwater v. Tucker, 36 Mich.,

474; 24 Am. Rep., 601, per Campbell, J.

²⁷ State *ex rel.* v. Franklin, 40 Kan., 410; 19 Pac. Rep., 801; R. S. of Mo., 1899, sec. 6169; Laws of Mo., 1901, p. 79.

Power, as to traffic beyond boundaries. *In re* East River Bridge Co., 75 Hun. (N. Y.), 119; 25 N. Y. Suppl., 145.

Improving highways outside limits, under legislative power. Hagood v. Hutton, 33 Mo., 244, 249.

28 State ex rel. v. Franklin, 40 Kan., 410; 19 Pac. Rep., 801.

²⁹ Chicago, P. & P. Co. v. Chicago, 88 Ill., 221; 30 Am. Rep., 545.

Police jurisdiction within one mile. Falmouth v. Watson, 5 Bush. (Ky.), 660.

Power to regulate hucksters and runners selling in market, living within one mile of corporate limits. Snell v. Belleville, 30 Up. Can. Q. B., 81.

LIQUOR SELLING. Legislature may confer jurisdiction upon a munici-

actions ex delicto is recognized.30 There seems to be no time when such corporations were wholly free from responsibility for torts by the common law.31 In considering liability for civil wrongs, it should be borne in mind constantly that municipal corporations are of two-fold character: The one as regards the state at large in so far as they are its agents in government; the other private in so far as they provide the local necessities and conveniences for their own citizens. In other words, a municipal corporation "possesses two kinds of powers, one governmental and public, and to the extent they are held and exercised, is clothed with sovereignty—the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes; the latter for private purposes. While in the exercise of the former the corporation is a municipal government, and while in the exercise of the latter it is a corporate legal individual."32 The rule is firmly established in our law that where the municipal corporation is performing a duty imposed upon it as the agent of the state in the exercise of strictly governmental functions, there is no liability to private action on account of injuries resulting from the wrongful acts or negligence of its officers or

pal corporation to regulate, prohibit and license the sale of malt or vinous liquors within two miles of the corporate limits, and, upon the courts and officers thereof, to enforce such regulations. State v. Shroeder, 51 Iowa, 197; 1 N. W. Rep., 431; Centerville v. Miller, 51 Iowa, 712; 2 N. W. Rep., 527; Toledo v. Edens, 59 Iowa, 352; 13 N. W. Rep., 313.

JURISDICTION OVER WHARVES. docks, and other artificial erec-Brooklyn, 19 Udall v. Johns (N. Y.), 175. Sometimes the whole of a navigable river and harbor, adjacent to the city, to actual low water mark on the opposite shores, as the same may be formed, from time to time, by docks, wharves and other permanent erections. Stryker v. New York, 19 Johns (N. Y.), 179.

30 Richmond v. Long, 17 Gratt. (Va.), 375.

³¹ Jones, Negligence of Mun. Corp., sec. 18, and authorities cited; Municipal Code of St. Louis, p. 394, sec. 110, *et seq*.

In Hill v. Boston, 122 Mass., 344, Gray, C. J., reviews the authorities and adopts the conclusion that at common law no private action would lie for injury inflicted on account of failure to repair a highway or bridge unless the right to such action was given by statute. 32 Per Foot, J., in Lloyd v. Mayor, etc., of N. Y., 5 N. Y., 369, 374; 55 Am. Dec., 347; Maxmilian v. New York, 62 N. Y., 160, 164; 20 Am. Rep., 468; Edgerly v. Concord, 62 N. H., 8; Springfield, etc., Ins. Co. v. Keeseville, 148 N. Y., 46; 30 L. R. A., 660; Caspary v. Portland, 19 Oreg., 496; 24 Pac. Rep., 1036.

agents thereunder, unless made liable by statute.³³ A distinction has been drawn between the performance or not of *quasi* judicial duties which are discretionary, and such as are ministerial which are mandatory.³⁴ As a general rule, a municipal corporation is not liable either for the non-exercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character.³⁵ Thus, it is not liable for failure to enact ordinances or when enacted to enforce

33 Louisiana — Rudolph v. New Orleans, 11 La. Ann., 242.

Maine—Mitchell v. Rockland, 41 Me., 363; 66 Am. Dec., 252.

Massachusetts—Hill v. Boston, 122 Mass., 344; Fisher v. Boston, 104 Mass., 87; Hafford v. New Bedford, 16 Gray (Mass.), 297.

Michigan—Webb v. Board, 116 Mich., 516; 72 Am. St. Rep., 541; 74 N. W. Rep., 734; Gilboy v. Detroit, 115 Mich., 121; 73 N. W. Rep., 128; Detroit v. Blackeby, 21 Mich., 84; 4 Am. Rep., 450; Larkin v. Saginaw County, 11 Mich., 88; 82 Am. Dec., 63; Leoni Tp. v. Taylor, 20 Mich., 148; O'Leary v. Board, 79 Mich., 281; 19 Am. St. Rep., 169; L. R. A., 170; 44 N. W. Rep., 608.

Missouri — Donahoe v. Kansas City, 136 Mo., 657, 664, et seq.; 38 S. W. Rep., 571; Carrington v. St. Louis, 89 Mo., 208; 58 Am. Rep., 108; 1 S. W. Rep., 240; Kiley v. Kansas City, 87 Mo., 103; Armstrong v. Brunswick, 79 Mo., 319, McKenna v. St. Louis, 6 Mo. App., 320.

New Hampshire—Eastman v. Meredith, 36 N. H., 284, 298; 72 Am. Dec., 302.

New York—Maxmilian v. New York, 62 N. Y., 160; 20 Am. Rep., 468.

Texas—Galveston v. Posnainsky, 62 Tex., 118.

West Virginia—Brown v. Guyandotte, 34 W. Va., 299; 12 S. E. Rep., 707; 11 L. R. A., 121; Mendel v.

Wheeling, 28 W. Va., 233; 57 Am. Rep., 664.

Negligent Management of Hospitals, etc., creates no liability.

Ogg v. Lansing, 35 Iowa, 495; 14 Am. Rep., 499; Barbour v. Ellsworth, 67 Me., 294; Brown v. Vinalhaven, 65 Me., 402; 20 Am. Rep., 709.

No liability for failure to disinfect a smallpox hospital. Nicholson v. Detroit (Mich., 1902), 88 N. W. Rep., 695, reviewing authorities.

Nor for unskilled treatment by physician. Sherbourne v. Yuba Co., 21 Cal., 113; 81 Am. Dec., 151. Removing negligently sick person, held to create a liability. Aaron v. Broiles, 64 Tex., 316; 53

No liability for negligence of servants and officers of hospital. Murtaugh v. St. Louis, 44 Mo., 479. 34 Judd v. Hartford, 72 Conn., 350; 44 Atl. Rep., 510.

Am. Rep., 764.

FOR DISTINCTION BETWEEN MANDATORY AND DISCRETIONARY POWERS, see sections 82 and 83, supra. 35 Moran v. Pullman, Palace Car Co., 134 Mo., 641; 56 Am. St. Rep., 543; 33 L. R. A., 755; 36 S. W. Rep., 659; Stewart v. Clinton, 79 Mo., 603, 611, 612; Imler v. Springfield, 55 Mo., 119, 125; Schattner v. Kansas City, 53 Mo., 162; Steines v. Franklin County, 48 Mo., 167; St. Louis v. Gurno, 12 Mo., 414; Taylor v. St. Louis, 14 Mo., 20;

them, or, enforce state laws within its jurisdiction,36 as, for example, an ordinance forbidding the unlawful use of the streets, as by coasting.37 (unless such use amounts to the maintenance of a public nuisance), 38 or, prohibiting swine or cattle from running at large,39 or, neglect to prevent the erection of wooden buildings within certain limits, in accordance with charter or ordinance provisions, 40 or, failure to exercise power to supply water and apparatus for extinguishing fires, 41 or, the power to enforce ordinances forbidding the use of fire works within the corporate limits, 42 or, an ordinance directing the city to remove obstructions in a navigable river.43 So there is no liability for failure of firemen to use proper efforts in preventing the spread of fire,44 or, according to some cases, for the negligent con-Woods v. Kansas City, 58 Mo. App., Iowa-Ball v. Woodbine, 272, 279.

36 Fowle v. Alexandria, 3 Peters (U. S.), 398: Collins v. Savannah, 77 Ga., 745; Forsyth v. Atlanta, 45 Ga., 152: Odell v. Schroeder, 58 Ill., 353; Wheeler v. Plymouth, 116 Ind., 158; 9 Am. St. Rep., 837; 18 N. E. Rep., 532. Compare New Orleans v. Peyroux, 6 Mart. (N. S. La.), 155; Arnold v. Stanford (Ky., 1902), 69 S. W. Rep., 726.

Duty imposed by statute. Baltimore v. Marriott, 9 Md., 160; Pittsburgh v. Grier, 22 Pa. St., 54.

37 Lafayette v. Timberlake, 88 Ind., 330; Faulkner v. Aurora, 85 Ind., 130; 44 Am. Rep., 1; Burford v. Grand Rapids, 53 Mich., 98; 18 N. W. Rep., 571; 51 Am. Rep., 105. 38 See next succeeding section.

39 Rivers v. Augusta, 65 Ga., 376; 38 Am. Rep., 787; Levy v. New York, 1 Sandf. (N. Y.), 465; Kelly v. Milwaukee, 18 Wis., 83.

40 Harman v. St. Louis, 137 Mo., 494; 38 S. W. Rep., 1102; Forsyth v. Atlanta, 45 Ga., 152; 12 Am. Rep., 576.

41 New York v. Workman, 35 U. S. App., 201.

42 Arizona—Fifield v. Phoenix (Ariz., 1894), 24 L. R. A., 430; 36 Pac, Rep., 916,

Iowa, 83; 47 Am. Rep., 805; 15 N. W. Rep., 846.

Massachusetts-Morrison v. Lawrence, 98 Mass., 219.

North Carolina-Hill v. Charlotte, 72 N. C., 55; Love v. Raleigh, 116 N. C., 296; 21 S. E. Rep., 503; 28 L. R. A., 192.

Pennsylvania-McDade v. Chester, 117 Pa. St., 414; 12 Atl. Rep., 421: 2 Am. St. Rep., 681; Norristown v. Fitzpatrick, 94 Pa. St., 121.

Ohio-Robinson v. Greenville, 42 Ohio St., 625, 630; 51 Am. Rep., 857.

West Virginia - Bartlett v. Clarksburg, 45 W. Va., 393; 31 S. E. Rep., 918; 43 L. R. A., 295.

Wisconsin-Aron v. Wausau, 98 Wis., 592; 74 N. W. Rep., 354; 40 L. R. A., 733.

No liability for failure to enforce ordinance as to storing inflammable oil. Roberts v. Cincinnati, 5 Ohio Dec., 361.

Courts will not control the exercise of discretionary powers. Carr v. Northern Liberties, 35 Pa. St., 324; 78 Am. Dec., 342.

43 Coonley v. Albany, 57 Hun. (N. Y.), 327.

44 New York v. Workman, 35 U. S. App., 201; Mendel v. Wheeling, 28 W. Va., 223.

struction, maintenance or use of appliances for the extinguishment of fire.⁴⁵ So, as a general rule, failure to enforce ordinance providing for the abatement of nuisances, creates no liability to private action.⁴⁶

§ 437. Same subject—Exception—Nuisances. The rule that, a municipal corporation is not liable for the non-exercise of its legislative powers or for the failure to enforce its ordinances, should be applied reasonably. If the corporation permits something to exist in its streets and public ways, by license or otherwise, which constitutes a nuisance and which may seriously interfere with a reasonable use of such ways by travelers in the ordinary modes, no good reason can be advanced to excuse municipal liability, in event of damage directly resulting from such nuisance. This would constitute a sound exception to the rule under consideration, which exception is recognized by the decisions. Thus in a New York case, it was held that a city is liable for injury to property by an explosion of fire works, constituting a dangerous public nuisance, when the display was made under a permit given by the mayor, acting under authority of an ordinance.47 Prior to this decision the same court held that the granting of a license, even though authorized by ordinance, to an individual, permitting him to keep wagons on the highway, and a person passing under one of them was damaged by its falling upon him because of the collision of the wagon in question with an ice wagon properly passing along the street, would render the city liable. The court found that the wagons in the street constituted a public nuisance maintained by the city, and that the city could not thus make use of its legislative powers to the damage of individuals.48 And where the municipal authorities suffer streets to

45 Massachusetts — Tainter v. Worcester, 123 Mass., 311; 25 Am. Rep., 90.

Missouri—McKenna v. St. Louis, 6 Mo. App., 320.

New Hampshire—Edgerly v. Concord, 62 N. H., 8.

New York—Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y., 46; 30 L. R. A., 660.

Wisconsin—Hayes v. Oshkosh, 33 Wis., 314; 14 Am. Rep., 760.

46 Davis v. Montgomery 51 Ala.,

139; 23 Am. Rep., 545; Butz v. Cavanaugh, 137 Mo., 503; 38 S. W. Rep., 1104; Kiley v. Kansas City, 87 Mo., 103; Armstrong v. Brunswick, 79 Mo., 319.

Rule applied in location of pest house. Arnold v. Stanford, 24 Ky. Law Rep., 626; 69 S. W. Rep., 726. ⁴⁷ Speir v. Brooklyn, 139 N. Y., 6; 34 N. E. Rep., 727; 21 L. R. A., 641; 36 Am. St. Rep., 664.

48 Cohen v. New York, 113 N. Y., 532; 21 N. E. Rep., 700; 10 Am. St.

become unsafe by reason of failure to enforce police regulations designed to keep them free from obstructions and nuisances and damage results by reason thereof, responsibility cannot be evaded on the ground that the omitted duty is legislative or governmental in character. Thus where a city by license authorizes a use to be made of a street which rendered it dangerous or unsafe for travelers, e. g., the exhibit of wild animals thereon, resulting in damage by reason of the team of a person properly using the street, taking fright, the city was held liable.49 While a city possesses the right to use any proper implement run by steam for the purpose of constructing or repairing its streets, and, in the absence of carelessness or negligence in its management, it is not liable for damages occasioned by a horse becoming frightened thereat,50 "an object in a public street calculated to frighten horses ordinarily gentle, and which causes an accident resulting in injury," has been held to render municipal corporations liable, "if they have been guilty of negligence in allowing it to remain for an unreasonable time. * * * But objects, outside the traveled way, and not near enough to the line of public travel to interfere with or incommode travelers, are not defects in the highway." 51

Rep., 506, approved in Speir v. Brooklyn, supra.

49 2 Dillon, Mun. Corp., sec. 1021, citing Little v. Madison, 42 Wis., 643; 24 Am. Rep., 435, where a city licensed the exhibition of bears in one of its principal streets, thus authorizing a dangerous obstruction and nuisance. See also the "Sacred Ox Case," Cole v. Newburyport, 129 Mass., 594; 23 Albany Law Journ., 3, where the city granted the right to erect a booth in one of its public squares for the use and exhibition of an The city was held not animal. liable.

50 Sparr v. St. Louis, 4 Mo. App., 572.

But in Stanley v. Davenport, 54 Iowa, 463; 2 N. W. Rep., 1064; 6 N. W. Rep., 706, in an action against a city to recover for personal injuries caused by the frightening of plaintiff's horse by a steam motor, used upon a street railway by permission of the city council, it was held that, in the absence of express statutory authority, a city has no power to authorize or permit the use of steam motors upon its streets, either upon ordinary railroads or street railways, and the grant of such authority or permission constitutes negligence which will render the city liable for damages caused thereby. The fact that the action of the city council in granting such right was without authority would not protect the city from liability. corporations being responsible for the acts of their officers and agents done within the apparent scope of their authority, and the streets of the city, under the control of the city council.

51 2 Dillon, Mun. Corp. (4th

rule is well illustrated and enforced in a Virginia case, where the charter of the particular city imposed the duty to keep the streets in good condition. Under ordinance, persons building or excavating on lots adjoining the street were allowed to deposit materials in that part of the street opposite their premises to the extent of one-half of the width of the street and under special license they might be authorized to occupy more than one-half of such street with such material. Where a person lawfully riding in the street at night was damaged by falling over a pile of sand in the street, not occupying more than one-half of its width, the city was held liable on the ground that it might not abrogate, nor dispense by ordinance, with the duties and liabilities imposed by charter;52 that (to quote the language of the court), "reason and public policy supplement the law in holding the city responsible for neglect or omission of due diligence in the discharge of their charter duties." 53 As we have seen, the city may lawfully permit the use of its streets for coasting,54 but it cannot do so if such use amounts to the maintenance of a public nuisance, the determination of which question is controlled by the surrounding circumstances. In a Michigan case a city had set apart a particular street for coasting, and one making proper use of the street was injured by a coasting sled running into him. The court found that the use of the street for coasting was not necessarily a nuisance, therefore, the city was held not liable. The court further found that the action of the council in setting aside the street for this use was within its discretionary and legislative powers, and however unwise it may have been exercised in the particular instance, the court should not interfere.55

The circumstances under which the municipal corporations will be held liable for nuisance generally will further appear from the cases in the note.⁵⁶

Ed.), sec. 1011, where many illustrative cases are cited in the notes.

- 52 Public powers cannot be surrendered or delegated. Sec. 84, surra.
- 53 Per Fauntleroy, J., in McCoull
 v. Manchester, 85 Va., 579, 587; 8
 S. E. Rep., 379.
 - 54 Section next preceding.
- 55 Burford v. Grand Rapids, 53Mfch., 98; 18 N. W. Rep., 571; 51Am. Rep., 105.

56 MUNICIPAL LIABILITY FOR NUISANCES EXISTS, WHEN.

Connecticut—Mootry v. Danbury, 45 Conn., 550; 29 Am. Rep., 703.

Illinois—Champaign v. Forrester, 29 Ill. App., 117.

Maryland—Baltimore v. Marriott, 9 Md., 160; 66 Am. Dec., 326. Michigan—Pennoyer v. Saginaw, 8 Mich., 534.

New Jersey-Hart v. Union

§ 438. General requisites of valid police regulations. The requisites of a valid ordinance, enumerated elsewhere,⁵⁷ apply to police ordinances. Likewise the rules elsewhere given for-

County, 57 N. J. L., 90; 29 Atl. Rep., 490.

New York—Jackson v. Rochester, 43 Hun. (N. Y.), 635; Hill v. New York, 139 N. Y., 495; 34 N. E. Rep., 1090; Bolton v. New Rochelle, 84 Hun. (N. Y.), 281; 32 N. Y. Suppl., 442.

North Carolina—Downs v. High Point, 115 N. C., 182; 20 S. E. Rep., 385.

Pennsylvania — Vanderslice v Philadelphia, 103 Pa. St., 102.

Texas—Ft. Worth v. Crawford, 74 Tex., 404; 15 Am. St. Rep., 840; 12 S. W. Rep., 52; San Antonio v. Mackey, 14 Tex. Civ. App., 210; 36 S. W. Rep., 760; Hillsboro v. Ivey, 1 Tex. Civ. App., 653; 20 S. W. Rep., 1012.

Wisconsin—Harper v. Milwaukee, 30 Wis., 365.

Pest House; municipal liability for location of, when. Henderson v. O'Haloran, 24 Ky. Law Rep., 995; 70 S. W. Rep., 662; Paducah v. Allen, 20 Ky. Law Rep., 1342; 49 S. W. Rep., 343; Clayton v. Henderson, 20 Ky. Law Rep., 87; 44 S. W. Rep., 667; Neblett v. Nashville, 12 Heisk. (Tenn.), 684.

NO MUNICIPAL LIABILITY FOR NUISANCE, WHEN.

Georgia—Atkinson v. Atlanta, 81 Ga., 625; 7 S. E. Rep., 692.

Indiana—Anderson v. East, 117 Ind., 126; 2 L. R. A., 712; 10 Am. St. Rep., 35; 19 N. E. Rep., 726.

Louisiana—Howe v. New Orleans, 12 La. Ann., 481.

Maine—Seele v. Deering, 79 Me., 343; 1 Am. St. Rep., 314; 10 Atl. Rep., 45.

Missouri—Armstrong v. Brunswick, 79 Mo., 319; Martinowsky v.

Hannibal, 35 Mo. App., 70; Van de Vere v. Kansas City, 107 Mo., 83; 28 Am. St. Rep., 396; 17 S. W. Rep., 695; Whitfield v. Carrollton, 50 Mo. App., 98.

Pennsylvania—McDade v. Chester, 117 Pa. St., 414; 2 Am. St. Rep., 681; 12 Atl. Rep., 421.

Tennessee—McCrowell v. Bristol, 5 Lea (73 Tenn.), 685.

Texas—Ft. Worth v. Crawford, 64 Tex., 202; 53 Am. Rep., 753.

Under legislative authority a municipal corporation may establish a smallpox hospital upon its own grounds, and if the hospital is properly located and conducted no action will lie for damages to the value of property in the neighborhood, for such act does not constitute a taking or damaging of private property for public use, within the meaning of the constitution. Frazer v. Chicago, 186 Ill., 480; 57 N. E. Rep., 1055. Compare L'Hote, etc., v. New Orleans, 177 U. S., 587; 20 Sup. Ct. Rep., 788.

CONTRA. "Where a city or other municipality erects and maintains a public institution, which, by reason of its nature, endangers the lives or health of the occupants of adjacent premises, as by subjecting them to contagious or infectious diseases, it is not only a nuisance, but it is such an invasion of the property rights of such adjacent holders as amounts both to an injury and a taking of property under the section of our con-For this the city must stitution. make compensation." Paducah v. Allen, 23 Ky. Law Rep., 701; 63 S. W. Rep., 981.

57 Section 14, supra,

bidding the delegation of power, legislative or otherwise,⁵⁸ discriminations as to persons or classes,⁵⁹ and oppressive and unreasonable regulations,⁶⁰ must be duly observed in the enactment and enforcement of police regulations. The police ordinance must prescribe a general and uniform rule and conditions for the regulations, to which all similarly situated may conform.⁶¹ But limitations are best determined by individual cases, and what courts have in fact sanctioned or condemned. General rules may serve as guides; but each case presents its own facts. Therefore, an effort has been made to present in text and note the rules as applied to the facts and circumstances of the particular case, with the reasoning of the court, when practicable.

2. HEALTH AND SANITARY REGULATIONS—NUISANCES.

§ 439. Health and sanitary regulations—Power to make and enforce. One of the chief purposes for the institution of municipal government is the conservation of the public health and safety. No more important obligation is confided to municipal corporations. The nature of the ordinances they shall adopt for this purpose is largely a matter within the discretion of the local authorities. Under the usual charter powers to preserve the public health, etc., ordinances designed to protect

58 Section 84, supra.

59 Sections 193 and 194, supra.

Discrimination against residents in favor of non-residents of certain class as to width of tires on vehicles, held bad. Regina v. Pipe, 1 Ont. Rep., 43.

60 Ch. VI, Of Reasonableness of Ordinances.

61 No Uniform Rule—Delegation.

Laundry. Yick Wo v. Hopkins, 118 U. S., 356; *In re* Quong Woo, 7 Sawyer (U. S. C. C.), 526; 13 Fed. Rep., 229.

Use of steam-whistles—Permission of mayor. Baltimore v. Radecke, 49 Md., 217.

Slaughter house—permission of council. Barthet v. New Orleans, 24 Fed. Rep., 563.

Dairies—permission of council. State v. Mahner, 43 La. Ann., 496; 9 So. Rep. 480.

Erection of buildings. Newton v. Belger, 143 Mass., 598; 10 N. E. Rep., 464.

Ordinances regulating the storing of petroleum, naphtha, benzine, etc., condemned because it did not provide a uniform rule. Richmond v. Dudley, 129 Ind., 112; 28 N. E. Rep., 312; 28 Am. St. Rep., 180; 13 L. R. A., 587.

Establishment of pounds and appoint pound keepers. Dillard v. Webb., 55 Ala., 468. Compare Batsel v. Blaine (Tex., 1901), 15 S. W. Rep., 283.

Tannery; granting of permit in uncontrolled discretion of board of health and council, held void. Plythe local community from infectious, contagious and pestilential diseases, from impure water, bad food, nuisances injurious to health and comfort, noxious odors and gases, unusual noises, etc., are usually liberally construed by the courts, and, unless clearly unreasonable and arbitrary, or demonstrably violative of some constitutional provision intended to protect the liberty of the individual or property rights, they will be sustained. Within the power to preserve the public health is the power to create boards of health with authority to appoint officers and subordinates for this purpose; 63 establish hospitals or asylums for the care of the sick or affleted; 64 promulgate reasonable

mouth v. Schultheis, 135 Ind., 339; 35 N. E. Rep., 12; 135 Ind., 701; 35 N. E. Rep., 14.

Street obstruction; power to remove may be delegated. New Orleans Gas Co. v. Hart, 40 La. Ann., 474; 4 So. Rep., 215; 8 Am. St. Rep., 544.

62 Louisiana—Kennedy v. Phelps, 10 La. Ann., 227; Tissot v. Great Southern T. & T. Co., 39 La. Ann., 996; 3 So. Rep., 261; Monroe v. Gerspach, 33 La. Ann., 1011.

Maryland—Baltimore v. Marriott, 9 Md., 160; 66 Am. Dec., 326; Harrison v. Baltimore,, 1 Gill (Md.), 264.

Massachusetts—Baker v. Boston, 12 Pick (Mass.), 184, 193; 22 Am. Dec., 421.

North Carolina—State v. Hill, 126 N. C., 1139, 1147; 36 S. E. Rep., 326; 50 L. R. A., 473, 475; State v. Summerfield, 107 N. C., 895; 12 S. E. Rep., 114; State v. Pendergrass, 106 N. C., 664; 10 S. E. Rep., 1002.

New York—In re Jacobs, 98 N. Y., 98; 50 Am. Rep., 636; In re Ryers, 72 N. Y., 1; Kelley v. New York, 6 Misc. (N. Y.), 516.

Ohio—State v. Capital City Dairy Co., 62 Ohio St., 350; 57 N. E. Rep., 62.

South Dakota—State v. Scougal, 3 S. D., 55; 51 N. W. Rep., 858; 44 Am. St. Rep., 756,

Virginia—Lacey v. Palmer, 93 Va., 159; 24 S. E. Rep., 930; 57 Am. St. Rep., 795.

United States — Northwestern Fertilizing Co. v. Hyde Park, 97 U. S., 659, 667.

INCIDENTAL POWER to enact sanitary ordinances exists. St. Paul v. Laidler, 2 Minn., 190; 72 Am. Dec., 89. Incidental powers broadly claimed in Crawfordsville v. Braden, 130 Ind., 149; 28 N. E. Rep., 849; 30 Am. St. Rep., 214, holding enumeration does not necessarily exclude other powers.

HEALTH AND SAFETY DISTINGUISHED. Distinction between ordinances to protect the health, and those designed to insure safety merely, as inspection of steam boilers, stated in State v. Robertson, 45 La. Ann., 954; 40 Am. St. Rep., 272; 13 So. Rep., 164.

63 Boehm v. Baltimore, 61 Md., 259.

Power of Boards of Health. Grace v. Newton, 135 Mass., 490; State v. Neidt (N. J. Eq., 1890), 19 Atl. Rep., 318; Philadelphia v. Provident Life, etc., Co., 132 Pa. St., 224; 18 Atl. Rep., 1114; Kennedy v. Philadelphia, 2 Pa. St., 366.

64 HOSPITALS. The city may regulate the establishment of hospitals and forbid the erection of private hospitals within the city. regulations respecting the practice of medicine, surgery and midwifery⁶⁵ (if charter power exists or the matter is not controlled by state statute, which is often the case);⁶⁶ forbid bringing within the limits insane persons and paupers;⁶⁷ prohibit the use of poison and adulteration in drugs, medicines, chemicals, etc.:⁶⁸ adulteration of milk, bread and other food products sold within the city; and, generally, to prevent and abate all public nuisances which are or may become detrimental to the public health.⁶⁹

§ 440. What constitutes a nuisance. Nuisance, nocumentum, or annoyance, signifies anything that works hurt, inconvenience or damage. A private nuisance is anything done to the hurt or annoyance of lands, tenements or hereditaments of another. A common or public nuisance affects the public. It is such an inconvenience or troublesome offense as annoys the whole community, in general, and not merely some particular person. A

Milne v. Davidson, 5 Martin (N. S. La.), 409; 16 Am. Dec., 189.

Hospitals are not nuisances. City cannot license under general police powers. Bessonies v. Indianapolis, 71 Ind., 189.

Hospitals, insane asylums, poor houses and dispensaries may be established. Municipal Code of St. Louis, p. 578.

These are sometimes eleemosynary institutions of the state, but often they are private and belong to the city. State *ex rel*. St. Louis v. Seibert, 123 Mo., 424, 429; 24 S. W. Rep., 750; 27 S. W. Rep., 624.

The business of maintaining private hospitals, asylums, etc., being lawful cannot be forbidden either directly or indirectly by restrictive and unreasonable regulations. Ex parte Whitwell, 98 Cal., 73; 32 Pac. Rep., 870; 35 Am. St. Rep., 152

65 Municipal Code of St. Louis, p. 576, sec. 719 et seq.

Vital statistics containing the births and deaths may be required to be made regularly by practicing physicians, etc. Mun. Code of St. Louis, 576, 715 et seq. Also mortuary records. Mun. Code of St. Louis, p. 593 et seq.

66 Practice of medicine is within the police power of the state. State v. Carey, 4 Wash., 424; 30 Pac. Rep., 729.

State statutes often regulate. 2 R. S. of Mo., 1899, sec. 8507; Laws of Mo., 1901, pages 207, 210.

67 Municipal Code of St. Louis, p. 601, sec. 868 et seq.

88 State v. Fourcade, 45 La. Ann.,
717; 13 So. Rep., 187; 40 Am. St.
Rep., 249; Milne v. Davidson, 5
Mart. La. (N. S.), 409; 16 Am.
Dec., 189.

69 Ferguson v. Selma, 43 Ala.,
398; Salem v. Eastern R. R. Co.,
98 Mass., 431; 96 Am. Dec., 650;
Armstrong v. Brunswick, 79 Mo.,
319, 321.

PESTHOUSE, as nuisance. Haag v. Vanderburgh Co. Comrs., 60 Ind., 54; 28 Am. Rep., 654.

Opium, regulating sale of. valid. Ex parte Hong Shen 98 Cal., 681; 33 Pac. Rep., 799; In re Ah Lung, 45 Fed. Rep., 684, private nuisance is a private wrong done to an individual and must be redressed by private action. Such wrongs fall under the head of torts. Common or public nuisances are denominated public wrongs, and are classified as crimes and misdemeanors, since the damage resulting therefrom is common to the whole community, in general, no one being able to assign his particular portion of it.⁷⁰ Generally speaking, anything which is detrimental to health or which threatens danger to persons or property within the city may be regarded and dealt with by the municipal authorities as a nuisance.⁷¹ But what annoyance or combination of annoyances will constitute a nuisance in a given instance will depend upon the circumstances

70 Nuisance means "annoyance," anything that works hurt, inconvenience or damage. Miller v. Burch, 32 Tex., 208; 5 Am. Rep., 242.

Public and Private Nuisance distinguished. State v. Luce, 9 Houst. (Del.), 396; 32 Atl. Rep., 1076; Burlington v. Stockwell, 5 Kan. App., 569; 47 Pac. Rep., 988; Seifried v. Hays, 81 Ky., 377; 50 Am. Rep., 167; King v. Morris, 18 N. J. Eq., 397; Warren v. Hunter, 1 Phila. (Pa.), 414.

Crime at common law to maintain public. Indianapolis v. Blythe, 2 Ind., 75.

71 Nuisance Described. "If it affects the rights of the community in general, and not merely of a few persons; if it damages or menaces all persons who come within the sphere of its operations, though it may vary in its effects on individuals, it amounts to a common or public nuisance." Commonwealth v. Miller, 139 Pa. St., 77; 21 Atl. Rep., 138; Westcott v. Middleton, 43 N. J. Eq., 478; 11 Atl. Rep., 490.

Blackstone defines a nuisance as anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. 3 Bl. Com., 215.

Mr. Justice Cooley describes an actionable nuisance to be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights. Cooley on Torts (2nd Ed.), 670, 671.

If the thing complained of does in fact operate injuriously upon the rights of the public, it is a common nuisance, irrespective of any motive or intent, wrongful or innocent, on the part of the person charged. Bonnell v. Smith, 53 Iowa, 281; 5 N. W. Rep., 128; South Royalton Bank v. Suffolk Bk., 27 Vt., 505; Seacord v. People, 121 Ill., 623; 13 N. E. Rep., 194.

"The fact being established, that the act or thing endangers the life, health or property of the public, or any considerable part of it, the offense is proved and there can be no justification." Parker and Worthington on Public Health and Safety, sec. 178.

Any use of property that corrupts the atmosphere with noxious and noisome smells, producing injury to property or health, or impairing the comfortable enjoyment of it as a dwelling, etc., is a nuisance. But the damage "must be real, not fanciful; not a mere nuisance to a person of fastidious

of each case as it arises.⁷² No particular kinds of annoyance are requisite to constitute a nuisance. The definitions or descriptions found in the text books and judicial decisions are neither exhaustive nor inclusive.⁷³ Some structures when located in close proximity to a family residence or other places of habitation, or when the filth therefrom is carried onto the premises of another, are necessarily nuisances.⁷⁴ But others which are not nuisances per se may, under certain conditions, become such, as brick kilns.⁷⁵

The law recognizes two kinds of public nuisances: 1. Wrongs or injuries which affect morality and decency. They are maleum in se and constitute nuisances in fact, irrespective of location and results. 2. All kinds of acts relating to the exercise of trades, occupations, etc., and the use of property which become public nuisances because of the location and surroundings.⁷⁶

§ 441. Municipal power to declare and define nuisances. Under general grant of power respecting nuisances the municipal corporation may declare a thing a nuisance which is one in fact,⁷⁷ but, without express charter power, the general rule is maintained that the local corporation cannot declare by

tastes and habits, but such sensible and real damages as a sensible person, if submitted to it, would find injurious to him." Wood on Nuisances, sec. 599, 600, adopted by Philips, P. J., in Beckley v. Skroh, 19 Mo. App., 75.

⁷² Read observations of Pollock, J., in Bamford v. Turnley, 113 Eng. C. L., 66, as to difficulty or impossibility of formulating a rule to cover all cases.

73 See Galbraith v. Olivet, 3 Pitts. (Pa.), 78; Huckenstine's Appeal, 70 Pa. St., 102; 10 Am. Rep., 669; Salvin v. North Brancepeth Coal Co., L. R., 9 Ch. App., 705; Campbell v. Seaman, 63 N. Y., 568.

⁷⁴ Kirchgraber v. Lloyd, 59 Mo. App., 59, 62.

75 Huckenstine's Appeal, 70 Pa.
 St., 102; 10 Am. Rep., 669.

When the facts are undisputed

or conceded the question of nuisance is solely one of law for the court. Kirchgraber v. Lloyd, 59 Mo. App., 59, 62. But where evidence is conflicting, or the thing is not a nuisance *per se*, the question is to be determined by the jury or triers of the fact. Kearney v. Farrell, 28 Conn., 317.

Ordinarily, the question of nuisance is one of fact. Yates v. Milwaukee, 10 Wall. (U. S.), 497; St. Louis v. Schnuckelberg, 7 Mo. App., 536.

76 Ex parte Foote, 70 Ark., 12;
65 S. W. Rep., 706; 91 Am. St. Rep.,
63.

77 Arkadelphia v. Clark, 52 Ark.,
23; 20 Am. St. Rep., 154; 11 S. W.
Rep., 957; Green v. Lake, 60 Miss.,
451; Nazworthy v. Sullivan, 55 Ill.
App., 48.

ordinance that a nuisance which is not so in fact.⁷⁸ Under this rule some decisions would appear to limit the inquiry as to what is a nuisance to those things which have been regarded so at

NUISANCES IN FACT.

Wreck dangerous to health. Lewis v. Dodge, 17 How. Pr. (N. Y.), 229.

Milldam. State v. Close, 35 Iowa, 570.

Power to declare what shall be a nuisance confers authority to declare by ordinance that the keeping of a stallion within one-half mile of the public square shall be a nuisance. Hoops v. Ipava, 55 Ill. App., 94.

The keeping of a jackass within the corporate limits may be declared to be a nuisance by ordinance and the offense punished. Ex parte Foote, 70 Ark., 12; 65 S. W. Rep., 706; 91 Am. St. Rep., 63; Farrell v. Cook, 16 Neb., 483; 20 N. W. Rep., 720; 49 Am. Rep., 721.

Under general power to prevent and remove nuisance, an ordinance is valid which forbids the exhibiting of a stud horse within the town limits. Nolin v. Mayor, etc., 4 Yerg. (12 Tenn.), 163, where it "Was this a nuisance is said: within the meaning of the act of incorporation? Keeping hogs in a market town has been so holden (Salk, 460); as are ale houses, gaming houses, brothels, booths and stages for rope-dancers, mountebanks and the like. 1 Hawkins' Pleas of the Crown C., 75, sec. 6. The exhibition of these in the streets would be clearly a nuisance; and we think as certainly showing and keeping a stud horse in the town is. The corporation law was warranted by the charter." Compare Ex parte Robinson, 30 Tex. App., 493; 17 S. W. Rep., 1057.

Under general power, ordinance

cannot declare the running of locomotives at a certain rate of speed a nuisance. State (The N. J. R. & T. Co.) v. Jersey City, 29 N. J. L., 170.

Ordinance cannot provide to punish the crime of nuisance by virtue alone of general charter powers. Knovxille v. C., B. & Q. R. R. Co., 83 Iowa, 636; 50 N. W. Rep., 61; 32 Am. St. Rep., 321, approving Nevada v. Hutchins, 59 Iowa, 506; 13 N. W. Rep. 634.

Fire engine house erected under authority of charter is not a nuisance per se. Van de Vere v. Kansas City, 107 Mo., 83; 17 S. W. Rep., 695.

Power to declare must be exercised by ordinance, affecting all property similarly circumstanced. American Fur. Co. v. Batesville, 139 Ind., 77; 38 N. E. Rep., 408.

Declaration under express charter power. Americus v. Mitchell, 79 Ga., 807; 5 S. E. Rep., 201.

Ordinance forbidding boys from getting on and off trains, unless passengers, held valid. Bearden v. Madison, 73 Ga., 184.

Private property; regulating. Chicago, B. & Q. R. R. Co. v. Haggerty, 67 Ill., 113.

Throwing cotton bales from upper floor, may be prohibited by penal ordinance. Charleston v. Elford, 1 McMull. (S. C.), 234.

78 United States—Yates v. Milwaukee, 10 Wall. (77 U. S.), 497; 19 L. Ed., 984; Hennessy v. St. Faul, 37 Fed. Rep., 565.

Arkansas—Ward v. Little Rock, 41 Ark., 526; 48 Am. Rep., 46.

Colorado—Denver v. Mullen, 7 Colo., 345; 3 Pac. Rep., 693.

Illinois - Harmison v. Lewis-

common law or have been declared such by statute.⁷⁹ Many decisions hold that where a city has power to determine what

town, 153 Ill., 313; 46 Am. St. Rep., 893; 38 N. E. Rep., 628; Des Plaines v. Poyer, 123 Ill., 348; 14 N. E. Rep., 677; 5 Am. St. Rep., 524; North Chicago City R. Co. v. Lake View, 105 Ill., 207; 44 Am. Rep., 788; Railroad v. Jacksonville, 67 Ill., 37, 40; Lake View v. Rose Hill Cemetery Co., 70 Ill., 191, 198; Chicago v. Laffin, 49 Ill., 172.

Indiana—Walker v. Jameson, 140 Ind., 591; 37 N. E. Rep., 402; 39 N. E. Rep., 869; 49 Am. St. Rep., 222; Evansville v. State, 118 Ind., 426, 447; 21 N. E. Rep., 267; Plymouth v. Schultheis, 135 Ind., 339; 35 N. E. Rep., 12; Evansville v. Miller, 146 Ind., 613; 45 N. E. Rep., 1054.

Iowa—Everett v. Council Bluffs, 46 Iowa, 66; Patterson v. Vail, 43 Iowa, 142; Bills v. Belknap, 36 Iowa, 583.

Michigan—In re Frazee, 63 Mich., 396; 30 N. W. Rep., 72; 6 Am. St. Rep., 310; Wreford v. People, 14 Mich., 41.

Minnesota—St. Paul v. Gilfillan, 36 Minn., 298; 31 N. W. Rep., 49.

Mississippi—Ex parte O'Leary, 65 Miss., 80; 3 So. Rep., 144; 7 Am. St. Rep., 640; Quintini v. Board, etc., 64 Miss., 483, 489, 491; 1 So. Rep., 625.

Missouri—St. Louis v. Heitzberg P. & P. Co., 141 Mo., 375; 42 S. W. Rep., 954; 64 Am. St. Rep., 516; 39 L. R. A., 551.

New Jersey—Hutton v. Camden, 39 N. J. L., 122, 130; State (N. J. R. & T. Co.) v. Jersey City, 29 N. J. Law, 170.

New York—In re Jacobs, 98 N. Y., 98; People v. Rosenberg, 138 N. Y., 410, 415, 416; 34 N. E. Rep.,

285; Coe v. Schultz, 47 Barb. (N. Y.), 64, 69.

North Carolina—State v. Taft, 118 N. C., 1190; 23 S. E. Rep., 970; 54 Am. St. Rep., 768.

Ohio—Cleveland v. Malm, 7 Ohio Dec., 124.

Oregon-Wygant v. McLauchlan (Oreg., 1901), 64 Pac. Rep., 867.

ILLUSTRATIONS.

Rule applied to ordinance forbidding burial of dead in city. Exparte Wygant, 39 Oreg., 429; 64 Pac. Rep., 867.

So power to pass by-laws and ordinances to abate and remove nuisances does not give power to enact legislation to prevent. Rochester v. Collins, 12 Barb. (N. Y.), 559.

An ordinance forbidding as a nuisance the fencing of a right of way of railroad, held void. Grossman v. Oakland, 30 Oregon, 478; 60 Am. St. Rep., 832; 36 L. R. A., 593; 41 Pac. Rep., 5.

79 St. Louis v. Heitzeberg P. & P. Co., 141 Mo., 375; 64 Am. St. Rep., 516; 39 L. R. A., 551; 42 S. W. Rep., 954; Everett v. Council Bluffs, 46 Iowa, 66; Bates v. District of Columbia, 1 MacArthur (8 D. C.), 433.

An ordinance declaration that any specified thing is a nuisance does not make it so in fact. Board, etc., v. Norman, 51 La. Ann., 736; 25 So. Rep., 401; Walker v. Jameson, 140 Ind., 591; 37 N. E. Rep., 402; 39 N. E. Rep., 869; 49 Am. St. Rep., 222; 28 L. R. A., 679; Evansville v. Miller, 146 Ind., 613; 45 N. E. Rep., 1054.

A declaration on the part of the city that a particular thing is a nuisance is not conclusive unless the thing declared against is a nuisance, per se. at common law,

constitutes a nuisance and it declares that a particular thing is a nuisance such determination is conclusive of the question.⁸⁰ And it has been held, and it is doubtless the true rule, that where the particular thing declared against is a nuisance per se the action of the city authorities is conclusive.⁸⁰

§ 442. **Same—Illustrative cases.** The general power to declare what constitutes a nuisance was held, in Louisiana, to be sufficient to support an ordinance of the City of New Orleans, forbidding smoking in street cars as a nuisance.⁸¹ Likewise under general power an ordinance forbidding the cultivation

Hisey v. Mexico., 61 Mo. App., 248, or has been declared such by statute. Allison v. Richmond, 51 Mo. App., 133.

Stationary steam engine. Baltimore v. Radecke, 49 Md., 217; 33 Am. Rep., 239; Rhodes v. Dunbar, 57 Pa. St., 274; 98 Am. Dec., 221.

80 Georgia-Green v. Mayor, etc., 6 Ga., 1.

Illinois—Goddard v. Jacksonville, 15 Ill., 588.

Louisiana—State v. Heidenhain, 42 La. Ann., 483; 7 So. Rep., 621.

Missouri—St. Louis v. Stern, 3 Mo. App., 48; St. Louis v. Schnuckelberg, 7 Mo. App., 536.

New York—Van Wormer v. Mayor, etc., 15 Wend. (N. Y.), 262.

Pennsylvania—Kennedy v. Board of Health, 2 Pa. St., 366; see Wistar v. Addicks, 9 Phila. (Pa.), 145.

South Carolina—Crosby v. Warren, 1 Rich. (S. C.), Law, 385; Kennedy v. Sowden, 1 McMullen (S. C.), 323.

Where thing is condemned as a nuisance investigation of fact of whether or not it is a nuisance is not required. Waters Pierce Oil Co. v. New Iberia, 47 La. Ann., 863: 17 So. Rep., 343.

80½ Harmison v. Lewistown, 153
 Ill., 313; 38 N. E. Rep., 628; 46
 Am. St. Rep., 893, affirming 46 Ill.

App., 164; Kansas City v. Neal, 49 Mo. App., 72; Kansas City v. Mc-Aleer, 31 Mo. App., 433; St. Louis v. Steele, 12 Mo. App., 570; St. Louis v. Stern, 3 Mo. App., 48, 55; People v. Rosenberg, 138 N. Y., 410; 34 N. E. Rep., 285.

Nuisance per se. Bleating of calves at slaughter house is. Bishop v. Banks, 33 Conn., 118; 87 Am. Dec., 197.

BOARDS OF HEALTH; power to declare and abate nuisances. Bates v. District of Columbia, 1 MacArthur (8 D. C.), 433; Baker v. Bohannan, 69 Iowa, 60; 28 N. W. Rep., 435; St. Louis v. Steele, 12 Mo. App., 570; Hamilton Tp. Board of Health v. Neidt (N. J. Ch., 1901), 19 Atl. Rep., 318; Rogers v. Barker, 31 Barb. (N. Y.), 447; People v. New York Board of Health, 33 Barb. (N. Y.), 344; Gregory v. New York, 40 N. Y., 273.

81 "Smoking in itself is not to be condemned for any reason of public policy. It is agreeable and pleasant, almost indispensable to those who have acquired the habit, but it is distasteful and offensive, and sometimes hurtful to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places. Smoking may be classed among

of rice within the corporate limits was sustained, in Georgia, as a proper police regulation.⁸² So power to declare what shall be a nuisance, is sufficient to support an ordinance declaring that swine running at large within the corporate limits is a nuisance.⁸³ Under like power, an ordinance declaring that the selling of spirituous liquor within the corporate limits is a nuisance was sustained.⁸⁴

The general rule of law is well established that the power of a municipality to declare what shall be deemed a nuisance is not so absolute as to be beyond the cognizance of the courts to determine whether it has been reasonably exercised in a given case or not.⁸⁵ Thus a partially burned building cannot be declared a public nuisance, irrespective of its actual condition as affecting private or public safety and health.⁸⁶ The enactment of an ordinance declaring a thing a nuisance under express

these of legislation by the municipal corporation." Per McEnery, J., in State v. Heidenhain, 42 La. Ann., 483, 486; 21 Am. St. Rep., 388; 7 So. Rep., 621.

SMOKING ON STREETS. An early statute of Massachusetts imposed a penalty on "any person who shall smoke or have in his possession any lighted pipe or cigar in any street, lane or passageway" in Boston. It was construed to apply to all open ways, used as such, although not legally established as public ways. Com. v. Thompson, 12 Met. (53 Mass.), 231.

82 In a proceeding under such an ordinance it is not necessary to show that the cultivation of rice is injurious to health, since the power to declare what is a nuisance was conferred by the charter. Green v. Savannah, 6 Ga., 1, relying on the principle of Martin v. Mott, 12 Wheat. (U. S.), 19. See Summerville v. Pressley, 33 S. C., 56; 26 Am. St. Rep., 659; 8 L. R. A., 854; 11 S. E. Rep., 545.

83 Roberts v. Ogle, 30 Ill., 459; Crosby v. Warren, 1 Rich. (S. C.) Law, 385; Kennedy v. Sowden, 1 McMullen (S. C.), 323.

84 Goddard v. Jackson, 15 Ill., 588; Block v. Jacksonville, 36 Ill., 301.

So Denver v. Mullen, 7 Colo., 345;
Pac. Rep., 693; Yates v. Milwaukee, 10 Wall. (77 U. S.), 497; 19 L.
Ed., 984; St. Louis v. Heitzeberg,
P. & P. Co., 141 Mo., 375; 64 Am.
St. Rep., 516; 39 L. R. A., 551; 42
S. W. Rep., 954; River Rendering
Co. v. Behr, 77 Mo., 91, 98.

80 Evansville v. Miller, 146 Ind.,613; 45 N. E. Rep., 1054; 38 L. R.A. 161.

BUILDING may be declared a nuisance, when. Nazworthy v. Sullivan, 55 Ill., App. 48.

Public Picnics and open air dances cannot be declared by ordinance to be nuisances. The nuisance must consist in the manner of conducting them which may be productive of annoyance and injury to the public and this is a question of fact and not of law. Des Plaines v. Poyer, 123 Ill., 348; 5 Am. St. Rep., 524; 14 N. E. Rep., 677, affirming 22 Ill. App., 574; 18 Ill. App., 225.

power to declare, prevent and abate nuisances, is prima facie reasonable and valid.⁸⁷ "Before a by-law can be set aside on this ground its unreasonableness must be shown demonstrably. There should be no equipoise or vacillation in the beam, the scale containing the proofs should instantly descend and hold the counter-proofs in steady suspension."

§ 443. Same—Doubt as to nuisance. "In doubtful cases," says the Supreme Court of Illinois, "where a thing may or may not be a nuisance, depending upon a variety of circumstances, requiring judgment or discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, will be conclusive of the question. There are many innoxious useful things which the municipal authorities of a town or city could not lawfully, under a general grant of power, like the one in question, declare a nuisance—such, for instance, as the exercise of certain trades and callings, as that of a physician, druggist and the like. In all such cases as these, courts, acting upon their own experience and knowledge of human affairs, would say, as matter of law, the exercise of these trades or callings, or things of like character, are not nuisances, and that any attempt to so declare them by the municipal authorities would be unwarranted abuse of their power. On the other hand, there are many things which courts, without proof, will, on the same principle, declare nuisances. Such, for instance, would be the digging of a pit, or the erection of a house, or other obstruction, in a public highway; and an ordinance passed by a town or city having, as

*7 Morse v. West Port, 110 Mo. 502; 19 S. W. Rep., 831. Hannibal v. M. & K. Tel. Co., 31 Mo. App., 23; Commonwealth v. Robertson, 5 Cush. (Mass.), 438; Fisher v. Harrisburg, 2 Grant (Pa.), 291.

An ordinance declaring that the running of a rock crushing machine on a block or square where there are three or more residences occupied is a nuisance is reasonable and constitutes such act a nuisance. Kansas City v. McAleer, 31 Mo. App., 433.

A clear case should be made out to authorize judicial interference. St. Louis v. Weber, 44 Mo., 547; St. Louis v. Griswold, 58 Mo., 175, 192; State v. Able, 65 Mo., 357; Plattsburg v. Riley, 42 Mo. App., 18; St. Louis v. Spiegel, 8 Mo. App., 478.

The legal presumption is in favor of the ordinance and the burden is upon the party who denies its validity. State v. Trenton, 53 N. J. L., 132; 20 Atl. Rep., 1076.

88 Paxson v. Sweet, 13 N. J. L., 196. in the present case, a general power over the subject, declaring such obstruction nuisances, would be valid on its face, and a conviction might properly be had under it, without any extrinsic proof to show the act complained of was in fact a nuisance. In all such cases it is sufficient to show the existence of the fact constituting the nuisance." Accordingly, in this case, it was held that the use of steam as motive power in operating trains along and over one of the public streets of the town, contrary to an ordinance, was per se a public nuisance.⁸⁹

§ 444. Power to abate nuisances. The power to abate nuisances is a portion of the police power necessarily vested in the corporate authorities. The right of summary abatement of public nuisances existed at common law, and this remedy has not been impaired by constitution, statute or decision. The public health, morals and safety are of paramount importance. Therefore, it cannot be contended that laws authorizing summary abatement of public nuisances deprive one of liberty or property without due process of law or trial by jury. It is wisely held that formal legal proceedings and trial by jury are neither necessary nor appropriate in cases of this character. Injunction has been recognized as a proper remedy to prevent

89 North Chicago City Ry. Co. v. Lake View, 105 Ill., 207, 212.

These views indorsed in Harmison v. Lewistown, 153 Ill., 313; 38 N. E. Rep., 628; 46 Am. St. Rep., 893; Walker v. Jameson, 140 Ind., 591; 37 N. E. Rep., 402; 39 N. E. Rep., 869; 49 Am. St. Rep., 222; 28 L. R. A., 679.

When legislature declares a thing a nuisance, see Lawton v. Steele, 119 N. Y., 226; 23 N. E. Rep., 878; Train v. Boston D. Co., 144 Mass., 523; 11 N. E. Rep., 929; Miller v. Horton, 152 Mass., 540; 26 N. E. Rep., 100; Philadelphia v. Trust Co., 132 Pa. St., 224; 18 Atl. Rep., 1114; Hannibal v. Richards, 82 Mo., 330; Parker and Worthington on Public Health and Safety, sec. 249.

The legislature may declare privy vaults in crowded localities

to be nuisances, require abatement thereof, without hearing, etc. Harrington v. Providence, 20 R. I., 233; 38 L. R. A., 305; 38 Atl. Rep. 1.

CERTAINTY OF ORDINANCE declaring a nuisance. Carthage v. Buckner, 4 Ill. App., 317; Ogdensburg v. Lyon, 7 Lans. (N. Y.), 215.

90 Kennedy v. Phelps, 10 La., Ann., 227.

⁹¹ Carthage v. Frederick, 122 N. Y., 268; 25 N. E. Rep., 480; Bumgartner v. Hasty, 100 Ind., 575.

⁹² King v. Davenport, 98 Ill., 305;
Carleton v. Rugg, 149 Mass., 550;
22 N. E. Rep., 55; St. Louis v.
Stern, 3 Mo. App., 48; Lawton v.
Steele, 119 N. Y., 226; 23 N. E.
Rep., 878; Soon King v. Crowley,
113 U. S., 703; Mugler v. Kansas,
123 U. S., 623; Article 30 Am. Law
Reg., 157.

Where the nuisance is physical

the erection or maintenance of a public nuisance.⁹³ In declaring and abating public nuisances, especially where it results necessarily in the destruction of private property, the public authorities must observe all legal provisions applicable.⁹⁴

§ 445. Contagious diseases, etc.—Quarantine. The introduction and spread of infectious and contagious diseases may be

and tangible, the legislature may direct its summary abatement by executive officers, without the intervention of judicial proceedings, in cases analogous to those where the remedy by summary abatement existed at common law. Lawton v. Steele, 119 N. Y., 226; 23 N. E. Rep., 878. Where a board of health declares a drain and sewer pipe to be a nuisance in an action for failure to abate the nuisance within a specified time, the adjudication of the board of health is prima facie evidence of the existence of the nuisance. Kirkwood v. Cairns, 44 Mo. App., 88; but not conclusive. St. Louis v. Schnuckelburg, 7 Mo. App., 536. The same rule applies to a dairy. St. Louis v. Schnuckelburg, 7 Mo. App., 536. Also to a carpet beating establishment. St. Louis v. Steele, 12 Mo. App., 570. But where the thing declared against is a nuisance, per se, that is, a nuisance at common law, the declaration was declared conclusive as applied to a hog pen in the city. St. Louis v. Stern, 3 Mo. App., 48. In an action for the failure to abate a nuisance caused by a private drain and sewer pipe which had been condemned as a nuisance by the board of health, the fact that the city has not established a public sewer does not constitute a defense. Kirkwood v. Cairns, 44 Mo. App., 88. The failure of a city is a mere non-exercise of a discretionary or legislative power, and it has been held that a person damaged by the failure of the city to exercise such a power has no right of action against it. McCormack v. Patchin, 53 Mo., 33; Saxton v. St. Joseph, 60 Mo., 153; Carroll v. St. Louis, 4 Mo. App., 191; Foster v. St. Louis, 4 Mo. App., 564; Steinmeyer v. St. Louis, 3 Mo. App., 256; Armstrong v. Brunswick, 79 Mo., 319, 321; Kiley v. Kansas City, 87 Mo., 103.

The city cannot exercise the power to abate nuisances where the owner fails and enforce a reimbursement of the expenses by a lien on the lot where the nuisance was created by the city itself. The city cannot create a nuisance on defendant's lot and then require him to abate it at his own charge. Hannibal v. Richards, 35 Mo. App., 15; Hannibal v. Richards, 82 Mo., 330, 336. As to when owner will be compelled to abate nuisance at his own cost, see Watkins v. Milwaukee, 55 Wis., 335; 13 N. W. Rep., 222.

93 Ottumwa v. Chinn, 75 Iowa, 405; 39 N. W. Rep., 670; Health Dept. v. Purdon, 99 N. Y., 237; 1 N. E. Rep., 687; Flint v. Russell, 5 Dillon, C. C., 151. Although equity will prevent the erection and maintenance of nuisances per se, the jurisdiction does not extend to enjoining structures which are merely prohibited by municipal regulation. Thus the erection of a frame building within the fire limits will not be enjoined. Rice v. Jefferson, 50 Mo. App., 464.

94 Frank v. Atlanta, 72 Ga., 428. Council may confer power upon prevented by reasonable police regulations.⁹⁵ For this purpose proper quarantine regulations may be established and enforced,⁹⁶ hospitals and pest houses maintained,⁹⁷ compulsory

its board of health to abate nuisances dangerous to public health by the destruction of property. Waters v. Townsend, 65 Ark., 613; 47 S. W. Rep., 1054.

Resolutions directing a named officer to abate a specified nuisance under a general ordinance is legal, and cannot be assimilated to an ordinance inflicting a penalty upon a particular individual. Kennedy v. Phelps, 10 La. Ann., 227.

When existence of nuisance to be ascertained. Joyce v. Woods, 78 Ky., 386.

Notice to property owner. Hutton v. Camden, 39 N. J. L., 122; 23 Am. Rep., 203; St. Louis v. Flynn, 128 Mo., 413, 422; 31 S. W. Rep., 17.

Only in extreme cases should one be deprived of the use of his property. Waggoner v. South Gorin, 88 Mo. App., 25.

The corporation is liable for the wanton destruction of property. Allison v. Richmond, 51 Mo. App., 133.

Decayed and dilapidated houses may be destroyed. Court will not enjoin. Ferguson v. Selma, 43 Ala., 398.

Compensation for destruction of property is sometimes required. Safford v. Detroit Board of Health, 110 Mich., 81; 67 N. W. Rep., 1094; 64 Am. St. Rep., 332; 33 L. R. A., 300.

When a business officially declared to be a nuisance has been discontinued, the owner of the property used in such business is not entitled to compensation therefor as for property taken for public use. St. Louis v. Stern, 3 Mo. App., 48.

95 § 272 Supra. Lorenzen v.

Woods, 1 McGloin (La.), 373; Leavey v. Preble, 64 Me., 120; State v. Speyer, 67 Vt., 502; 48 Am. St. Rep., 832; 32 Atl. Rep., 476.

Legislative act may authorize the killing of horses to prevent the spread of farcy or glanders. Newark & S. O. Horse Car Co. v. Hunt, 50 N. J. L., 308; 12 Atl. Rep., 697; Miller v. Horton, 152 Mass., 540; 10 L. R. A., 116; 26 N. E. Rep., 100.

66 Georgia—Morris v. Columbus, 102 Ga., 792; 30 S. E. Rep., 850; 66 Am. St. Rep., 243.

Louisiana—Rudolph v. New Orleans, 11 La. Ann., 242.

Maryland—Harrison v. Baltimore, 1 Gill (Md.), 264.

Massachusetts—Train v. Boston Disinfecting Co., 144 Mass., 523; 59 Am. Rep., 113; 11 N. E. Rep., 929.

Mississippi—Kosciusko v. Slomberg, 68 Miss., 469; 24 Am. St. Rep., 281; 12 L. R. A., 528; 9 So. Rep., 297.

Missouri—St. Louis v. Boffinger, 19 Mo., 1.

New York—In re Smith, 146 N. Y., 68; 40 N. E. Rep., 497; 28 L. R. A., 820, reversing 84 Hun. (N. Y.), 465; 32 N. Y. Supp., 317; People v. Roff, 3 Parker Cr. Rep. (N. Y.), 216; Young v. Flower, 3 Misc. Rep. (N. Y.), 34; 22 N. Y. Supp., 332.

New Jersey—Newark & S. O. H. C. Ry. Co. v. Hunt, 50 N. J. L., 308; 12 Atl. Rep., 697.

North Carolina—Salisbury v. Powe, 51 N. C., (6 Jones Law), 134.

See elaborate note to Hurst v. Warner, 102 Mich., 238; 26 L. R. A., 484; 60 N. W. Rep., 440.

Power of city in case of epidemic. Thomas v. Mason, 39 W.

vaccination required,⁹⁸ those afflicted with contagious diseases removed beyond the corporate limits,¹ private buildings taken possession of and controlled temporarily by the public officers,² and practicing physicians within the city compelled, under penalty, to report immediately each case of smallpox, typhoid fever, cholera, etc.³ So clothing infected may be destroyed,⁴ and second-hand clothing may be required to be delivered to the proper officers for disinfection and a reasonable price for such service paid.⁵ But it has been held that general power to prevent the introduction of infectious or contagious diseases, and power to preserve the health, etc., does not confer authority to make, by ordinance, it unlawful "to import,

Va., 526; 20 S. E. Rep., 580; 26 L. R. A., 727; Davock v. Moore, 105 Mich., 120; 63 N. W. Rep., 424; 28 L. R. A., 783.

Particular quarantine regulations held valid. Metcalf v. St. Louis, 11 Mo., 103. An ordinance of the City of St. Louis prescribing that boats coming from below Memphis having had on board at any time during the voyage more than a specified number of passengers should remain in quarantine not less than 48 hours nor more than 20 days, held valid. St. Louis v. McCoy, 18 Mo., 238.

In Alabama incorporated towns have no power to make and enforce quarantine regulations. New Decatur v. Berry, 90 Ala., 432; 7 So. Rep., 838.

97 Frazer v. Chicago, 186 III., 480; 57 N. E. Rep., 1055; 78 Am. St. Rep., 296; Staples v. Plymouth County, 62 Iowa, 364; 17 N. W. Rep., 569; Aull v. Lexington, 18 Mo., 401; Richmond v. Henrico County, 83 Va., 204; 2 S. E. Rep., 26.

Power "to remove or confine persons having infectious diseases," gives implied authority to hire buildings in which to confine such persons. Anderson v. O'Conner, 98 Ind., 168. 98 Morris v. Columbus, 102 Ga.,
792; 30 S. E. Rep., 850; 66 Am. St.
Rep., 243; Ft. Wayne v. Rosenthal,
75 Ind., 156; 39 Am. Rep., 127;
Hazen v. Strong, 2 Vt., 427.

Children not vaccinated, excluded from schools. *In re* Walter, 84 Hun. (N. Y.), 457; 32 N. Y. Suppl., 322.

¹ Aaron v. Broiles, 64 Tex., 316; 53 Am. Rep., 764; Haverty v. Bass, 66 Me., 71; compare Boom v. Utica, 2 Barb. (N. Y.), 104; Eddy v. Board of Health, 10 Phila. (Pa.), 94; 30 Leg. Int., 392.

2-Power of health officers to take possession and control private houses. Spring v. Hyde Park, 137 Mass., 554; 50 Am. Rep., 334; Brown v. Murdock, 140 Mass., 314; 3 N. E. Rep., 208.

Power of health officers to take possession and control of ships. Mitchell v. Rockland, 41 Me., 363; 66 Am. Dec., 252.

³ State v. Wordin, 56 Conn., 216; 14 Atl. Rep., 801; Kansas City v. Baird, 163 Mo., 196; 63 S. W. Rep., 495.

4 Rogers v. Barker, 31 Barb. (N. Y.), 447.

⁵ Rosenbaum v. Newbern, 118 N. C., 83; 24 S. E. Rep., 1; 32 L. R. A., 123. sell or otherwise deal in second-hand clothing or cast-off garments, blankets, bedding or bed clothes," with a proviso excepting the sale of such articles when not imported or which have not been used by persons having infectious diseases.

§ 446. Burial of the dead—Cemeteries. Ordinances regulating the burial of the dead and cemeteries fall strictly within the police power.⁷ But the exercise of this power must not be arbitrary. The necessity and reasonableness of such police control must appear. A cemetery within the corporate limits is not a nuisance per se. The fact of nuisance is to be determined by the particular location and surroundings.⁸ Where the burial of the dead within the city, or certain parts thereof, would be

"The operation of the ordinance reaches beyond the scope of necessary protection and prevention into the domain of restraint of trade. * * * Municipal authorities * * * cannot absolutely prohibit a lawful business not necessarily a nuisance but may abate it when so carried on as to constitute a nuisance." Greensboro v. Ehrenreich, 80 Ala., 579, 583; 60 Am. Rep., 130; 18 Am. & Eng. Corp. Cas., 483: State v. Taft, 118 N. E., 1190; 54 Am. St. Rep., 768; 23 S. E. Rep., 970; 32 L. R. A., 122. Lawful business cannot be suppressed. Weil v. Ricord, 24 N. J. Eq., 169.

7 Illinois—Concordia Cemetery Assn. v. Minnesota & N. W. R. Co., 121 Ill. 199; 12 N. E. Rep., 536.

Louisiana—New Orleans v. St. Louis Church, 11 La. Ann., 244.

Massachusetts—Woodlawn Cemetery Assn. v. Everett, 118 Mass., 354; Com. v. Fahey, 5 Cush (Mass.), 408; Com. v. Goodrich, 13 Allen (Mass.), 546.

New York—Brick Presbyterian Church v. New York, 5 Cow. (N. Y.), 538; New York v. Slack, 3 Wheeler Cr. Cas. (N. Y.), 237.

New Hampshire—Page v. Symonds, 63 N. H., 17; 56 Am. Rep., 481.

Pennsylvania—Craig v. Pittsburgh First Presby. Ch., 88 Pa. St. 42; 32 Am. Rep., 417.

Wisconsin—Pfleger v. Groth, 103 Wis., 104; 79 N. W. Rep., 19.

Control sometimes limited to those belonging to city. Bogert v. Indianapolis, 13 Ind., 134.

Cemeteries are owned by the municipal corporation in its proprietary capacity. Mount Hope Cemetery Assn. v. Boston, 158 Mass., 509; 33 N. E. Rep., 695.

City cannot regulate by ordinance cemeteries or burying grounds outside of corporate limits. Authority "to prohibit interments except in cemeteries heretofore established by law," held to be restricted to interments within the city limits. Begein v. Anderson, 28 Ind., 79.

CREMATORIES. Cities have power to establish. Right to establish and regulate by ordinance. Mun. Code of St. Louis, p. 600, sec, 863.

Concerning the transportation and disinterment of dead bodies. State laws relating to embalming. Law of Mo. 1895, pp. 174, 176.

s California—Los Angeles v. Hollywood Cemetery Assn., 124 Cal., 344; 71 Am. St. Rep., 75; 57 Pac. Rep., 153.

detrimental to the public health, or would constitute a nuisance, municipal power to forbid it exists by virtue of general authority to protect the health and prevent and abate nuisances. And it is clearly within the police power to discontinue cemeteries within the city, and compel the removal of dead bodies interred therein. As a reasonable police regulation, ordi-

Illinois—Lake View v. Rose Hill Cemetery Co., 70 Ill., 191; 22 Am. Rep., 71.

Indiana—Begein v. Anderson, 28 Ind., 79.

Louisiana—Musgrove v. Catholic Church, 10 La. Ann., 431.

Maine—Monk v. Packard, 71 Me., 309; 36 Am. Rep., 315; Barnes v. Hathorn, 54 Me., 124.

New York—Baptist Church v. Schenectady & T. Ry. Co., 5 Barb. (N. Y.), 79.

North Carolina—Ellison v. Washington Comrs., 5 Jones Eq. (N. C.), 57; 75 Am. Dec. 430.

Oregon—Ex parte Wygant, 39 Oregon, 429; 64 Pac. Rep., 867.

Texas—Dunn v. Austin, 77 Tex. 139; 11 S. W. Rep., 1125.

Forbidden within city limits.
People v. Pratt, 129 N. Y., 68; 29
N. E. Rep., 7; 30 N. E. Rep., 64;
60 Hun. (N. Y.), 582; 14 N. Y.
Suppl., 804.

Confined to certain districts. Newark v. Watson, 56 N. J. L., 667; 29 Atl. Rep., 487.

Prohibited in certain places. Scovill v. McMahon, 62 Conn., 378; 36 Am. St. Rep., 350; 26 Atl. Rep., 479.

Ordinances preventing the establishment of new burial grounds, sustained. Charleston v. Wentworth Street Baptist Ch., 4 Strobh. (S. C.), 306.

Ordinances restricting burials to three designated cemeteries in Austin, Tex. Court declined to declare it void on its face. Austin v. Austin City Cemetery Assn., 87

Tex., 330; 47 Am. St. Rep., 114; 28 S. W. Rep., 528.

Power to make by-laws for regulating the interment of the dead authorizes a by-law forbidding interment altogether in a particular cemetery, notwithstanding it destroys the private property of the owners of burial places therein. Slattery v. Naylor, 13 App. Cas., 446; 59 L. T. (N. S.), 41; 57 L. J. P. C., 73; 36 W. R., 897.

General power, held insufficient to support an ordinance declaring generally that burials in any part of the city shall constitute a nuisance. Ex parte Wygant, 39 Oregon, 429; 64 Pac. Rep., 867, explaining Portland v. Terwilliger, 16 Oregon, 465; 19 Pac. Rep., 90, and approving Grossman v. Oakland, 30 Oregon, 478; 60 Am. St. Rep., 832; 36 L. R. A., 593; 41 Pac. Rep., 5.

Injunction to restrain enforcement of ordinance regulating cemetery, denied. St. Peters Episcopal Ch. v. Washington, 109 N. C., 21; 13 S. E. Rep., 700.

Injunction granted. Los Angeles County v. Hollywood Cemetery Assn., 124 Cal., 344; 71 Am. St. Rep., 75; 57 Pac. Rep., 153; Austin v. Austin City Cemetery Assn., 87 Tex., 330; 47 Am. St. Rep., 114; 28 S. W. Rep., 528. Compare Lowe v. Prospect Hill Cemetery Assn., 58 Neb., 94; 46 L. R. A., 237; 78 N. W. Rep., 488.

10 Campbell v. Kansas City, 102
 Mo., 326; 13 S. W. Rep., 897; 10
 L. R. A., 593.

11 Humphrey v. Front Street M.

nances may require permits for the burial of the dead within the city.¹²

§ 447. Nuisances arising from trades, manufactures, etc. While residents of cities must submit to some annoyance and inconvenience arising from the various trades and manufactures carried on therein, ¹³ municipal jurisdiction to regulate and prevent them from becoming public nuisances, and if they become such, to abate them, is everywhere enforced, as will appear from the cases in the notes and the sections which follow. ¹⁴ Things offensive to the sense of smell constitute nui-E. Church, 109 N. C., 132; 13·S. E. would not support an ordinance Rep., 793. *In re* Wong Yaug Quy, forbidding the bringing into or 6 Sawy. (U. S.), 442.

The legislature has the right to authorize a municipality to remove the remains of the dead from the cemeteries. Craig v. First Presb. Church, 88 Pa. St., 42; 32 Am. Rep., 417; Kincaid's Appeal, 66 Pa. St., 411.

"The right of the legislature to authorize the removal of the dead from cemeteries is well settled. So it may delegate such power to municipalities. It is a police power necessary to the public health and comfort." Coats v. New York City, 7 Cow. (N. Y.), 585. See note to Raynor v. Nugent, 1 Am. & Eng. Corp. Cas., 271.

If it can be clearly proven that a cemetery is so situated that the burial of the dead there will endanger either life or health by corrupting the surrounding atmosphere, or the waters or wells or springs, a court of equity will grant injunction to remove the same. Lake View v. Letz, 44 Ill., 81; New Orleans v. Church of St. Louis, 11 La. Ann., 244; Barnes v. Hawthorn, 54 Me., 124.

¹² Graves v. Bloomington, 17 Ill. App., 476.

In an early Massachusetts case it was held that power to appoint and locate places of burial, etc., would not support an ordinance forbidding the bringing into or burial of any dead body within the town, without written consent of a majority of the selectmen, as the ordinance was not a regulation but a prohibition. Austin v. Murray, 16 Pick. (33 Mass.), 121.

13 Commonwealth v. Miller, 139
Pa. St., 77, 94; 21 Atl. Rep., 138;
Hyatt v. Myers, 73 N. C., 237;
Green v. Lake, 54 Miss., 540, 545;
Powell v. Bentley & G. Furniture
Co., 34 W. Va., 804, 810, 811; Van
De Vere v. Kansas City, 107 Mo.,
83; 17 S. W. Rep., 695; Gibson v.
Donk, 7 Mo. App., 37.

14 California—Ex parte Whitwell, 98 Cal., 73; 32 Pac. Rep., 870; 19 L. R. A., 727.

Connecticut—Raymond v. Fish, 51 Conn., 80; 50 Am. Rep., 3.

Illinois—Chicago v. Rumpff, 45 Ill., 90; 92 Am. Dec. 196; Lake View v. Letz, 44 Ill., 81.

Louisiana—New Orleans v. Lambert, 14 La. Ann., 247.

Kentucky—Ashbrook v. Com., 1
Bush (Ky.), 139; 89 Am. Dec., 616.

Massachusetts—Taunton v. Taylor, 116 Mass., 254; Com. v. Kidder, 107 Mass., 188; Belcher v.
Farrar, 8 Allen (Mass.), 325; Com. v. Rumford Chemical Works, 16
Gray (Mass.), 231.

Michigan—People v. Detroit White Lead Works, 82 Mich., 471; sances at common law,15 and they may be forbidden, under

46 N. W. Rep., 735; 9 L. R. A., 722. If the ordinance operates in restraint of trade power to pass it must be undoubted. St. Paul v. Traeger, 25 Minn., 248; 33 Am. Rep., 462; Dunham v. Rochester, 5 Cow. (N. Y.), 462.

Regulations can only relate to public health, morals and order. Muhlenbrinck v. Long Branch Comrs., 42 N. J. L., 364; 36 Am. Rep., 518.

BRICK KILNS; establishment of, may be regulated by ordinance. State ex rel. v. St. Louis Board of Health, 16 Mo. App., 8. When a nuisance. Kirchgraber v. Lloyd, 59 Mo. App., 59; Huckenstine's Appeal, 70 Pa. St., 102, 106; 10 Am. Rep., 669. Ordinance forbidding erection and use, without a license. Ward v. Washington, 4 Cranch C. C., 232; 29 Fed. Cas., No. 17,163.

QUARRY. An ordinance forbidding the working of stone quarries within 300 feet of a residence, without the written consent of the occupant, is neither unreasonable nor unconstitutional. St. Louis v. Frein, 9 Mo. App., 590.

MANUFACTURE OF OILS. Winthrop v. Farrar, 11 Allen (Mass.), 398.

DISTILLERY. Smith v. McConathy, 11 Mo., 517.

FERTILIZERS, etc. State v. Luce, 9 Houst. (Del.), 396; Athens v. Georgia R. R. Co., 72 Ga., 800; Czarniecki v. Ballman (Pa.), 10 Cent. Rep., 96; Garrett v. State, 49 N. J. L., 94, 103; 7 Atl. Rep., 29; 60 Am. Rep., 592; Manhattan Mfg. & F. Co. v. Van Keuren, 23 N. J. Eq., 251; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S., 659.

LIME KILNS, not being nuisances per se, cannot be declared such by ordinance. State v. Mott. 61 Md.,

297; 48 Am. Rep., 105; Slight v. Gutzlaff, 35 Wis., 675; 17 Am. Rep., 476. When a nuisance. Reynolds v. Schultz, 34 How. Pr. (N. Y.), 147.

STEAM WHISTLE. Whitcomb v. Springfield, 2 Ohio Cir. Dec., 138.

CULTIVATION OF RICE. An ordinance forbidding, and providing for the removal and destruction of growing crops of rice within the corporate limits, held valid. Green v. Savannah, 6 Ga., 1. Ordinance prohibiting the cultivation of rice, and of gardens of more than one-eighth of an acre by any one family, sustained. Summerville v. Pressley, 33 S. C., 56; 26 Am. St. Rep., 659; 8 L. R. A., 854; 11 S. E. Rep., 545.

TALLOW CHANDLER shop. Zylstra v. Charleston, 1 Bay (S. C.), 382. FISH-FRYING. Bramtree Board of Health v. Boyton, 52 L. T. (N. S.), 99; 48 J. P., 582.

HIDE CURING establishment. May v. People, 1 Colo. App., 157; 27 Pac. Rep., 1010; State (Marshall) v. Cadwalader, 36 N. J. L., 283; Baugh v. Sheriff, 7 Phila. (Pa.), 82; Weil v. Ricord, 24 N. J. Eq., 169; Kennedy v. Phelps, 10 La. Ann., 227; Lippman v. South Bend, 84 Ind., 276.

SOAP FACTORY. First Municipality v. Blineau, 3 La. Ann., 688.

ROCK-CRUSHING machine. Kansas City v. McAleer, 31 Mo. App., 433.

BEE RAISING. Arkadelphia v. Clark, 52 Ark., 23; 20 Am. St. Rep., 154; 11 S. W. Rep., 957.

MERRY-GO-ROUND. Davis v. Davis, 40 W. Va., 464; 21 S. E. Rep., 906.

15 Hackney v. State, 8 Ind., 494; State v. Boll, 59 Mo., 321.

Gas. People v. New York Gaslight Co., 64 Barb (N. Y.), 55;

penalty, by ordinance,¹⁶ as unwholesome smells arising from the burning of garbage,¹⁷ odors and gas from fat-rendering establishments,¹⁸ or from the manufacture of superphosphate of lime.¹⁹

§ 448. **Slaughtering of animals—Slaughter houses.** The regulation of the slaughtering of animals and slaughter houses within the corporate limits is within the jurisdiction of the municipal police power.²⁰ Charter power "to regulate butchers and the place and manner of selling meat," gives implied power

Varnish. Rex v. Neil, 2 Car. & P., 483.

16 Com. v. Patch, 97 Mass., 221. 17 Kobbe v. New Brighton, 20

Misc. (N. Y.), 477.

18 Weil v. Schultz, 33 How. Pr. (N. Y.), 7; People v. Rosenberg, 138 N. Y., 410; 34 N. E. Rep., 285; State v. Lederer, 52 N. J., Eq., 675; 29 Atl. Rep., 444; State v. Neidt (N. J. 1901); 19 Atl. Rep., 318; Grand Rapids v. Weiden, 97 Mich., 82; 56 N. W. Rep., 233; Seacord v. People, 121 Ill., 623; 13 N. E. Rep., 194; Peck v. Elder, 3 Sandf. (N. 1.), 126; Winslow v. Bloomington, 24 Ill. App., 647; Allen v. State, 34 Tex., 230.

¹⁹ Coe v. Schultz, 47 Barb. (N. Y.), 64.

²⁰ California—Ex parte Shrader, 33 Cal., 279.

Illinois—Tugman v. Chicago, 78 Ill., 405.

Louisiana—Darcantel v. People's Slaughterhouse & R. Co., 44 La. Ann., 632; 11 So. Rep., 239.

Massachusetts—Sawyer v. State Board of Health, 125 Mass., 182.

Michigan—Wreford v. People, 14 Mich., 41.

Wisconsin—Milwaukee v. Gross, 21 Wis., 241; 91 Am. Dec., 472.

United States—Slaughter house cases, 16 Wall. (U. S.), 36; Butchers Union Slaughter house, etc. Co., v. Crescent City Live Stock, etc.

Co., 111 U. S., 746; 4 Sup. Ct. Rep., 652; 28 L. Ed., 585.

Monopoly. In regulating slaughter houses, city cannot create a monopoly. Chicago v. Rumpff, 45 Ill., 90; 92 Am. Dec., 196.

ESTABLISHMENT BY CITY. Establishment and maintenance of slaughter house by city, by appropriation of public funds, denied under grant of power to regulate or prohibit slaughter house within the corporate limits. Huesing v. Rock Island, 128 Ill., 465; 15 Am. St. Rep., 129; 21 N. E. Rep., 558, reversing 25 Ill. App., 600. Under ample charter power city may establish and maintain, and forbid slaughtering at other places within the city. Milwaukee v. Gross, 21 Wis., 241; 91 Am. Dec., 472.

APPROVAL OF HEALTH BOARD OF ORDINANCE. Under charter provision requiring that ordinances designating places for the slaughtering of animals shall obtain the approval of the board of health, the board has no power to amend, but must approve or disapprove. Darcantel v. People's Slaughterhouse & R. Co., 44 La. Ann., 632; 11 So. Rep., 239.

ONE ANIMAL. Ordinance, held not to apply to the case of the killing and dressing of a single animal. St. Paul v. Smith, 25 Minn., 372.

DELEGATION OF POWER. An ordi-

to regulate the killing and bleeding of animals.21 So power to protect the public health, to establish, control and regulate slaughter houses and to regulate the sale of fresh meat within the corporation, authorizes an ordinance forbidding the slaughtering of animals to be used for food within the corporate limits unless slaughtered in a house or pen constructed in accordance with specifications provided in such ordinance. The fact that the operation of the ordinance is not, by its terms, suspended until such building as is therein described can be constructed is immaterial.22 Under the police power the city has the unquestioned right to restrict the slaughtering of animals to designated districts or localities. These districts may be changed from time to time, as where the slaughter houses established become nuisances to the surrounding neighborhood. But, of course, such discretion must be cautiously exercised, for it is not an arbitrary power.²³ Thus under power to regulate the erection, use and continuance of slaughter houses, the city may, by ordinance, prohibit the slaughtering of animals within certain specified portions of the city.24 Power to provide for the exclusion of slaughter houses from the corporation, authorizes an ordinance forbidding the further use of such establishments

nance forbidding operation of slaughter house within 300 feet of dwelling house, without the written consent of the occupant, held invalid as attempting to substitute for the sanction of a law the written consent of one or more individuals. St. Louis v. Howard, 119 Mo., 41; 24 S. W. Rep., 770; 41 Am. St. Rep., 630, following St. Louis v. Russell, 116 Mo., 248; 22 S. W. Rep., 470; 20 L. R. A., 721.

"OPENING A SLAUGHTER HOUSE"; what is. St. Louis v. Krentz, 12 Mo., App., 591.

²¹ Brooklyn v. Cleves, Hill & Denio Supp. (N. Y.), 231.

²² Maxim salus populi suprema est lex applied. Boyd v. Montgomery, 117 Ala., 677; 23 So. Rep., 663.

²³ Villavasco v. Barthel, 39 La. Ann., 247; 1 So. Rep., 599.

24 "To regulate implies a power

of restriction and restraint, and is applied in the charter not merely to the 'use' of slaughter houses which would relate to the manner of conducting the business, but also to their 'erection' on the one hand and their 'continuance' on the other; so that their 'erection' in the first instance, and then the mode and manner of their 'use' after they are built, and lastly their 'continuance,' are placed under the regulating power of the municipal authority. It would be a very narrow and technical construction to say that a power to regulate the erection of a slaughter house is exhausted in prescribing the form or material of its erection and has no reference to its locality." Cronin v. People, 82 N. Y., 318, 321; 37 Am. Rep., 564, affirming 20 Hun. (N. Y.), 137.

already in operation. Such exercise of the police power invades no constitutional rights.²⁵

General power to preserve the public health and declare and abate nuisance is ample to justify an ordinance declaring a slaughter house a nuisance.²⁶

An ordinance passed under express charter power, forbidding the maintenance of slaughter houses within the corporate limits cannot be held void by the courts as unreasonable. In such case, in Indiana, it has been held that no investigation into the character or condition of the slaughter houses is required.²⁷

§ 449. Dairies and cow stables. The erection and maintenance of cow stables and dairies, within the corporation are subjects of reasonable local police regulation.²⁸ Charter power

25 "It is true that at the time it (slaughter house) was erected the law did not forbid the slaughtering of animals or the maintenance of a slaughter house within the city, but the law-making power did not thereby come under any obligation or give any assurance that the legislation upon the subject would remain unchanged. Indeed, supervision of the public health and public morals is a governmental power which cannot be bartered away either directly or indirectly." Portland v. Meyer, 32 Oregon, 368, 371; 52 Pac. Rep., 21; 67 Am. St. Rep., 538. May be excluded from city. Ex parte Heilbron, 65 Cal., 609; 4 Pac. Rep., 648; Harmison v. Lewistown, 153 Ill., 313; 46 Am. St. Rep., 893; 38 N. E. Rep., 628, affirming 46 Ill. App., 164; St. Louis v. Howard, 119 Mo., 41; 41 Am. St. Rep., 630; 24 S. W. Rep., 770; Spokane v. Robinson, 6 Wash., 547; 33 Pac. Rep., 960.

²⁶ Ordinance declaration, held conclusive. Harmison v. Lewiston, 153 III., 313; 38 N. E. Rep., 628; 46 Am. St. Rep., 893, affirming 46 III. App., 164; Rund v. Fowler, 142 Ind., 214; 41 N. E. Rep., 456.

27 Beiling v. Evansville, 144 Ind.,644; 42 N. E. Rep., 621; 35 L. R.A., 272.

No ordinance emanating by express charter power, exercised in the manner prescribed, can be held unreasonable. Sec. 181 supra. A slaughter house forbidden by ordinance becomes a public nuisance. Rund v. Fowler, 142 Ind., 214; 41 N. E. Rep., 456. When statutory provisions respecting the location and removal of slaughter houses will supersede charter sections on the same subject. St. Paul v. Byrnes, 38 Minn., 176; 36 N. W. Rep., 449.

ESTOPPEL. The fact that the location of the slaughter house was directed and consented to by the town trustees does not estop the corporation from claiming that the slaughter house violates an ordinance, in the absence of legal corporate action in the premises. Rund v. Fowler, 142 Ind., 214; 41 N. E. Rep., 456. The action of the council or trustees, to be binding, must be as an entity or board. Sec. 91, supra.

28 Ordinance forbidding the keeping of more than one cow within certain portion of the city, held valid, under usual power. In re

to "prohibit the erection of cow stables and dairies within prescribed limits, and to remove and regulate the same," and "to regulate and prevent the carrying on of any business which may be dangerous or detrimental to the public health." 29 authorizes an ordinance prescribing that "no dairy or cow stable shall hereafter be erected, built or established within the limits of the city, without first having obtained permission so to do from the municipal assembly, by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the municipal assembly, by proper ordinance." Respecting the contention that the law-making power should first designate certain districts within the city by metes and bounds, within which no dairy or cow stable should be erected or maintained, the court remarked: "But the charter does not so command. It nowhere limits the prohibited territory to less than the whole city," therefore, the conclusion was stated: We have no doubt of the power under the charter to make the prescribed limits co-extensive with the city limits, and this we construe the ordinance to have done.30 Concerning the point that the ordinance was void because it provided for special privileges to one man by special ordinance, which might be denied to another man, his next-door neighbor, the court observed: "We think this position is entirely untenable. The charter confers not only the power to prohibit, but to remove and regulate, and it was entirely competent for the assembly to decline to prohibit dairies altogether, but to impose on all persons desiring to erect or maintain a dairy or cow stable to first obtain permission from the mayor and assembly by a duly enacted ordinance. Having absolute power to prohibit, it could make its own conditions."31

Linehan, 72 Cal., 114; 13 Pac. Rep., 170. By-law forbidding the keeping of cow stables at a less distance than 40 feet from the nearest dwelling, sustained. McKnight v. Toronto, 3 Ont. Rep., 284.

Ordinance regulating cow stables, etc., held void as not providing uniform rule, etc. State v. Mahner, 43 La. Ann., 496; 9 So. Rep., 480; State v. Dulaney, 43 La. Ann., 500; 9 So. Rep., 481.

Where dairy is not a nuisance per se, see In re Linehan, 72 Cal., 114; 13 Pac. Rep., 170; State v. Boll, 59 Mo. 321; Donough v. Robbens, 60 Mo. App., 156.

²⁹ St. Louis Charter, Art. III. § 26, par. 6; The Municipal Code of St. Louis, pp. 217, 218.

30 Distinguishing In re Linehan, 72 Cal., 114; 13 Pac. Rep., 170.

31 "We are asked to declare this ordinance void in the face of the

§ 450. Livery stables. While a livery stable in a populous community is not per se a public nuisance, it may become such, and hence it has been long recognized as a subject necessarily within reasonable police regulations.³² Power to regulate livery stables and sales stables includes the power to limit them to certain localities and to provide for their cleanliness, so that they may not become injurious to health.³³

§ 451. Hogs and hog pens. Charter power to define nuisances and to regulate and control the keeping of animals will authorize an ordinance forbidding the keeping of hogs and hog pens within the corporate limits,³⁴ especially where they are maintained in close proximity to residences.³⁵ An ordinance

unrestricted power in the charter, because for sooth the assembly may at some time discriminate against one man and favor another. cannot and shall not indulge in any such presumption against the integrity of the municipal assembly, but shall, as was said in St. Louis v. Howard, 119 Mo., 41, 50; 24 S. W. Rep., 770; 41 Am. St. Rep., 630, assume that the municipal assembly, before granting permission, will inquire and determine whether the place and the neighborhood is a proper one in which to allow a dairy to be maintained and will act impartially. Such favorable presumptions are constantly indulged in regard to legislative action." (State ex rel. v. Mead, 71 Mo., 266, 272); Per Gantt, J. in St. Louis v. Fischer, 167 Mo., 654, 657, 663; 67 S. W. Rep., 872, approved in St. Louis v. Schefe, 167 Mo., 666; 67 S. W. Rep., 1100.

32 Phillips v. Denver, 19 Colo.,179; 41 Am. St. Rep., 230; 34 Pac.Rep., 902.

Livery stable is not per se a nuisance. Ex parte Lacey, 108 Cal., 326; 41 Pac. Rep., 411; 38 L. R. A., 640; St. Louis v. Russell, 116 Mo., 248, 259; 22 S. W. Rep., 470; 20 L. R. A., 721; Shiras v. Olinger, 50 Iowa, 571; 32 Am. Rep., 138, 141; Burditt v. Swenson, 17 Tex., 489; 67 Am. Dec., 665.

A livery stable within sixty five feet of a hotel is prima facie a nuisance. Coker v. Birge, 10 Ga., 336.

33 St. Louis v. Russell, 116 Mo., 248; 22 S. W. Rep., 470; 20 L. R. A., 721, declaring void an ordinance authorizing lot owners to determine whether a person shall be permitted to erect a livery stable in a block in which their property is located, as permitting discrimination, and delegating legislative authority. Contra. State ex rel v. Beattie, 16 Mo. App., 131. Similar Chicago ordinances were sustained. Chicago v. Stratton, 162 Ill., 494; 44 N. E. Rep., 853; 53 Am. St. Rep., 325; 35 L. R. A., 84, affirming 58 Ill. App., 539; Swift v. People, 162 Ill., 534; 44 N. E. Rep., 528, reversing 60 Ill. App., 395.

LICENSE. A statute, forbidding the erection, occupation or use of any building in any city for a stable for more than four horses, unless licensed so to do by the board of health was held constitutional in Massachusetts. It is an exercise of the police power and not of the right of eminent domain. Such an

prohibiting hog pens except for the purposes of commerce in a city of fifteen thousand inhabitants was sustained.³⁶

§ 452. **Dead animals, garbage, offal, etc.** Dead animals, garbage, offal, etc., clearly are subjects within the municipal police power. Power to preserve the public health, etc., gives implied power to pass and enforce reasonable ordinances to protect the community against offensive and unwholesome smells arising

exercise of the power is valid, although no provision is made for compensation to the owner, and no right of appeal is given from the local authorities, to whom the legislature has seen fit to intrust the determination of the question. Newton v. Joyce, 166 Mass., 83; 44 N. E. Rep., 116; 55 Am. St. Rep., 385.

INJUNCTION TO RESTRAIN ERECTION allowed. Coker v. Birge, 9 Ga., 425; 54 Am. Dec., 347.

INJUNCTION DENIED. Shiras v. Olinger, 50 Iowa, 571; 33 Am. Rep., 138; Kirkman v. Handy, 30 Tenn., (11 Humph), 406; 54 Am. Dec., 45.

34 State v. Hord, 122 N. C., 1092; 29 S. E. Rep., 952; 65 Am. St. Rep., 743; Darlington v. Ward, 48 S. C., 570; 26 S. E. Rep., 906; 38 L. R. A., 326, compare dissenting opinions.

35 A hog pen or pig sty maintained in close proximity to a dwelling house is a nuisance per se. Whipple v. McIntyre, 69 Mo. App., 397, 402; Smith v. McConathy, 11 Mo., 517; St. Louis v. Stern, 3 Mo. App., 48, 54; Quincy v. Kennard, 151 Mass., 563; 24 N. E. Rep., 860; Com. v. Perry, 139 Mass., 198; 29 N. E. Rep., 656; Com. v. Kidder, 107 Mass., 188; Com. v. Patch, 97 Mass., 221.

36 State (Cedar Rapids) v. Holcomb, 68 Iowa, 107; 56 Am. Rep., 853; 26 N. W. Rep., 33. Contra, Ex parte O'Leary, 65 Miss., 80; 7 Am. St. Rep., 640; 3 So. Rep., 144, where it is said hogs may or may

not be a nuisance. Compare Mc-Knight v. Toronto, 3 Ont. Rep., 284; Everett v. Grapes, 3 L. T. (N. S.), 669.

The keeping of swine and cows may be regulated. *In re* Linehan, 72 Cal., 114; 13 Pac. Rep., 170.

Under express legislative power forbidding the keeping of swine within a certain district, violation may be abated as nuisance. Com. v. Young, 135 Mass., 526; Com. v. Alden, 143 Mass., 113; 9 N. E. Rep., 15.

Regulations are not in restraint of trade. Pierce v. Bartrum, 1 Cowp., 269.

The keeping of hogs and hog pens as a nuisance. State v. Kaster, 35 Iowa, 221; In re Rolfs, 30 Kan., 758; 1 Pac. Rep., 523; State v. Payson, 37 Me., 361; Attorney-General v. Steward, 20 N. J. Eq., 415; Babcock v. New Jersey Stock Yards, 20 N. J. Eq., 296; Com. v. Van Sickle, Brightly (Pa.), 69; Com. v. Hutz, Brightley, (Pa.), 75.

The stench from a hog pen to be a nuisance must be offensive to a person of ordinary sensitiveness. Burlington v. Stockwell, 5 Kan. App., 569; 47 Pac. Rep., 988.

DISCRIMINATION. An ordinance is not void for discrimination which prohibits a citizen from keeping hog pens within one hundred feet of the residence of another, but does not forbid him from keeping them within a like distance from his own. A nuisance is to be pub-

from decaying vegetable and animal matter.³⁷ The power to remove dead animals, garbage, offal, etc., necessarily confers power to direct the manner thereof.³⁸ The collection and removal of dead animals not slain for food, garbage, offal, etc., may be forbidden by ordinance, without a license.³⁹ And an ordinance is reasonable which requires garbage wagons or carts to be water tight and labeled "garbage." ⁴⁰

Ordinances are common, particularly in the larger cities, providing for garbage removal by contract. The nature of such ordinances and the manner of making the contract thereunder are controlled by the local charter. The property right of the owner in dead animals is recognized and protected.⁴¹ Ordinances or contracts granting the exclusive privilege of removed of dead animals, not slain for food, for a term of years to a single person or corporation have been sustained.⁴²

§ 453. House dirt, rubbish, privy vaults, etc. The usual mu-

lic, or to others than the one who creates it. An injury or annoyance which a person causes himself and family is not a public nuisance. State v. Hord, 122 N. C., 1092; 65 Am. St. Rep., 743; 29 S. E. Rep., 952.

37 State v. Payssan, 47 La. Am.,
 1029; 49 Am. St. Rep., 390; 17 So.
 Rep., 481; Newton v. Lyons, 11
 App. Div. (N. Y.), 105.

Decaying dead animals constitute a nuisance, per se. Rogers v. Barker, 31 Barb. (N. Y.), 447; Seacord v. People, 121 Ill., 623; 13 N. E. Rep., 194.

Rendering of dead animals within the corporate limits may be prohibited. Cushing v. Buffalo, 13 N. Y. St. Rep., 783.

38 People v. Gordon, 81 Mich., 306; 21 Am. St. Rep., 524; 45 N. W. Rep., 658.

⁸⁹ State v. Orr, 68 Conn., 101; 35 Atl. Rep., 770; 34 L. R. A., 279; *In re* Vandine, 6 Pick (Mass.), 187; 17 Am. Dec., 351; Morgan & Co. v. Cincinnati, 9 Ohio Dec., 280; 12 Wkly. Law Bull. (Ohio), 41.

40 People v. Gordon, 81 Mich.,

306; 21 Am. St. Rep., 524; 45 N. W. Rep., 658.

41 Schoen v. Atlanta, 97 Ga., 697; 25 S. E. Rep., 380; 33 L. R. A., 804; State v. Morris, 47 La. Ann., 1660; 18 So. Rep., 710; River Rendering Co. v. Behr, 77 Mo., 91; 46 Am. Rep., 6, reversing 7 Mo. App., 345; Underwood v. Green, 42 N. Y., 140.

The carcass of a dead animal may be a nuisance. Ellis v. K. C. St. J. and C. B. R. R. Co., 63 Mo., 131.

42 Smiley v. MacDonald, 42 Neb., 5; 47 Am. St. Rep., 684; 27 L. R. A., 541; 60 N. W. Rep., 355; Coombs v. MacDonald, 43 Neb., 632; 62 N. W. Rep., 41; Sanitary Reduction Works v. California Reduction Co., 94 Fed. Rep., 693; National Fertilizer Co. v. Lambert, 48 Fed. Rep., 458. Compare In re Lowe, 54 Kan., 757; 39 Pac. Rep., 710; 27 L. R. A., 545.

Ordinance relating to the removal of dead animals and garbage, held valid. Alpers v. Brown, 60 Cal., 447; Walker v. Jameson, 140 Ind., 591; 49 Am. St. Rep., 222; 28 L. R. A., 679; 37 N. E. Rep., 402;

nicipal powers respecting nuisances will support reasonable ordinances and by-laws regulating the removal and deposit of house dirt, rubbish, filth, refuse matter, etc., the time and manner of cleaning and removal of the contents of sinks, cesspools. privy vaults, etc.,43 and when a public nuisance results from any of these, it may be abated by the proper municipal authorities.44 Under general power "to preserve the health of the city and to prevent and remove nuisances," etc., the removal of the contents of privy vaults may be forbidden by ordinance, except under license. 45 And by virtue of like charter power, a by-law forbidding the removal of house dirt and offal from the city without a license, was sustained and declared not to be in restraint of trade.46 So an ordinance was sustained which required owners of land abutting on a private passageway to remove filth, waste and stagnant water from such way.47 So an ordinance prohibiting the throwing into or depositing upon the public ways, except at such places as might be properly designated, any glass, broken ware, dirt, rubbish, garbage or filth, was held to be valid and within the municipal police power.48

39 N. E. Rep., 869; Louisville v. Wible, 84 Ky., 290; 1 S. W. Rep., 605; Alpers v. San Francisco Co., 32 Fed Rep., 503.

"Garbage," "offal," etc., defined. St. Louis v. Robinson, 135 Mo., 460, 469; 37 S. W. Rep., 110.

Kitchen garbage, offal, refuse, etc. State v. Orr, 68 Conn., 101; 34 L. R. A., 279; 35 Atl. Rep., 770.

43 State (Nicoulin) v. Lowery, 49 N. J. L., 391; 8 Atl. Rep., 513.

44 Privies as Nuisances. Vason v. Augusta, 38 Ga., 542; Wahle v. Reinbach, 76 Ill., 322.

Ordinance requiring the filling up of sinks or vaults of privies sustained. "We think the right exists in the council * * * to determine what, in its nature and use, it deems a nuisance, and to direct its removal or discontinuance." Monroe v. Gerspach, 33 La. Ann., 1011.

('nder charter power "to remove the cause of all nuisances," etc.,

the municipal authorities can not order privies to be replaced by water-closets, since the abatement of the nuisance may be accomplished by the cleaning of the privy vaults. Philadelphia v. Provident Life and Trust Co., 132 Pa. St., 224; 18 Atl. Rep., 1114.

LEGISLATIVE ACT declaring privies unsanitary, etc. Theilan v. Porter, 14 Lea (Tenn.), 622; 52 Am. Rep., 173.

The legislature may declare privies in crowded districts to be nuisances, and provide for the abatement thereof, without notice to and hearing of, the owners. Harrington v. Providence, 20 R. I., 233; 38 L. R. A., 305; 38 Atl. Rep., 1.

45 Boehm v. Baltimore, 61 Md.,
 259; State ex rel v. McMahon, 69 Minn., 265; 72 N. W. Rep., 79.

⁴⁶ In re Vandine, 6 Pick. (Mass.), 187; 17 Am. Dec., 351.

⁴⁷ Commonwealth v. Cutter, 156 Mass., 52; 29 N. E. Rep., 1146.

48 Ex parte Casinello, 62 Cal.,

Ordinances may regulate the burning of refuse matter and make it unlawful to burn rubbish in the streets and public places. Thus a village ordinance providing that no rubbish "shall be set on fire or burned in any street at any time, or in any lot of the village except between the rising and setting of the sun," was sustained, and construed as forbidding fires in the streets at all times, but permitting them in lots between sunrise and sunset. 481/2

§ 454. Drains, sewers, ponds, stagnant water, pollution of water supply, etc. In the interest of the public health, general municipal police powers authorize reasonable ordinances designed to protect the water supply from pollution,⁴⁹ to prevent the fouling of water in creeks, brooks, ponds, etc.,⁵⁰ to regulate drains and sewers,⁵¹ and to abate nuisances arising from these sources.⁵² In the exercise of this power under sufficient legis-

538; Rochester v. Collins, 12 Barb. (N. Y.), 559.

⁴⁸½ New Rochelle v. Clark, 65 Hun. (N. Y.), 140; 19 N. Y. Supp., 989.

49 Martin v. Gleason, 139 Mass., 183; 29 N. E. Rep., 664; Belton v. Baylor Female College (Tex. Civ. App., 1896) 33 S. W. Rep., 680; Belton v. Central Hotel Co. (Tex. Civ. App., 1895); 33 S. W. Rep., 297; State v. Bergen County, 46 N. J. Eq., 173; 18 Atl. Rep., 465; Kelley v. New York, 6 Misc. (N. Y.), 516.

Ordinance may forbid boating and fishing on lake from which the water supply is taken. Dunham v. New Britain, 55 Conn., 378; 11 Atl. Rep., 354.

50 State v.Wheeler, 44 N. J. L., 88. FOULING OF WATER is a public nuisance. State v. Taylor, 29 Ind., 517; Brookline v. Mackintosh, 133 Mass., 215; Morton v. Moore, 15 Gray (Mass.), 573; Com. v. Reed, 34 Pa. St., 275; 75 Am. Dec., 661

51 POLICE POWER AS TO DRAINAGE.
Americus v. Mitchell, 79 Ga., 807;
5 S. E. Rep., 201; Zigler v. Menges,
121 Ind., 99; 22 N. E. Rep., 782; 16

Am. St. Rep., 357; Grace v. Newton, 135 Mass., 490; Baker v. Boston, 12 Pick. (Mass.), 184; 22 Am. Dec., 421; State v. Newark, 34 N. J. L., 264; Yonkers v. Copcutt, 140 N. Y., 12; 35 N. E. Rep., 443; 23 L. R. A., 485; Bliss v. Kraus, 16 Ohio St., 54; Com. v. Webb, 6 Rand. (Va.), 726; Bryant v. Robbins, 70 Wis., 258; 35 N. W. Rep., 545.

DISCHARGE OF SEWAGE may be controlled. Bell v. Rochester, 58 Hun. (N. Y.), 602; 11 N. Y. Supp., 305.

DRAIN EMPTYING INTO A PUBLIC STREET is a public nuisance and may be abated. Kirkwood v. Cairns, 44 Mo. App., 88; Board of Health v. Maginnis Cotton Mills, 46 La. Ann., 806; 15 So. Rep., 164.

SEWER CONNECTION. Com. v. Roberts, 155 Mass., 281; 29 N. E. Rep., 522.

PRIVATE SEWERS abated by judicial action. State v. Hutchinson, 39 N. J. Eq., 218; State v. McCulla, 16 R. I., 196; 14 Atl. Rep., 81.

INJUNCTION to restrain discharge of sewage, etc. Gould v. Rochester, 105 N. Y., 46; 12 N. E. Rep., 275, reversing 39 Hun. (N. Y.), 79.

52 A CREEK may be diverted from

lative grant, grades may be established and lands may be made to conform thereto, to provide a proper drainage system, so as to abate and prevent nuisances.⁵³

§ 455. Wells. In Louisiana, an ordinance was sustained, as a valid exercise of the police power, which made it unlawful to excavate or sink a well on any premises used as a bakery or bake shop, within the corporate limits, and required all wells in such places to be filled up immediately, to the surface of the ground.⁵⁴ Wells within the limits of the public streets and ways may be abolished by the public authorities, either as a sanitary measure or to accommodate the public travel, on the ground that such wells constitute an obstruction, without compensation to those who constructed them.⁵⁵ The enactment of an ordinance directing such wells to be filled up operates as a revocation of any license express or implied to construct the wells in the streets.⁵⁶

its channel. Murphy v. Wilmington, 5 Del. Ch., 281.

RIVER. An ordinance declaring a particular branch of a river a public nuisance and providing for the abatement thereof by means of a new channel, held within the police power. Hamilton v. Fond du Lac, 40 Wis., 47.

Ponds. Ordinance may provide for filling up ponds, to prevent the collection of stagnant water. Rochester v. Simpson, 134 N. Y., 414; 31 N. E. Rep., 871, reversing 57 Hun. (N. Y.), 36; 10 N. Y. Supp., 499

53 Lawrence v. Webster, 167
Mass., 513; 46 N. E. Rep., 123;
Cavanagh v. Boston, 139 Mass.,
426; 1 N. E. Rep., 834; 52 Am. Rep.,
716; Bancroft v. Cambridge, 126
Mass., 438; Read v. Cambridge, 126
Mass., 427; Cambridge v. Monroe,
126 Mass., 496; Coble v. Boston, 109
Mass., 438; 112 Mass., 181; Dingley
v. Boston, 100 Mass., 544; Watuppa
Reservoir Co. v. Mackenzie, 132
Mass., 71.

Charters authorize work in abating drain and pond nuisances at expense of owner. Hannibal v.

Richards, 82 Mo., 330; Mun. Code of St. Louis, p. 298; St. Louis Charter Art. 12, §6.

Resolution giving owner choice of means as to filling up, draining, etc., held valid. Bliss v. Kraus, 16 Ohio St., 54.

The determination of the necessity of the required work to be done cannot be delegated to health officers. Lufkin v. Galveston, 56 Tex., 522.

54 State v. Schlemmer, 42 La. Ann., 1166; 8 So. Rep., 307.

55 Ferrenbach v. Turner, 86 Mo., 416. And this is true notwithstanding it is the law in this state that the lot owner has a property right in the street. Lackland v. N. Mo. Ry. Co., 31 Mo., 180; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582, 584. Even though the dedication was by way of statutory plat. Rutherford v. Taylor, 38 Mo., 315; Price v. Thompson, 48 Mo., 361; Thurston v. St. Joseph, 51 Mo., 510, 512.

56 Ferrenbach v. Turner, 86 Mo. 416. The city cannot, in any event, permanently contract away the

§ 456. Emission of dense smoke as a public nuisance. In Missouri it has been held that, as the emission of smoke within a populous city is not a nuisance per se at common law, an ordinance of the City of St. Louis, enacted under charter power "to declare, prevent and abate nuisances on public and private property and the causes thereof," declaring the emission "of dense black or thick gray smoke," within the corporate limits, to be a nuisance, without any limitation as to the time it is emitted, or as to whether it is in fact a nuisance, and without providing for any inquiry as to these matters, was invalid; that such charter power does not include the power to declare that to be a nuisance which is not so in fact.⁵⁷ But in Illinois, under like charter power, an ordinance of the City of Chicago, which made it a misdemeanor to "permit or allow dense smoke to issue or be emitted from the smokestack of any boat or locomotive or the chimney of any building within the corporate limits," was sustained.58

streets for private purposes. Belcher S. R. Co. v. St. L. G. E. Co., 82 Mo., 121.

⁵⁷ St. Louis v. Heitzeberg P. & P.
Co., 141 Mo., 375; 64 Am. St. Rep.,
516; 39 L. R. A., 551; 42 S. W. Rep.,
954; St. Louis v. Regina Flour Milling Co., 141 Mo., 389; 42 S. W. Rep.,
1148.

The rule appears to be sustained by the *dicta* in Seiger v. Cleveland, 3 Ohio *Nisi Prius*, 119.

58 Harmon v. Chicago, 110 Ill., 400; 51 Am. Rep., 698.

EMISSION OF DENSE SMOKE-PROOF REQUIRED. In Marshall Field & Co. v. Chicago, 44 Ill. App., 410, appellants complained of the refusal of the following instructions: "The jury are instructed that it is the duty of the city to prove that, among other things, the smoke that issued from the chimney of the defendants at the time complained of was not only dense, but was, at that particular time, of a nature detrimental to the property which was close enough in proximity to it to be affected by it injuriously, or was of a nature to be personally annoying to the public at large, and unless the jury believe from the evidence that the smoke complained of was, at the particular time in question, dense, and also proved to be detrimental to property within the City of Chicago, or was of a nature to be personally annoying to the public at large, then your verdict should be for Of the instruction defendants." the court said: "The last half of it, as to what the jury should believe in order to convict, was, perhaps, proper, but the first half, requiring the city to prove what may be presumed without proof, was It is a matter of common knowledge that smoke becomes soot, which falls and blackens where it rests; that it is injurious to vegetation, to many kinds of goods, and annoying to people. This common knowledge is so generally diffused in Chicago, that no jury could be without it." Accordingly, a judgment of conviction was affirmed which was obtained on the The power of the state legislature to declare the emission of dense smoke within the limits of a populous community a nuisance is undoubted.⁵⁹ The Court of Appeals of the District of Columbia, in a comparatively recent case, fully sustains legislation against the smoke nuisance on the express ground that the emission of dense smoke in populous cities is *per se* a public nuisance, and that the legislative department of the government has plenary power to so declare, and when it does so de-

evidence of two witnesses who testified to dense smoke that could not be seen through coming from the chimney of the retail store of defendants, on a specified day, for several minutes.

In Caskell v. Bayley, 30 L. T. (N. S.), 516; 38 J. P., 805, a prosecution under the English smoke law, the inspectors testified to having seen "black smoke" and "medium smoke" emitted from defendant's stack for a considerable time, and the court, on appeal, in affirming the conviction, observed: "It is not necessary to show that the issuing of black smoke is injurious to health as well as a nuisance, and the issuing of black smoke in the quantities and manner described was undoubtedly a nuisance." Further as to nature of proof required, see Art. 46 Central Law Journ. pp. 152, 153.

Dense Smoke as a Nuisance. People v. Lewis, 86 Mich., 273; 49 N. W. Rep., 140; People v. Detroit White Lead Works, 82 Mich., 471; 46 N. W. Rep., 735; St. Paul v. Gilfillan, 36 Minn., 298; 31 N. W. Rep., 49; State v. Sheriff, 48 Minn., 236; 51 N. W. Rep., 112; St. Paul v. Johnson, 69 Minn., 184; 72 N. W. Rep., 64; Whalen v. Keith, 35 Mo., 87; Prescott's Case, 2 N. Y. City Hall Record, 161; Cincinnati v. Miller, 29 Ohio L. J., 364; Higgins v. Northwich Union Guardians of the Poor, 22 L. T. (N. S.), 753; Queen v. Waterhouse, 26 L. T. (N. S.), 761; Barnes v. Ackroyd, 26 L. T. (N. S.), 692; Garrett on Nuisances pp. 274-278; Article in 46 Central Law Journ. p. 147, 153.

59 THE MISSOURI ACT. The emission or discharge into the open air of dense smoke within the corporate limits of cities of this state which now have or may have hereafter a population of one hundred thousand inhabitants is hereby declared to be a public nuisance. The owners, lessees, occupants, managers or agents of any building, establishment or premises from which dense smoke is so emitted or discharged, shall be deemed guilty of a misdemeanor and upon conviction thereof, in any court of competent jurisdiction, shall pay a fine of not less than twenty-five dollars, nor more than one hundred dollars. And each and every day whereon such smokeshall emitted or discharged shall constitute a separate offense: Provided. however, that in any suit or proceeding under this act, it shall be defense if a good the person charged with a violation thereof shall show to the satisfaction of the jury or court trying the facts. that there is no known practicable device, appliance, means or method by application of which to his building, establishment or premises the emission or discharge of the dense smoke complained of in that proceeding could have been prevented. Section Two. All cities

clare the courts are not at liberty to put themselves in the place of the legislature and assume to say that such law is unreasonable because smoke was not per se a nuisance at common law, or because there is no known practical device or appliance to abate smoke, or because the community where the law applies exclusively uses soft or bituminous coal, which is peculiarly liable to make objectionable smoke.⁶⁰

§ 457. Regulating sale of cigarettes. It has been held that the power to pass and enforce all necessary police regulations which may be necessary or expedient for the preservation of

to which the provisions of this act are applicable are hereby empowered to enact all necessary or desirable ordinances, not inconsistent with the provisions herein, nor the constitution, nor any general law of this state, in order to carry out the provisions of this act. Approved March 21, 1901; Laws of Missouri, 1901, pp. 71, 73; Mun. Code of St. Louis, appendix, pp. 969, 970.

60 The law involved was an act of congress applicable to the District of Columbia only, and provided that "the emission of dense or thick black or gray smoke or cinders from any smoke stack or chimney used in connection with any stationary engine, steam boiler or furnace of any description within the District of Columbia shall be deemed and is hereby declared to be a public nuisance; provided that nothing in this act shall be construed as applicable to chimneys or buildings used exclusively for private residences.

"That the owner, agent, lessee, or occupant of any building of any description from the smoke stack or chimney of which there shall issue or be emitted thick or dense black or gray smoke or cinders within the District of Columbia on or after the day above named, shall be deemed and held guilty of creating

a public nuisance and of violating the provisions of this act."

The penalty was fixed at not less than ten dollars nor more than one hundred dollars, "and each and every day wherein the provisions of this act shall be violated shall constitute a separate offense." The decision sustains the law as valid and constitutional.

The rules laid down in the case may be thus summarized:

- 1. It is a matter of common knowledge, not to be ignored by the courts, that the emission of a volume of dense black smoke from a single smoke stack or chimney of a large furnace may, under some circumstances, work physical discomfort to the general public coming within its circle of distribution upon public thoroughfares, and may possibly also work injury to public interests in other respects.
- 2. A statute declaring the emission of thick or dense black or gray smoke from chimneys a nuisance per se, and punishing the act as an offense, is within the police power, and therefore does not deprive persons of property without due process of law.
- 3. Exempting chimneys of buildings used exclusively for private residences from a statute declaring the emission of dense or thick black or gray smoke or cinders

the health, or the suppression of diseases authorizes provisions regulating and licensing the sale of cigarettes.⁶¹ The Supreme Court of Tennessee has declared that cigarettes are not legitimate articles of commerce within the protection of the constitution of the United States because they possess no virtue and are bad inherently.⁶²

3. PUBLIC SAFETY-STREETS-BUILDINGS.

§ 458. Regulating use of streets, etc., and keeping same free from obstruction. It is undoubtedly true that the police power extends to all reasonable regulations relating to keeping the sidewalks, streets and public ways free from obstructions and nuisances and to all proper restraining regulations relative to the use thereof. The protection of life and limb is a matter of public concern and there is both a power and obligation on the part of the public authorities to pass and enforce reasonable police provisions for this purpose. ⁶³ Generally, the local corporation has discretionary power to establish and open

from smoke stacks or chimneys to be a public nuisance, and limiting the statute to any smoke stack or chimney used in connection with any stationary engine, steam boiler or furnace, does not make the statute unconstitutional because of inequality or unjust discrimination in violation of the provision as to equal protection of the laws, since it is not apparent that the classification made is without reasonable basis.

- 4. Evidence that no smoke-consuming appliance known will prevent the emission of all black smoke from furnaces burning soft coal is immaterial upon a prosecution for violation of a statute declaring the permitting of such emission to be a nuisance.
- 5. Witnesses cannot testify that smoke from a certain chimney is not of such a character as to be dangerous to health, life, or property of persons living in the vicinity, or to the public at large, or

that it does not constitute a public nuisance, since this would be to state not facts but opinions.

- 6. Evidence that certain neighbors may not have sustained injury to property or health from the smoke of a chimney is not admissible in support of a defense to a prosecution for the violation of a statute which declares the smoke a public nuisance.
- 7. Smoke may constitute a public nuisance, although it is not constantly emitted, but only at intervals from day to day. Moses v. United States, 16 App. Cas. Dist. of Col., 428; 50 L. R. A., 532.
- 61 Gundling v. Chicago, 176 Ill.,
 340; 52 N. E. Rep., 44; 48 L. R. A.,
 230, affirmed in 177 U. S., 183; 44
 L. Ed., 725; 20 Sup. Ct. Rep., 633.
- ⁶² Austin v. State, 101 Tenn., 563;
 48 S. W. Rep., 305.
- 63 Alabama—Montgomery v. Parker, 114 Ala., 118; 21 So. Rep., 452;
 62 Am. St. Rep., 95.

streets and public ways, fix their width, determine how much of that width shall be devoted to a carriage way and how much to a foot way or sidewalk; direct the planting of trees within the limits of the streets and public grounds; decide where and how hitching posts shall be set, telegraph, telephone and electric wires and poles erected, and, finally, to make all necessary and desirable regulations which are reasonable and manifestly in the interest of public safety and convenience. With this end in view, regulations that are general and uniform, reasonable and certain, and that do not conflict with the charter, general laws or the constitution, may be prescribed by ordinance, forbidding the obstruction of streets with vehicles, 65 railroad

Connecticut—Hawley v. Harrall, 19 Conn., 142.

Kentucky—James v. Harrodsburg, 86 Ky., 191.

Massachusetts—Alger v. Lowell, 3 Allen (Mass.), 402.

Michigan—Everett v. Marquette, 53 Mich., 450; 19 N. W. Rep., 140. New York—Griffin v. New York, 9 N. Y., 456; 61 Am. Dec., 700; Lavery v. Hannigan, 20 Jones & S. (N. Y.), 463.

North Carolina—State v. Summerfield, 107 N. C., 895; 12 S. E. Rep., 114.

Wisconsin—Janesville v. Milwaukee & M. R. R., 7 Wis., 484.

64 SHADE TREES; planting of. The Municipal code of St. Louis, pg. 614, § 914.

Charter power to direct and regulate the planting, rearing, trimming and preserving of shade trees in the streets and public places, gives power to regulate the cutting of such trees, without legal permission. State (Consolidated Traction Co.) v. East Orange Tp., 61 N. J. L., 202; 38 Atl. Rep., 803; affirmed 63 N. J. L., 669; 44 Atl. Rep., 1099.

A penal ordinance punishing any one who may destroy trees planted in the streets, etc., within the corporate limits is valid. State v. Merrill, 37. Me., 329.

HITCHING RACK, in public square contrary to ordinance is a public nuisance and may be destroyed by the municipal authorities. Samuels v. Nashville, 3 Sneed (Tenn.), 298.

65 OBSTRUCTING STREETS WITH VEHICLES. Ordinance prohibiting the stopping of vehicle on street for a longer time than twenty minutes, held valid. Commonwealth v. Fenton, 139 Mass., 195; 29 N. E. Rep., 653; Commonwealth v. Rowe, 141 Mass., 79; 6 N. E. Rep., 545; Commonwealth v. Lagorio, 141 Mass., 81; 6 N. E. Rep., 546.

Under general power, city may forbid sale of produce or other merchandise on any sidewalk or the space in front of a building used as a sidewalk, in such manner as may incommode passengers, although the municipality may not have acquired an easement or title to the soil in the area within which the prohibition is intended to operate. State v. Summerfield, 107 N. C., 895; 12 S. E. Rep., 114.

Charter power "to prohibit and prevent incumbering or obstructing streets," etc., "with vehicles, animals," etc., authorizes an ordinance forbidding standing on designated streets and selling out loads of cars, 66 or otherwise; providing stands for cabs, hacks, carriages, etc., and salutary rules for the proper regulation of the drivers thereof; 67 prohibiting excavations in streets and public ways or under sidewalks, without legal permit and under safe restrictions; 68 regulating the extent to which streets and sidewalks may be obstructed temporarily with building material, machinery, produce, goods, merchandise, etc.; 69 the extent to which sidewalks may be obstructed by cellar doors,

farm produce. However, such ordinance is not to be so construed as to prevent casually stopping such wagons for sale, since the purpose of the regulation is to prevent street obstruction. People v. Keir, 78 Mich., 98; 43 N. W. Rep., 1039.

An ordinance of Boston forbidding selling goods in streets, except in accordance with a permit from the superintendent of streets, held reasonable, constitutional and valid. "Anyone who has observed the obstruction to travel and the general inconvenience which are caused by a stationary object in our crowded and narrow streets, would be slow to declare unreasonable a prohibition intended to prevent that inconvenience. We are of opinion, both in principle and on authority, that for this purpose the city council lawfully may forbid public selling in the streets. This being so, the ordinance is none the worse for the exception in case of a permit from the superintendent of streets." Per Holmes. J. in Com. v. Ellis, 158 Mass., 555; 33 N. E. Rep., 651.

66 Duluth v. Mallett, 43 Minn.,204; 45 N. W. Rep., 154.

67 Montgomery v. Parker, 114 Ala., 118; 21 So. Rep., 452; 62 Am. St. Rep., 95; Chillicothe v. Brown, 38 Mo. App., 609.

Places at depots and stations may be assigned to hacks or hack-

men, and they may be forbidden to go elsewhere. Colorado Springs v. Smith, 19 Colo., 554; 36 Pac. Rep., 540; Lindsay v. Anniston, 104 Ala., 257; 16 So. Rep., 545; 53 Am. St. Rep., 44; 27 L. R. A., 436. Compare Napman v. People, 19 Mich., 352.

Power to regulate cannot be delegated. State v. Fiske, 9 R. I., 94.

Ordinance authorizing depot marshal or police officer to designate stands, upheld. Veneman v. Jones, 118 Ind., 41; 20 N. E. Rep., 644; 10 Am. St. Rep., 100; St. Paul v. Smith, 27 Minn., 364; 7 N. W. Rep., 734; 38 Am. Rep., 296.

Rate of hack fare. Com. v. Gage, 114 Mass., 328.

68 Dubuque v. Maloney, 9 Iowa, 450; Allen v. Boston, 159 Mass., 324; 34 N. E. Rep., 519; 38 Am. St. Rep., 423; Fisher v. Thirkell, 21 Mich., 1; 4 Am. Rep., 422; Westport v. Mulholland, 159 Mo., 86; 60 S. W. Rep., 77; Northern Liberties v. Northern Liberties Gas Co., 12 Pa. St., 318.

⁶⁹ Hexamer v. Webb, 101 N. Y., 377; 4 N. E. Rep., 755; 54 Am. Rep., 703.

REMOVAL OF BUILDINGS and the temporary use of the streets for this purpose may be regulated by ordinance. The general police power to regulate the use of streets will support it. Day v. Green, 4 Cush.. (Mass.), 433, 437.

doorsteps, coal holes,⁷⁰ bay windows, cornices and the like;⁷¹ prohibiting the driving of vehicles and the riding of animals on the sidewalks,⁷² ball playing, stone throwing and any sport, amusement or exercise "likely to scare horses or embarrass the passage of vehicles," or the flying of any kite in any part of the city devoted to business;⁷³ forbidding water from any flowing well or spring to flow upon any street, alley or sidewalk;⁷⁴ requiring the removal, by summary or other appropriate action, of obstructions and nuisances in the public ways, and, under the prevailing judicial view, compelling owners or occupiers of property abutting on sidewalks to remove snow and ice therefrom, under penalty.⁷⁵

§ 459. Obstructions in public streets and highways as nuisances. All unauthorized and illegal obstructions which pre-

70 Cushing v. Boston, 128 Mass., 330; 35 Am. Rep., 383; Hoey v. Gilroy, 129 N. Y., 132; 29 N. E. Rep., 85; Clifford v. Dam., 81 N. Y., 52; 12 Jones & S. (N. Y.), 391.

COAL HOLE and vault may be constructed in sidewalk by abutting owner, where the sidewalk is left in a safe condition. Gordon v. Peltzer, 56 Mo. App., 599.

71 Com. v. Goodnow, 117 Mass.,
114; Livingston v. Wolf, 136 Pa.
St., 519, 533; 20 Am. St. Rep., 936;
20 Atl. Rep., 551; Hess v. Lancaster, 4 Pa. Dist. Rep., 737.

72 State v. Brown, 109 N. C., 802;
 13 S. E. Rep., 940.

78 Mashburn v. Bloomington, 32
Ill. App., 245; People v. Armstrong,
73 Mich., 288; 41 N. W. Rep., 275;
16 Am. St. Rep., 578, 584; 2 L. R.
A., 721.

74 Power to enact the ordinance is implied from power to control streets and enforce sanitary regulations. Skaggs v. Martinsville, 140 Ind., 476; 39 N. E. Rep., 241; 49 Am. St. Rep., 209; 33 L. R. A., 781.

Discharge of sewage on sidewalk is a public nuisance. Kirkwood v. Cairns, 44 Mo. App., 88.

75 Hartford v. Talcott, 48 Conn., 525; Flynn v. Canton Co., 40 Md., 312; 17 Am. Rep., 603; In re Goddard, 16 Pick. (Mass.), 504; 28 Am. Dec., 259; Kirby v. Boylston Market Assn., 14 Gray (Mass.), 249; 74 Am. Dec., 682; People v. Mattimore, 45 Hun. (N. Y.), 448; 19 Am. Law Review, 113; 33 Am. Law Review, 462; 8 Yale Law Journal, 344. Contra, Chicago v. O'Brien, 111 Ill., 532; 53 Am. Rep., 640; Gridley v. Bloomington, 88 Ill., 554; 30 Am. Rep., 566.

May regulate the removal of snow and ice from railroad tracks by the company. Union Ry. Co. v. Cambridge, 11 Allen (Mass.), 287.

SWEEPING AND CLEANING OF STREET'S may be required of owners or occupiers of premises fronting thereon. Carthage v. Frederick, 122 N. Y., 268; 25 N. E. Rep., 480.

REPAIRING OF SIDEWALKS. Express charter power may compel the building, repairing, etc., of sidewalks. James v. Pine Bluff, 49 Ark., 199; 4 S. W. Rep., 760; Macon v. Patty, 57 Miss., 378; 34 Am. Rep., 451.

But it has been held that the owner or occupier of a lot cannot vent or interfere with the free use of the street or highway as such is within the legal notion of a nuisance.76 But obstructions to constitute a nuisance in the street or highway must be such an annoyance to the public as to render the use of the streets hazardous or prevent its free and unobstructed use as a public thoroughfare. The use of the street temporarily for the depositing of building material, merchandise and fuel is necessary, and such temporary use does not constitute a public nuisance. However, such use is subject to reasonable police regulations, and, ordinarily, restrictive ordinances exist regulating such matters.⁷⁸ Without legal sanction, the following be required to keep the sidewalk in repair by fine provided for by ordinance. Chicago v. Crosby, 111 Cain v. Syracuse, 95 N. Y., 83. 111., 538.

76 Alabama-Webb v. Demopolis, 95 Ala., 116; 13 So. Rep., 289; 21 L. R. A., 62.

Georgia-Simon v. Atlanta, 67 Ga., 618; 44 Am. Rep., 739; Columbus v. Jaques, 30 Ga., 506.

Illinois-People v. St. Louis, 10 Ill., 351; 48 Am. Dec., 339.

Indiana-State v. Louisville, N. A. & C. R. Co., 86 Ind., 114.

Iowa-Patterson v. Vail, 43 Iowa, 142.

Missouri-State v. Campbell, 80 Mo. App., 110.

New York-Babbage v. Powers, 130 N. Y., 281; 14 L. R. A., 398; 29 N. E. Rep., 132; Callanan v. Gilman, 107 N. Y., 360; 14 N. E. Rep., 264; Davis v. New York, 14 N. Y., 67 Am. Dec., 186; Ely v. Campbell, 59 How, Pr. (N. Y.), 333.

Pennsylvania-Allegheny v. Zimmerman, 95 Pa. St., 287; 40 Am. Rep., 649.

Wisconsin-State v. Carpenter, 68 Wis., 165; 31 N. W. Rep., 730; 60 Am. Rep., 848; State v. Leaver, 62 Wis., 387, 392; 22 N. W. Rep., 576.

Anything done to the street which renders its use in the ordinary way hazardous is a nuisance. Parker v. Macon, 39 Ga., 725; Stephani v. Brown, 40 Ill., 428; Bond v. Smith, 44 Hun. (N. Y.), 219;

Purposes of highway stated. Cohen v. New York, 113 N. Y., 532; 21 N. E. Rep., 700; 4 L. R. A., 406, reversing 43 Hun. (N. Y.), 345.

The obstruction or nuisance must be actual and interfere with the public easement. Jackson v. People, 9 Mich., 111; 77 Am. Dec., 491.

Partial obstruction. Laing v. Americus, 86 Ga., 756; 13 S. E. Rep., 107; State v. Berdetta, 73 Ind., 185; 38 Am. Rep., 117; Wilbur v. Tobey, 16 Pick. (Mass.), 177.

Nuisance in use of street. State v. Edens. 85 N. C., 522.

Location, width of street, and particular use as bearing on question of nuisance. Graves v. Shattuck, 35 N. H., 257; 69 Am. Dec.,

77 State v. Merrit, 35 Conn., 314; Burnham v. Hotchkiss, 14 Conn., 311; Griffith v. McCullum, 46 Barb. (N. Y.), 561; Howard v. Robbins. 1 Lans. (N. Y.), 63.

78 Illinois-McCarthy v. Chicago. 53 Ill., 38.

Indiana-Wood v. Mears, 12 Ind., 515; 74 Am. Dec., 222.

Iowa-Sikes v. Manchester, 59 Iowa, 65; 12 N. E. Rep., 755.

Nebraska-State ex rel. v. Oma-

have been held to be illegal obstructions and nuisances within the view of the law: Objects calculated to frighten horses of ordinary gentleness,⁷⁹ a tent within the limits of the highway,⁸⁰ trees standing on a sidewalk and stone columns within the limits of the street, which impede public travel,⁸¹ a fence on part of the street,⁸² deposit of earth, stone and gravel in the public way,⁸³ hitching rack for horses in public square,⁸⁴ unauthorized excavations on⁸⁵ or adjoining a highway,⁸⁶ weigh-

ha, 14 Neb. 265; 45 Am. Rep., 108; 15 N. W. Rep., 210; Stuart v. Havens, 17 Neb., 211; 22 N. W. Rep., 419.

New York—People v. Cunningham, 1 Denio (N. Y.), 524; 43 Am. Dec., 709; Cohen v. New York, 113 N. Y., 532; 21 N. E. Rep., 700; 4 L. R. A., 406, reversing 43 Hun. (N. Y.), 345.

Pennsylvania—Allegheny v. Zimmerman, 95 Pa. St., 287; 40 Am. Rep., 649; Com. v. Passmore, 1 Serg. & R. (Pa.), 217, 219.

⁷⁹ Dimock v. Suffield, 30 Conn., 129; Clinton v. Howard, 42 Conn., 294.

80 Ayer v. Norwich, 39 Conn., 376; 12 Am. Rep., 396.

81 Chase v. Oshkosh, 81 Wis.,313; 51 N. W. Rep., 560; 15 L. R.A., 553.

⁸² Langsdale v. Bonton, 12 Ind., 467.

A FENCE or other like obstruction in a street or highway is a nuisance.

California—Bequette v. Patterson, 104 Cal., 282; 37 Pac. Rep., 917.

Connecticut—State v. Merrit, 35 Conn., 314; Hubbard v. Deming, 21 Conn., 356; Burlington v. Schwarzman, 52 Conn., 181; 52 Am. Rep., 571.

Illinois—Boyd v. Farm Ridge, 103 Ill., 408; Owens v. Crossett, 105 Ill., 354; Lake View v. LeBahn, 120 Ill., 92; 9 N. E. Rep., 269.

Indiana—Langdale v. Bonton, 12 Ind., 467.

Mississippi—Nixon v. Bolioxi (Miss., 1889), 5 So. Rep., 621.

Michigan---Sheldon v. Kalama-zoo, 24 Mich., 383.

New York—Wakeman v. Wilbur, 147 N. Y., 657; 42 N. E. Rep., 341.

Ohio—Little Miami R. R. Co. v. Green County Commissioners, 31 Ohio St., 338.

Wisconsin—Childs v. Nelson, 69 Wis., 125; 33 N. W. Rep., 587; Neff v. Paddock, 26 Wis., 546.

Virginia—Yates v. Warrenton, 84 Va., 337; 4 S. E. Rep., 818.

85 Lowell v. Short, 4 Cush. (Mass.), 275; Indianapolis v. Miller, 27 Ind., 394.

84 If placed in violation of an ordinance the hitching rack may be removed by the public authority. Samuels v. Nashville, 3 Sneed (Tenn.), 298.

85 Portland v. Richardson, 54 Me.,46; 89 Am. Dec., 720.

DITCH dug in a lane of the city without authority, held a nuisance. Runyon v. Bordine, 14 N. J. L., 472.

EXCAVATION made under legal permission, held not a nuisance per se. McNaughton v. Elkhart, 85 Ind., 384.

**SEXCAVATIONS adjoining a highway are nuisances per se, when. Norwich v. Breed, 30 Conn., 535; Birge v. Gardiner, 19 Conn., 507; 50 Am. Dec., 261; Beck v. Carter, 6 Hun. (N. Y.), 604; Irvine v. Wood, 51 N. Y., 224; 10 Am. Rep., 603; State v. Society, etc., 42 N. J. L., 504; Temperance Hall Assn. v.

ing scales,⁸⁷ open cellar way,⁸⁸ unauthorized use of street or sidewalk for the display of goods, and merchandise, show cases, stands and booths for confectionery, etc., fish boxes, etc.⁸⁹ Many other illustrations appear from the cases in the note.⁹⁰

§ 460. Power to remove obstructions and nuisances exists. The power to remove obstructions and nuisances in the public thoroughfares has thus been comprehensively stated in a Pennsylvania case: "It admits of no controversy that the city is armed with ample authority to remove from the streets and thoroughfares every obstruction or impediment to their free use as such by the public, unless legalized by the authority of

Giles, 33 N. J. L., 260; Vanderbeck v. Hendry, 34 N. J. L., 467.

87 Emerson v. Babcock, 66 Iowa, 257; 23 N. W. Rep., 656.

WEIGHING SCALES are not an obstruction or nuisance, when legally authorized. Spencer v. Andrew, 82 Iowa, 14; 12 L. R. A., 115; 47 N. W. Rep., 1007.

88 Lowell v. Spaulding, 4 Cush.(Mass.), 277; 50 Am. Dec., 775.

⁸⁰ Alabama—Costello v. State, 108 Ala., 45; 18 So. Rep., 820; 35 L. R. A., 303.

Georgia—Laing v. Americus, 86 Ga., 756; 13 S. E. Rep., 107.

New York—Lavery v. Hannigan, 20 Jones & S. (N. Y.), 463; Simis v. Brookfield, 13 Misc. (N. Y.), 569; People v. New York, 18 Abb. N. C. (N. Y.), 123; Ely v. Campbell, 59 How. Pr. (N. Y.), 333.

Pennsylvania---Com. v. Wentworth, Brightly (Pa.), 318.

Wisconsin—Barling v. West, 29 Wis., 307; 9 Am. Rep., 576.

ORDINANCE LEASING SPACE IN STREET for produce dealers, held void as authorizing a nuisance. Schopp v. St. Louis, 117 Mo., 131; 22 S. W. Rep., 898.

OBSTRUCTIONS IN ALLEY. Bagley v. People, 43 Mich., 355; 38 Am. Rep., 192; 5 N. W. Rep., 415.

90 Obstruction in Highway as nuisance; when question of fact.

Bybee v. State, 94 Ind., 443; 48 Am. Rep., 175; Logansport v. Dick, 70 Ind., 65; 36 Am. Rep., 166; Centerville v. Woods, 57 Ind., 192; Grove v. Fort Wayne, 45 Ind., 429; 15 Am. Rep., 262.

BUILDING IN A STREET constitutes a nuisance and may be abated. Cheek v. Aurora, 92 Ind., 107; Hawley v Harrall, 19 Conn., 142; Barclay v. Commonwealth, 25 Pa. St., 503; 64 Am. Dec., 715; Cook v. Harris, 61 N. Y., 448.

A barn in a street, held a nuisance. State v. Leaver, 62 Wis., 387; 22 N. W. Rep., 576. Compare Cook v. Covil, 18 Hun. (N. Y.), 288.

City cannot license or give permission to maintain a nuisance in its streets and public highways, as by allowing the erection of buildings and other structures, without express legislative grant. Daly v. Georgia Southern & F. I. Co., 80 Ga., 793; 7 S. E. Rep., 146; or by leasing space in street to produce dealers. Schopp v. St. Louis, 117 Mo., 131; 22 S. W. Rep., 898.

County jail standing in a public square held to be a nuisance. Llano v. Llano County, 5 Tex. Civ. App., 132; 23 S. W. Rep., 1008.

Dwelling house in a public square held a nuisance; injunction

law." ⁹¹ Manifestly, the power to remove includes the power to prevent by such reasonable regulations as do not conflict with any of the provisions of the federal or state constitution, charter or general laws. ⁹² Penal ordinances may be enacted and enforced forbidding obstructions and nuisances in public thoroughfares. ⁹³ The general power over highways is usually sufficient to enable the municipal corporation to adopt adequate means and to take necessary and appropriate action, to remove obstructions and nuisances therefrom which interfere with their free use for public travel. ⁹⁴ All obstructions in pub-

to abate sustained. Com. v. Rush, 14 Pa. St., 186.

Columns of a building projecting some two feet onto the sidewalk are nuisances. First National Bank v. Tyson, 133 Ala., 459; 32 So. Rep., 144; 91 Am. St. Rep., 46.

STRUCTURES ON WHEELS and machinery in highway may be abated as a nuisance. Day v. Green, 4 Cush. (Mass.), 433.

MILL RACE in the street may be abated as nuisance. Waterloo v. Union Mill Co., 72 Iowa, 437; 34 N. W. Rep., 197.

STEPPING STONE on sidewalk, held not a nuisance. Dubois v. Kingston, 102 N. Y., 219; 6 N. E. Rep., 273; 55 Am. Rep., 804.

STONE WALK in a public highway, held a nuisance. Smith v. McDowell, 148 Ill., 51; 35 N. E. Rep., 141; 22 L. R. A., 393.

BOOTH in a public street for rope dancing is a public nuisance. Hall's Case, 1 Mod., 76; 2 Keble, 846; Vent, 169.

LAMP POSTS. New Orleans Gas Light Co. v. Hart, 40 La. Ann., 474; 4 So. Rep., 215.

91 Philadelphia v. P. & R. R. R. Co., 58 Pa. St., 253, 263; San Francisco v. Buckman, 111 Cal., 25; 43 Pac. Rep., 396; Terre Haute v. Turner, 36 Ind., 522; Dudley v. Frankfort, 12 B. Mon. (Ky.), 610; Grand Rapids v. Hughes, 15 Mich., 54;

Compton v. Waco Bridge Co., 62 Tex., 715.

Removing obstruction is an exercise of the police power. State (Dawes) v. Hightstown, 45 N. J. L., 501.

92 Philadelphia v. Brabender, 201
 Pa. St., 574; 51 Atl. Rep., 374.

93 Ex parte Taylor, 87 Cal., 91; 25 Pac. Rep., 258; White v. Kent. 11 Ohio St., 550; Norfolk City v. Chamberlain, 29 Gratt. (Va.), 534. 94 Massachusetts—Springfield v. Connecticut River R. Co., 4 Cush. (Mass.), 63.

Minnesota—Stearns County v. St. Cloud, M. & A. R. Co., 36 Minn., 425; 32 N. W. Rep., 91; Hutchinson Tp. v. Filk, 44 Minn., 536; 47 N. W. Rep., 255.

New Hampshire—Hooksett v. Amoskeag Mfg. Co., 44 N. H., 105; Troy v. Cheshire R. Co., 23 N. H., 83; 55 Am. Dec., 177.

New Jersey—Easton & A. R. Co. v. Greenwich Tp., 25 N. J. Eq., 565. New York—Hart v. Albany, 9 Wend. (N. Y.), 571; 24 Am. Dec., 165; Watertown v. Cowen,, 4 Paige (N. Y.), 510; 27 Am. Dec., 80.

Pennsylvania — Philadelphia v. Thirteenth & Fifteenth Streets P. R. Co., 8 Phila. (Pa.), 648.

Texas—Rio Grande R. Co., v. Brownsville, 45 Tex., 88.

When a municipality has control of its streets it may proceed in its

lic highways which are nuisances per se may be abated summarily by the municipal authorities.⁹⁵

§ 461. Awnings, signs, etc. Ordinances and by-laws intended to accomplish the purpose of securing a free and uninterrupted passage through streets situated in a populous neighborhood, by restraining and regulating erections over a portion of the traveled way, are clearly within the legitimate scope of the power confided to cities and towns. This is among the leading and obvious duties of municipal government. It was early held in Massachusetts that charter power to pass all salutary and needful by-laws was sufficient to authorize an ordi-

corporate name to prevent or remove obstructions therein by judicial proceedings. Yates v. Warrenton, 84 Va., 337; 4 S. E. Rep., 818.

The city has the same right to maintain an action to prevent the unlawful obstruction of a street as have the people of a state. People ex rel. v. Holladay, 93 Cal., 241; 29 Pac. Rep., 54.

INJUNCTION to restrain the placing of obstructions in streets, etc., may be invoked. Metropolitan City Ry. Co. v. Chicago, 96 Ill., 620; Jacksonville v. Jacksonville Ry. Co., 67 Ill., 540.

95 *Iowa*—Kemper v. Burlington,81 Iowa, 354; 47 N. W. Rep., 72.

Massachusetts—Com. v. Wilkinson, 16 Pick. (Mass.), 175; 26 Am. Dec., 654.

Pennsylvania—Easton, S. E. &
W. E. P. R. Co. v. Easton, 133 Pa.
St., 505; 19 Atl. Rep., 486; New
Castle v. Raney, 130 Pa. St., 546;
18 Atl. Rep., 1066; 6 L. R. A., 737.
Ohio—Van Dyke v. Cincinnati, 1
Disney (Ohio), 532.

Wisconsin—Hubbell v. Goodrich, 37 Wis., 84; Neff v. Paddock, 26 Wis., 546.

OBSTRUCTIONS. Charter power "to fix the squaring and to prevent any encroachment upon or the stopping and obstructing the streets," confers power to pass an ordinance directing the removal of obstructions from the public streets. Vicksburg, S. & P. R. R. Co. v. Monroe, 48 La. Ann., 1102; 20 So. Rep., 664.

SUMMARY REMOVAL OF RAILROAD TRACKS. Cape May v. C. M., D. Bay & S. P. R. R., 60 N. J. L. 224; 37 Atl. Rep., 892; 39 L. R. A., 609; State (Kennelly) v. Jersey City, 57 N. J. L., 293; 30 Atl. Rep., 531; 26 L. R. A., 281; State (Del. & Atl. Tel. & Tel. Co.) v. Pensauken Tp., 67 N. J. L., 91, 531; 50 Atl. Rep., 452; 52 Atl. Rep., 482.

TELEGRAPH POLES; ordinance for removal. Hannibal v. M. & K. Tel. Co., 31 Mo. App., 23.

LAMP POSTS. New Orlean Gas Light Co. v. Hart, 40 La. Ann., 474; 4 So. Rep., 215; 8 Am. St. Rep., 544.

WHEN SHADE TREES in streets constitute obstructions they may be cut down. Chase v. Oshkosh, 81 Wis., 313; 51 N. W. Rep., 560; 29 Am. St. Rep., 898; Mt. Carmel v. Shaw, 155 Ill., 37; 39 N. E. Rep. 584; 46 Am. St. Rep., 311.

JUDICIAL PROCEEDINGS necessary to abate, when. Teass v. St. Albans, 38 W. Va., 1; 19 L. R. A., 802; 17 S. E. Rep., 400.

Notice Required. Pruden v. Love, 67 Ga., 190.

951/2 In re Goddard, 16 Pick.

nance providing that no person shall maintain an awning before his door without the consent of the mayor and aldermen and that one erected without such consent is an unlawful obstruction and may be removed by the municipal authorities.96 General charter power to open public ways and keep streets and sidewalks free from obstruction and nuisance, was held, in North Carolina, to be insufficient to support an ordinance forbidding the suspension or projection of signs over the sidewalks, and requiring all signs so suspended or projected at the date of the passage of the ordinance to be removed, within a specified time. But it was conceded that where any sign constitutes an obstruction which tends to hinder, delay, incommode or in some way endanger the use of the sidewalk by pedestrians, its removal can be enforced under the police power.97 In Connecticut an ordiance was declared void for uncertainty which prohibited the maintenance of an awning over a sidewalk, "ex-

(Mass.), 504, 511; 28 Am. Dec., 259. 90 Pedrick v. Bailey, 12 Gray (Mass.), 161, per Bigelow, J.

Especially is it within their province to regulate the construction of awnings, inasmuch as they are liable for damages occasioned to passers-by through any defect or insufficiency in the construction. Drake v. Lowell, 13 Met. (Mass.), 292.

AWNING defined. State v. Clarke, 69 Conn., 371; 37 Atl. Rep., 975; 39 L. R. A., 670.

AWNING AS A NUISANCE discussed.

Connecticut—Hewison v. New Haven, 37 Conn., 475; 9 Am. Rep., 342.

Michigan—Hawkins v. Sanders, 45 Mich., 491; 8 N. W. Rep., 98.

Minnesota—Bohen v. Waseca, 32 Minn., 176; 19 N. W. Rep., 730; 50 Am. Rep., 564.

Missouri—Hisey v. Mexico, 61 Mo. App., 248.

New York—Hume v. New York, 74 N. Y., 264; Farrell v. New York, 22 N. Y. St. R., 469; Brinkman v. Eisler, 40 N. Y. St. R., 865; Simis v. Brookfield, 13 Misc. (N. Y.), 569. "ENCUMBRANCE," when an awning constitutes, within meaning of ordinance. Fox v. Winona, 23 Minn., 10.

ERECTION of awnings may be allowed. Hoey v. Gilroy, 129 N. Y., 132; 29 N. E. Rep., 85, reversing 37 N. Y. St. Rep., 754.

PROJECTIONS OVER SIDEWALK. Chambers v. Ohio Life Ins. & Trust Co., 1 Disney (Ohio), 327.

Law forbidding projection front of any building "over or upon the pavement of any street," construed not to apply to projections from the front of a building which were too high up to interfere with the free passage along the foot-"The object * * * path. pears to us to be to keep the pavement clear for the foot passengers, and to prevent obstructions to the passage of the street. * * * The words, as it seems to us, must be read as if they ran 'over or upon the pavement so as to obstruct the passage along it." Goldstraw v. Duckworth, 5 Q. B. Div., 275, 277.

97 An abutting owner to a street and sidewalk has an easement in

cept the same be upon a suitable frame, and attached entirely to the building, which awning shall not, when extended, be less than six feet from the sidewalk," and which ordinance did not specify what should be deemed a "suitable frame."

§ 462. Regulation of lamp posts, poles, electric wire, underground conduits, gas pipes, etc. During the past few years the subject of municipal control over the erection and maintenance of poles and electric wires in the streets, alleys and public ways of cities, and the placing of wires underground has received special judicial consideration. All reasonable and generally accepted improvements which tend to decrease the obstruction of the streets, or increase the safety or convenience of the public in their use, may be compelled. The fact that the power to grant the franchise is vested in the legislature, or the company has the sole and exclusive privilege of lighting the streets in part of the city, clearly does not exempt it from reasonable municipal police regulations. But unreasonable

his frontage which he may use in subordination to the superior rights of the public. State v. Higgs, 126 N. C., 1014; 35 S. E. Rep., 473; 48 L. R. A., 446. Compare Augusta v. Burum, 93 Ga., 68; 19 S. E. Rep., 820; 26 L. R. A., 340.

98 The ordinance requires the awning to be "upon a suitable frame." but "furnishes no criterion by which the question of suitability can possibly be determined. It does not define the word 'suitable,' as here used, and the law does not define it. Indeed, when it is thus used, it is incapable of any generallegal definition. Batters v. Dunning, 49 Conn., 479; Smiths' appeal, 65 Conn., 135; 31 Atl. Rep., 529. Its use, of necessity, implies the judgment of some tribunal or person who is to determine the question of suitability, and yet neither the charter nor the ordinances of the city empower any person or tribunal to exercise such judgment. The term 'suitable,' as here used, seems altogether too

vague and indefinite to serve as the basis of an ordinance so highly penal in its consequences as this one is. On the whole, we are of opinion that the ordinance in question is void for uncertainty." Per Torrance, J., in State v. Clarke, 69 Conn., 371; 39 L. R. A., 670; 37 Atl. Rep., 975.

¹ United States Illuminating Co. v. Grant, 55 Hun. (N. Y.), 222; 5 N. Y. Suppl., 788; Mutual Union Tel. Co. v. Chicago, 11 Biss. C. C., 539; 16 Fed. Rep., 309; Allentown v. Western Union Tel. Co., 148 Pa. St., 117; 23 Atl. Rep., 1070; 33 Am. St. Rep., 820.

² Barhite v. Home Telephone Co., 50 N. Y. App. Div., 25.

³ Missouri *ex rel*. Laclede Gas Light Co. v. Murphy, 170 U. S., 78, affirming 130 Mo., 10; 31 S. W. Rep., 594.

May forbid suspension of wires on roofs of buildings. Electric Imp. Co. v. San Francisco, 45 Fed. Rep., 593; 13 L. R. A., 131.

As to right to use terminal poles

burdens which impair contract obligations cannot be imposed.⁴ A franchise to use streets for the erection of poles and overhead lines under conditions respecting permits and directions as to where the same shall be placed, when accepted and acted upon, becomes a contract, which, without reservation, can neither be repealed or so amended as to impair rights acquired under it,⁵ yet all such franchises are subject to reasonable police regulations in the interest of public safety and convenience and therefore when reason, convenience or the good government of the municipality requires, wire using companies may be compelled to place their wires in subsurface conduits.⁶

§ 463. Billboards and structures for advertising. To promote the public safety and convenience, the power to regulate

in connection with underground conduits. Com. ex rel. v. Warwick, 185 Pa. St., 623; 40 Atl. Rep., 93.

§ 239, supra.

New Orleans v. The Great Southern Tel. & Telephone Co., 40 La. Ann., 41; 3 So. Rep., 533.

Elevis v. Newton, 75 Fed. Rep., 884; § 238, supra.

As permitting by ordinance a second company to interfere with the rights of the first. Equity will enjoin such interference. Rutland Electric Light Co. v. Marble City Electric Light Co., 65 Vt., 377; 26 Atl. Rep., 635.

The city cannot revoke a designation of the streets in which a telegraph company has been granted the right to place its poles when the company has conformed to the conditions upon which the designation was made, and has expended money in so placing its poles.

State (Hudson Telephone Co.) v. Jersey City, 49 N. J. L., 303; 8 Atl. Rep., 123.

⁶ N. W. Telephone Exch. Co. v. Minneapolis, 81 Minn., 140, 147; 83 N. W. Rep., 527; 86 N. W. Rep., 69; N. E. T. & T. Co. v. Boston Term. Co., 182 Mass., 397; 65 N. E. Rep., 835.

UNDERGROUND CONDUITS. Tele-

graph and telephone companies, under the Missouri statutes, have a right to occupy the streets of St. Louis in constructing their lines of wire, and, with the consent of the city, to lay such wires underground. And that city has the power to permit such companies to construct such underground conduits, and to enter into contract with them specifying the conditions upon which its consent to such construction is given. State ex rel. National Subway Co. v. St. Louis, 145 Mo., 551; 46 S. W. Rep., 981. See note to State ex rel. Underground Service Co. v. Murphy, 34 L. R. A., 369. The city in granting to a company the right to lay its wires and construct its underground conduits, acts in a proprietary capacity, and in pursuance of the powers conferred upon it by its charter. State ex rel. National Subway Co. v. St. Louis, 145 Mo., 551; 46 S. W. Rep., 981. The statutes of Missouri authorize one such subway company to charge another rent for the use of any part of its way or facilities. Ibid. The right to charge such companies tolls, or to make an agreement with other companies for the use of its subway, are franchise rights, derived the use of streets and public ways, confers ample authority to enact and enforce, by ordinance, reasonable regulations, general and uniform in their nature, respecting the erection and maintenance of billboards and other structures used for advertising purposes and placed at or near the street lines. Such regulations are salutary and necessary, are not in restraint of trade, nor unlawful restrictions upon the legal and beneficial

from the state alone, and with which the city has no concern. Ibid. A telegraph company is not a common carrier, and the fact that the city ordinance declares a telephone and telegraph company a common carrier does not make it such. It is the nature of the company's business that determines its character. But the use of the streets of a city by such company is a public use, and while not a common carrier it is in some respects similar to one; the city may by ordinance require it to permit other companies engaged in a similar business to lay their wires in its subway; on the other hand, such companies are public corporations, having the right to condemn property for public use. (Overruling State ex rel. v. Murphy, 134 Mo., 548; 31 S. W. Rep., 784; 34 S. W. Rep., 51; 35 S. W. Rep., 1132.) Where a telephone company has a clear legal right to the relief sought at the hands of the city, and no specific legal remedy therefor, a peremptory writ of mandamus will issue. Ibid. Such company, when such right exists, may proceed by mandamus to compel the city of St. Louis and its board of public improvements to take action upon plans and specifications submitted by the company for service and supply pipes connecting manholes in the subway, constructed by virtue of the terms of certain ordinances, with the area-way under the buildings and sidewalks, and for its permit to do such work. *Ibid*.

REGULATING POLES, WIRE, ETC. A grant by the legislature to a corporation of the right to use the streets of a city for illumination by electricity is subject to reasonable regulations as to its use, and, the power to regulate the use of its streets and general police power having been subsequently conferred on the city, such right must be exercised subject to the ordinances of the city relating to electric wires in its streets. State ex rel Laclede Gas Light Co. v. Murphy, 130 Mo., 10; 31 S. W. Rep., 594; 31 L. R. A., 798. Such city, under its power to regulate the use of its streets, and under its general police power, has the right to require a compliance with its regulations which either wholly prohibit the illuminating corporation from placing its wires under the streets, or which regulate the manner of doing so. State ex rel. Laclede Gas Light Co. v. Murphy, 130 Mo., 10; 31 S. W. Rep., 594. Where the lighting of cities by electricity was unknown when the authority delegated to a city to regulate the use of its streets was conferred by the legislature, the latter will not be held to have intended to grant rights and powers inconsistent with the ordinary use of such streets. State ex rel. Laclede Gas Light Co. v. Murphy, 130 Mo., 10; 31 S. W. Rep., 594. It is within the municipal police power to designate on what parts of use of property.7 Thus an ordinance of Buffalo, N. Y., which prohibited the erection of billboards exceeding seven feet in height, without permission of the council, and authorized the abatement of any billboard erected in violation of the ordinance as a nuisance, was sustained, but the ordinance was construed to be prospective in its operation only, and hence it did not authorize the destruction of billboards erected prior to its passage.8 So it has been held by the Court of Appeals of New York that the charter of Rochester, N. Y., which confers power "to license and regulate bill posters * * * and to prescribe the terms and conditions upon which any such license shall be granted," authorizes an ordinance forbidding the erection of billboards exceeding six feet in height, except with the permission of the council, after notice, in writing of the application for the permit, to the owners, occupants or agents of all houses and lots within a distance of 200 feet from where such billboard is to be erected.9

§ 464. Riding and driving on streets. Under general charter power to regulate the use of streets, municipal corporations may enact and enforce ordinances, by penal provisions, regulating the use of streets by omnibuses, stage coaches and other vehicles; forbid fast driving and riding thereon, and may im-

streets lines shall be constructed. The law will presume that the power was exercised reasonably, and the courts will not interfere unless the exercise has been manifestly arbitrary and unreasonable. Louisville Home Tel. Co. v. Cumberland Tel. Co. (U. S. C. C. A.), 111 Fed. Rep., 663.

A telegraph company is not a common carrier. State ex rel. National Subway Co. v. St. Louis, 145 Mo., 551, 575, 576; 46 S. W. Rep., 981.

A municipal ordinance which peremptorily directs a change in the location of telephone poles, as previously permitted and occupied, can not be upheld when it is neither averred nor shown that the existing location incommodes the public, or that any good reason exists for the removal. Hannibal v. M. & K. Tel. Co., 31 Mo. App., 23.

Wire company is liable for the death of a fireman caused by stepping on a live grounded wire in a public alley. Gannon v. Laclede Gas Light Co., 145 Mo., 502; 43 L. R. A., 505; 46 S. W. Rep., 968; 47 S. W. Rep., 907.

⁷ Gunning System v. Buffalo, 62 App. Div. (N. Y.), 497; 71 N. Y. Supp., 155; 75 App. Div., 31; 77 N. Y. Supp., 987.

8 Whitmier v. Buffalo, 118 Fed. Rep., 773.

9 "To Regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the busi-

pose other restrictions as to the use thereof, designed to preserve the public safety and convenience.¹⁰

§ 465. Regulation of bicycles and velocipedes. Reasonable regulations for the public safety may be made, concerning the use of streets by bicycles, velocipedes, etc. General charter

ness is to be conducted." Rochester v. West, 164 N. Y., 510, 513; 79 Am. St. Rep., 659; 58 N. E. Rep., 673, affirming 29 N. Y. App. Div., 125.

UNREASONABLE ORDINANCE. An ordinance of Topeka, Kan., providing that, "no person shall erect any billboard or other structure for advertising purposes unless the same is placed at such distance from the line of any street or sidewalk as shall exceed at least five feet the height of such billboard or structure," was held void as unreasonable. Crawford v. Topeka, 51 Kan., 756; 37 Am. St. Rep., 323; 20 L. R. A., 692; 33 Pac. Rep., 476.

10 Persons driving in the streets of a city (in the absence of municipal regulations, as to fast driving) are not limited to any particular rate of speed. They may drive slowly or rapidly, but they must use proper care and prudence, so as not to cause injury to other persons lawfully upon the streets. Crocker v. Knickerbocker Ice Co., 92 N. Y., 652.

Regulations as to use of *omnibuses and stage coaches*, while passing over public streets, held reasonable. Commonwealth v. Stodder, 2 Cush. (Mass.), 562.

May prevent driving horses on a trot or gallop in public ways. Such restriction is reasonable and not in restraint of trade. Com. v. Worcester, 3 Pick. (Mass.), 461, 473.

Riding or driving faster than a walk in "turning the corner of a street" may be forbidden. City

Council v. Dunn, 1 McCord (S. C.),

May forbid fast driving or riding on streets "faster than an ordinary trot"; held not void for vagueness or uncertainty. Nealis v. Hayward, 48 Ind., 19. May forbid "at a rate of speed which is deemed inconsistent with the public safety or convenience." Commonwealth v. Roy, 140 Mass., 432; 4 N.E.Rep.,814.

Ordinance forbidding riding or driving at an "immoderate" rate of speed, held void for vagueness in a Massachusetts case.

LAW OF THE ROAD. It is the right of every person to travel on any part of the public way that may suit his taste or convenience, not occupied by another, provided no one is meeting him with teams and carriages having occasion or desire to pass. Dunham v. Rackliff, 71 Me., 345. And when persons are meeting and passing each other upon the highway, it is their duty to drive to the right of the middle of the traveled part of the road or bridge when practicable. Kennard v. Burton, 25 Me., 39; Daniels v. Clegg, 28 Mich., 32; Cooley on Torts (2d Ed.), p. 434.

Though the statute requires a traveler to keep to the right, yet it does not justify him in stubbornly keeping on that side, and thus causing a collision which a slight change on his part might have avoided. O'Maley v. Dorn, 7 Wis., 236.

¹¹ Fuller v. Redding, 13 App. Div. (N. Y.), 61; 43 N. Y. Suppl., 96,

power to provide for the public safety, convenience, etc., gives authority to forbid by ordinance the riding of bicycles on the sidewalks, 12 and it has been held that they may be excluded

BICYCLE DEFINED. Bicycle held not to be a carriage, within the meaning of a statute requiring highways to be kept in repair for safe and convenient travel. "A bicycle is more properly a machine than a carriage; and so it is defined in Murray's dictionary." It was held to be a machine within the meaning of the statute. Richardson v. Danvers, 176 Mass., 413; 79 Am. St. Rep., 320; 50 L. R. A., 127; 57 N. E. Rep., 688.

The "consensus of authority establishes that the locomotive machine known as a bicycle belongs to the genus vehicle or carriage." State ex rel v. Mo. Pac. Ry. Co., 71 Mo. App., 385, 391.

Bicyclist recklessly running into a pedestrian properly on the sidewalk is guilty of assault and battery. Mercer v. Corbin, 117 Ind., 450; 10 Am. St. Rep., 76; 3 L. R. A., 221; 20 N. E. Rep., 132.

Recklessly riding a bicycle producing damages to one constitutes an offense under the English statute. Reg. v. Parker, 59 J. P., 793.

A person riding on a bicycle was held in Scotland not to be "traveling as an ordinary passenger" in a vehicle, within the meaning of the term as used in a policy of insurance. McMillan v. Sun Life Assurance Co., 4 Scots. L. T., 98.

¹² Moore v. District of Columbia,
12 App. Dist. of Columbia, 537; 41
L. R. A., 208.

A bicycle is an animal within the meaning of the statute forbidding the riding or driving of any animal upon sidewalk. Commonwealth v. Forest, 170 Pa. St., 40; 29 L. R. A., 365; 32 Atl. Rep., 652.

Bicycle held a vehicle, as to use

of sidewalks. Mercer v. Corbin, 117 Ind., 450; 20 N. E. Rep., 132; 10 Am St. Rep., 76; 3 L. R. A., 221; Reg. v. Justin, 24 Ont. Rep., 327.

When bicycle will be held to be a vehicle. Taylor v. Goodwin, 42 Q. B. Div., 228; Whiting v. Doob, 152 Ind., 157; 52 N. E. Rep., 759; Holland v Bartch, 120 Ind., 46; 22 N. E. Rep., 83; Swift v. Topeka, 43 Kan., 671; 23 Pac. Rep., 1075; Myers v. Hinds, 110 Mich., 300; 68 N. W. Rep., 156; Thompson v. Dodge, 58 Minn., 555; 60 N. W. Rep., 545; Geiger v. Perkiomen & Reading Turnpike Road, 167 Pa. St., 582; 31 Atl. Rep., 918; Taylor v. Union Traction Co., 184 Pa. St., 465; 40 Atl. Rep., 159; 47 L. R. A., 289; State v. Collins, 16 R. I., 371; 17 Atl. Rep., 131; Reg. v. Plumber, 30 Up. Can. Q. B., 41.

A tricycle in which a person unable to walk is traveling on a sidewalk is not within the scope of an ordinance against leading, riding, or placing "any beast of burden or vehicle on any sidewalk," or an ordinance which prohibits riding or driving except between the curb lines of streets. Wheeler v. Boone, 108 Iowa, 235; 44 L. R. A., 821; 78 N. W. Rep., 909.

DEFENSE. It is no defense for a bicyclist to show that it was customary to violate the law providing against riding on the sidewalk. Commonwealth v. Forest, 170 Pa. St., 40; 29 L. R. A., 365; 32 Atl. Rep., 652.

RIGHT OF WAY. Bicycles are not within the meaning of an ordinance giving vehicles a right of way upon street railway tracks in the direction in which the cars usually run, over vehicles moving in the oppo-

from bridges,¹³ and public parks under ample charter power;¹⁴ and general charter power will authorize other reasonable regulations, as requiring the use of bells when on the public streets and the carrying of lights at night.¹⁵

§ 466. Regulating street parades. Ordinances may provide reasonable regulations respecting the use of streets and public ways for processions, parades, etc. But such regulations must not be so framed as to allow their enforcement to rest alone upon official discretion. A uniform rule must be prescribed. An ordinance which prohibits the congregation of persons upon streets or sidewalks and the marching in processions, "at such

site direction, so that a bicyclist riding between the rails can compel an approaching vehicle to give way to him. Taylor v. Union Trac. Co., 184 Pa. St., 465; 10 Atl. Rep., 159; 47 L. R. A., 289.

The rule requiring drivers of vehicles drawn by horses, and riders of bicycles, to regard the ordinary rules of the road for each others safety, does not require the driver of a cart to drive to one side in order that the bicyclist may not have to deviate from a straight line. Taylor v. Union Trac. Co., 184 Pa. St., 465; 40 Atl. Rep., 159; 47 L. R. A., 289.

13 If riding bicycle or tricycle over a public bridge is likely to frighten horses, etc., rule forbidding, is reasonable. Twilley v. Perkins, 77 Md., 252; 19 L. R. A., 632; 26 Atl. Rep., 286.

Law conferring official discretion as to use of bicycles, etc., on certain highways, sustained. State v. Yopp, 97 N. C., 477; 2 Am. St. Rep., 305; 2 S. E. Rep., 458.

CONTRA. But in Kansas it has been held that an ordinance which attempts to prevent bicyclists from using the part of a street which is devoted to the use of vehicles is void as against common right. Swift v. Topeka, 43 Kan., 671; 8 L.

R. A., 772; 23 Pac. Rep., 1075; Emporia v. Wagoner, 6 Kan. App., 659; 49 Pac. Rep., 701.

14 Where park commissioners have full and exclusive power to govern, manage and direct the several public parks, squares and places in the city, a resolution or ordinance passed by them, in pursuance of the power so conferred, providing that no bicycle or tricycle should be allowed in certain parks, is valid. *In re* Wright, 29 Hun. (N. Y.), 357.

15 Des Moines v. Kellar, 116
 Iowa, 648; 88 N. W. Rep., 827.
 16 See § 416 supra.

UNREASONABLE ORDINANCES. re Frazee, 63 Mich., 396, 407; Campbell. 30 N. W. Rep., 72, C. J. said: "This by-law because - it unreasonable. presses what is generally perfectly lawful, and because it leaves the power of permitting or restraining processions, and their courses, to an unregulated official discretion when the whole matter, if regulated at all, must be by permanent, legal provisions, operating generally and impartially." Followed in Chicago v. Trotter, 136 Ill., 430; 26 N. E. Rep., 359; Anderson v. Wellington, 40 Kan., 173; 19 Pac. Rep., 719; 10 Am. St. Rep., 175; 2 L. R. time and place and in such number and manner as to obstruct or impede public travel," or to interfere with the business of any person on the street, and which forbids the making of any noise upon the streets or sidewalks "by means of musical instruments or otherwise, of such character and extent, and at such times and places as would be likely to cause horses and teams to become frightened and ungovernable or of such character, extent and duration as to annoy and disturb others," and which makes it a misdemeanor to refuse to desist from such forbidden acts upon command of the mayor or city marshal, was held valid in Iowa. It is not an unwarranted restraint upon person liberty. The gravamen of the offense is the doing of the prohibited act and not disobedience to the order of the officer, hence the offense does not depend upon the whim or caprice of the officer.¹⁷

§ 467 Distribution of hand bills, circulars, advertising matter. etc. Power to enact and enforce reasonable ordinances for the protection of the public in their right to the free and safe use of the highways of the city, authorizes ordinances forbidding the casting of any paper, advertisement, hand bill, circular or waste paper upon the streets, sidewalks and public places or prohibiting the carrying and placing in such places any show board, placard or sign, for the purpose of there displaying the same. Thus the general welfare clause and power to prevent "practices having a tendency to frighten teams or horses," was held sufficient to sustain the Denver ordinance, which made it unlawful to distribute hand bills, etc., in public places.¹⁸ So power to make all such salutary and needful bylaws, not repugnant to the laws of the state, for directing and managing the prudential affairs, preserving the peace and good order and maintaining the internal police thereof, as they may judge most conducive to the welfare of the town, was held

A., 110; Rich v. Naperville, 42 III. App., 222.

Right to parade and assemble in public places. State v. Hughes, 72 N. C., 25.

Ordinance forbidding going about beating drums, etc., valid. Salvation army. Roderick v. Whitson, 51 Hun. (N. Y.), 620; State v. White. 64 N. H., 48; 5 Atl. Rep.,

828; Bloomington v. Richardson, 38 Ill. App., 60.

¹⁷ Chariton v. Simmons, 87 Iowa,
 226; 54 N. W. Rep., 146.

18 "The evident object of the ordinance * * * is to prevent the littering of the streets and the frightening of horses. It certainly tends to the accomplishment of one of the purposes for which the city

ample to support an ordinance providing that, "no person shall place or carry or cause to be placed or carried on any sidewalk any show board, placard or sign for the purpose of there displaying the same." But general power and power to prevent obstructions, etc., on the streets and sidewalks was held insufficient to authorize the Detroit ordinance which forbade the circulation, distribution or giving away of "circulars, handbills or advertising cards of any description in or upon any of the public streets and alleys of said city." An ordinance of Philadelphia was sustained which forbade the casting of such articles into the vestibules of dwelling houses and which exempted from its operation newspapers and addressed envelopes. 1

was incorporated, viz., the protection of its inhabitants from danger as they pass along its streets, engaged in their business. Such an object is certainly legitimate, and the means employed are reasonable and surrounded by sufficient safeguards." Wettengel v. Denver, 20 Colo., 552, 557; 39 Pac. Rep., 343.

19 "The purpose of the ordinance in question is to prevent the placing of show-boards and signs upon the sidewalks so as to obstruct them, and also to prevent the carrving of placards and signs for the purpose of displaying them, which the tendency and effect might be to collect crowds, and thus to interfere with the use of the sidewalks by the public, and We cannot say lead to disorder. that such a provision applicable to the crowded streets of a populous city is unreasonable." Per Morton, C. J. in Com. v. McCafferty, 145 Mass., 384; 14 N. E. Rep., 451.

20 The special facts of this case probably had an influence on the decision. The cards given out were small, and read: "The invitation committee cordially invites you to spend this, or any Monday night from 7:45 to 9 o'clock at the Y. M. C. A. Building. Ice water and

fans." No persons were interfered with, nor were teams or horses There was no indisfrightened. criminate scattering of the papers. "The card itself was not only harmless, but the words printed thereon were an invitation to a moral and Christian assembly of people, gathered together for the public good. If this act can be classed as an offense punishable by fine and imprisonment, then the selling or distribution of newspapers upon the streets of the city would be punishable in the same way. What direction or restraint is required for the public good in the mere act of giving away an advertising card or handbill? This part of the ordinance is not aimed at the littering up of the streets, or to the frightening of horses, but the offense is made complete in itself by the mere act of distributing or giving away these enumerated articles." The penalty was also held unreasonable. Per Long, J. in People v. Armstrong, 73 Mich., 288, 295; 41 N. W. Rep., 275; 16 Am. St. Rep., 578, 584; 2 L. R. A., 721.

21 Philadelphia v. Brabender, 201
 Pa. St., 574; 51 Atl. Rep., 374.

§ 468. Animals at large—Regulating driving of, through streets. Usually municipal corporations have power to restrain animals, such as cattle, horses, mules, goats, sheep, swine, etc., from running at large upon the highways, streets, etc., and to regulate the driving of the same over the public ways. General charter power is sufficient for this purpose.²² The local corporation generally has power to provide for the taking, im-

²² California—Amyx v. Taber, 23 Cal., 370.

Colorado—Brophy v. Hyatt, 10 Colo., 223; 15 Pac. Rep., 399.

Illinois—Quincy v. O'Brien, 24 Ill. App., 591; Kinder v. Gillespie, 63 Ill., 88; Roberts v. Ogle, 30 Ill., 459; 83 Am. Dec., 201; Chamberlain v. Litchfield, 56 Ill. App., 652.

Kentucky—McKee v. McKee, 8 B. Mon. (47 Ky.), 433.

Louisiana — Third Municipality of New Orleans v. Blanc, 1 La. Ann., 385.

Maryland—Cochrane v. Frostburg, 81 Md., 54; 48 Am. St. Rep., 479; 27 L. R. A., 728; 31 Atl. Rep., 703.

Massachusetts—Com. v. Bean, 14 Gray (Mass.), 52.

Missouri—Spitler v. Young, 63 Mo., 42; Frazier v. Draper, 51 Mo. App., 163; Sherrell v. Murray, 49 Mo. App., 233; Vail v. K. C. C. & S. Ry., 28 Mo. App., 372.

North Carolina—Jones v. Duncan, 127 N. C., 118; 37 S. E. Rep., 135; Rose v. Hardie, 98 N. C., 44; 4 S. E. Rep., 41; State v. Tweedy, 115 N. C., 704; 20 S. E. Rep., 183.

Tennessee—Knoxville v. King, 7 Lea (Tenn.), 441; Chattanooga v. Norman, 92 Tenn., 73; 20 S. W. Rep., 417.

Texas—Heath v. Hall (Tex. Civ. App., 1894) 27 S. W. Rep., 160; Waco v. Powell, 32 Tex., 258.

Virginia—Bolton v. Vellines, 94 Va., 393; 26 S. E. Rep., 847; 64 Am. St. Rep., 737. Wisconsin—Miles v. Chamberlain, 17 Wis., 446.

Contra. Wilson v. Beyers, 5 Wash., 303; 34 Am. St. Rep., 858; 32 Pac. Rep., 90.

Swine may be included, though not specially enumerated in the charter. Heath v. Hall (Tex. Civ. App. 1894) 27 S. W. Rep., 160.

LIMITS. An ordinance forbidding the running at large in such limits as may be designated by the council from time to time, is not effective until such limits are so designated. Lenz v. Sherrott, 26 Mich., 139.

FEEDING CATTLE on highways may be made unlawful. Com. v. Bean, 14 Gray (80 Mass.), 52.

CONFLICT WITH STATE LAW, POWer to enact such ordinances as shall be deemed necessary for "the well regulation, interest, health, cleanliness convenience, and advantage," of the corporation, and -"to require and compel the abatement of nuisances," does not authorize an ordinance forbidding swine, cattle, horses, etc., from running at large, where the general law of the state permits such animals to run at large. Collins v. Hatch, 18 Ohio, 523; 51 Am. Dec., 465. Ordinance cannot conflict with state laws. § 16 supra, unless § 17 supra. See Ch. XV for municipal control of state offenses.

TRESPASS. Charter authorized ordinance to restrain animals from running at large. Held such power does not authorize ordinance pro-

pounding and selling of animals found running at large, in violation of ordinance provisions.²³

§ 469. Regulating dogs. Ordinances regulating dogs and requiring them to be registered and licensed, and at times muzzled and prevented from going at large, are within the police powers usually conferred upon the local corporation. Such ordinances are authorized by virtue of general powers and the

viding penalty for trespass committed by herdsmen or stock owners in herding their cattle upon the lands of private owners, within the corporate limits. State v. Johnson, 41 Minn., 111; 42 N. W. Rep., 786.

By law applied to swine on public highways, and not to going at large in private places. Shepherd v. Hees, 12 Johns. (N. Y.), 433.

LEAVING ANIMALS UNFASTENED. At common law one who leaves a horse loose and unattended in a street is responsible for damage done by it in running away. Shearman & Redf. on Neg., Sec. 35; Wharton on Neg. Secs. 113, 915; Phillips v. Dewald, 79 Ga., 732; 7 S. E. Rep., 151. An ordinance in this respect merely declares and enforces a common law duty. Becker v. Schutte, 85 Mo. App., 57. Hence, the rule declared in Sanders v. Southern E. Ry. Co., 147 Mo., 411; 48 S. W. Rep., 855; and other like cases is not applicable.

BICYCLE is an animal, in law forbidding use of sidewalk. Commonwealth v. Forest, 170 Pa. St., 40; 32 Atl. Rep., 652, reversing 3 Pa. Dist. Rep., 797.

Driving swine through street. Under power to make all salutary and needful by-laws, a by-law providing that no person shall permit any swine under his care to go upon any sidewalk, etc., held valid. Com. v. Curtis, 9 Allen (91 Mass.), 266.

May regulate driving horned cattle through streets. St. Louis v. Rothschild, 3 Mo. App., 563; Mun. Code of St. Louis, Secs. 1489, 1490.

Forbidding "drove" of cattle to be driven through streets, held void for vagueness. McConville v. Jersey City, 39 N. J. L., 38. See § 20 supra.

Power to regulate driving cattle through street does not give power to prohibit altogether. McConville v. Jersey City, 39 N. J. L., 38.

23 IMPOUNDING OF STOCK.

Alabama—Folmar v. Curtis, 86 Ala., 354; 5 So. Rep., 678.

Connecticut—Whitlock v. West, 26 Conn., 406.

Indiana—Slessman v. Crozier, 80 Ind., 487.

Iowa—Gosselink v. Campbell, 4 Iowa. 296.

Kansas—Smith v. Emporia, 27 Kan., 528.

Kentucky—South Covington, etc. St. R. Co. v. Berry, 93 Ky., 43; 18 S. W. Rep., 1026; 40 Am. St. Rep., 161; Armstrong v. Brown, 106 Ky. 81); 50 S. W. Rep., 17; Varden v. Mount, 78 Ky., 86; 39 Am. Rep., 208.

Michigan—Grover v. Huckins, 26 Mich., 476.

Missouri—McVey v. Barker, 92 Mo. App., 498.

North Carolina — Whitfield v. Longest, 6 Ired. (N. C.), 268; Hellen v. Noe, 3 Ired. (25 N. C.), 493. South Carolina—Crosby v. Warren, 1 Rich. Law (S. C.), 385.

Tennessee—Moore v. State, 11 Lea. (79 Tenn.), 35.

West Virginia-Burdett v. Allen,

usual general welfare clause.²⁴ Thus power to protect life, health and property authorizes an ordinance requiring owners of dogs, under penalty, to muzzle them, or keep them on their own premises, and directing the marshal to kill all dogs found running at large.²⁵ An ordinance authorizing the mayor, whenever he may apprehend danger of the existence or spread of hydrophobia, to issue a proclamation requiring all owners of

35 W. Va., 347; 13 S. E. Rep., 1012. Wisconsin—Wilcox v. Hemming,
58 Wis., 144; 15 N. W. Rep., 435; 46
Am. Rep., 625. See ch. V.

24 Georgia—Griggs v. Macon, 103
 Ga., 602; 30 S. E. Rep., 561; 68 Am.
 St. Rep., 134.

Indiana—Mitchell v. Williams, 27 Ind., 62.

Kansas—State ex rel v. Topeka, 36 Kan., 76; 12 Pac. Rep., 310; 59 Am. Rep., 529.

Maryland—Hagerstown v. Witmer, 86 Md., 293; 37 Atl. Rep., 965. Massachusetts—Com. v. Dow, 10 Met. (Mass.), 382; Com. v. Chase, 6 Cush. (60 Mass.), 248.

Missouri—Carthage v. Rhodes, 101 Mo., 175; 9 L. R. A., 352; 14 S. W. Rep., 181.

Tennessee—Memphis v. Cornell, 3 Shan. Cas. (Tenn.), 477.

Vermont—Brown v. Carpenter, 26 Vt., 638; 62 Am. Dec., 603.

Wisconsin—Carter v. Dow, 16 Wis., 299; Tenny v. Lenz, 16 Wis., 566.

United States—Washington v. Lynch 5 Cranch C. C., 498; 29 Fed. Cas. No. 17231.

Imposing license is exercise of police power. *Ex parte* Cooper, 3 Tex. App., 489.

Registering and license, valid. State v. Topeka, 36 Kan., 76; 59 Am. Rep., 529; 12 Pac. Rep., 310; Faribault v. Wilson, 34 Minn., 254; 25 N. W. Rep., 449.

From time immemorial dogs have been considered as holding their lives at the will of the legislature, and properly fall within the police power of the several states. Sentell v. N. O. & C. R. R. Co., 166 U. S., 698.

"It has been customary always to make dogs the subject of special and peculiar regulations," per Graves, J. in Van Horn v. People, 46 Mich., 183, 185; 9 N. W. Rep., 246.

As a police regulation, the owner may be required to muzzle his dog for the public safety. Washington v. Meigs, 8 District of Columbia (1 McArthur) 53; 29 Am. Rep., 578; Julienne v. Jackson, 69 Miss., 34; 10 So. Rep., 43; 30 Am. St. Rep., 526.

Owner has only a qualified property in dogs. Hagerstown v. Witmer, 86 Md., 293; 37 Atl. Rep., 965.

Ordinance making owner of dog liable to penalty if dog bite any one on street, held valid. Com. v. Steffee, 7 Bush. (Ky.), 161.

FEROCIOUS DOG, is a nuisance. Com. v. McClung, 3 Clark (Pa.), 413.

A Dog IS AT LARGE when following its owner on the highway, if he is so far away that the owner cannot control it. Com. v. Dow, 10 Met. (Mass.), 382.

25 Walker v. Towle, 156 Ind.,639; 59 N. E. Rep., 20; Haller v.Sheridan, 27 Ind., 494.

DESTROYING DOGS. Authority to regulate the keeping of dogs under the penalty of having them summarily destroyed without previous adjudication is within the police

dogs to confine or muzzle them is not invalid as a delegation of legislative power to an executive officer.²⁶

§ 470. Fire limits—Wooden buildings. Under the powers usually conferred, municipal corporations may prescribe fire limits and forbid the erection therein of wooden structures. The power of the state through its legislature to enact such police regulations for the protection of property against fire is Such building restrictions are sometimes conundoubted. tained in legislative acts, but more frequently the regulation of these matters is committed, either in express or general terms, to the local corporation in deference to the idea that it is more competent to deal with such questions than the legislature. Many cases hold that the power to make such regulations is inherent in the municipal corporation and is implied from its mere creation.27 A few cases have denied that the power arises by implication.28 But such power will be sustained under a general grant of authority or power contained in the general welfare clause, and additional power to protect the inhabitants and their property from fire, etc.29 Building regula-

power. Per Gray, J. in Blair v. Forehand, 100 Mass., 136; 1 Am. Rep., 94, Massachusetts legislation examined. Morey v. Brown, 42 N. H., 373; Nehr v. State, 35 Neb., 638; 53 N. W. Rep., 589; Hubbard v. Preston, 90 Mich., 221; 51 N. W. Rep., 209; 15 L. R. A., 249; Jenkins v. Ballantyne, 8 Utah, 245; 30 Pac. Rep., 760.

Dogs may be impounded, and if not redeemed, etc., may be destroyed. Hagerstown v. Witmer, 86 Md., 293; 37 Atl. Rep., 965.

Walker v. Towle, 156 Ind., 639;
N. E. Rep., 20.

Licensing dogs, § 422 supra.

²⁷ Kaufman v. Stein, 138 Ind., 49; 46 Am. St. Rep., 368; 37 N. E. Rep., 333; First Nat. Bk. v. Sarlls, 129 Ind., 201; 28 N. E. Rep., 434; Clark v. South Bend, 85 Ind., 276; 44 Am. Rep., 13.

The cases which sustain this view rest upon "solid principle, for the rule has always been that a

municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens against fire." Per Elliott, J., in Bumgartner v. Hasty, 100 Ind., 575, 580; 50 Am. Rep., 830; 8 Am. & Eng. Corp. Cas., 353; Monroe v. Hoffman, 29 La. Ann., 651; 29 Am. Rep., 345. Compare State v. Schuchardt, 42 La. Ann., 49; 7 So. Rep., 67; Wadleigh v. Gilman, 12 Me., 403; 28 Am. Dec., 188; Brady v. Northwestern Insurance Co., 11 Mich., 425.

28 State v. Schuchardt, 42 La.
Ann., 49; 7 So. Rep., 67; Hudson v.
Thorne, 7 Paige (N. Y.), 261; Pye v. Peterson, 45 Tex., 312, 315; 23
Am. Rep., 608. Compare Keokuk v. Scroggs, 39 Iowa, 447; Troy v.
Winters, 2 Hun. (N. Y.), 63; 4
Thomp. & C., 256; Kneedler v. Norristown, 100 Pa. St., 368, 371; 45
Am. Rep., 383.

²⁹ Alabama—Canepa v. Birmingham, 92 Ala., 358; 9 So. Rep., 180.

tions must be established by ordinance, unless self-enforcing charter and statutory provisions exist.^{29½} The ordinances upon this subject vary. Frequently questions arise respecting

Georgia—Ford v. Thralkill, 84 Ga., 169; 10 S. E. Rep., 600.

Illinois—King v. Davenport, 98 Ill., 305; 38 Am. Rep., 89.

Indiana—Bumgartner v. Hasty, 100 Ind., 575; 50 Am. Rep., 830.

Maine—Wadleigh v. Gilman, 12 Me., 403; 28 Am. Dec., 188.

Massachusetts—Salem v. Maynes, 123 Mass., 372.

Minnesota—State v. Starkey, 49 Minn., 503; 52 N. W. Rep., 24.

Mississippi—Alexander v. Greenville, 54 Miss., 659.

Oregon—Hubbard v. Medford, 20 Oregon, 315; 25 Pac. Rep., 640.

Washington—Olympia v. Mann, 1 Wash. St., 389; 25 Pac. Rep., 337; Baxter v. Seattle, 3 Wash. St., 352; 28 Pac. Rep., 537.

Generally cities may prevent wooden buildings within certain limits. Troy v. Winters, 4 Thomp. & C. (N. Y.), 256; 2 Hun. (N. Y.), 63.

Ordinarily city must have charter power. Hudson v. Thorne, 7 Paige (N. Y.), 261.

Charter power "to make regulations for guarding against damage or damages from fires," authorizes ordinance establishing fire limits, etc. Charleston v. Reed, 27 W. Va., 681; 55 Am. Rep., 336.

Pennsylvania boroughs, as a rule, have no power to pass ordinances forbidding erection of frame buildings. Hence, where no special circumstances are disclosed, showing the advantage or necessity of such an ordinance, it would be held void. Kneedler v. Norristown, 100 Pa. St., 368; 45 Am. Rep., 383.

Charter power limited. Keokuk v. Scroggs, 39 Iowa, 447.

Act of legislature expressly authorized, hence ordinance valid. Respublica v. Duquet, 2 Yeates (Pa.), 493. (Subject fully discussed.)

Frame building is not a nuisance per se. Wadleigh v. Gilman, 12 Me., 403, 406; 28 Am. Dec., 188; Klingler v. Bickel, 117 Pa. St., 326, 339, 10 Cent. Rep., 381; 11 Atl. Rep., 555.

The legislature may forbid erection of wooden buildings in limits and may confer power to prevent on municipal corporations. Klingler v. Bickel, 117 Pa. St., 326; 10 Cent. Rep., 381; 11 Atl. Rep., 555; Com. v. Tewksbury, 11 Met. (Mass.), 55; Douglass v. Com., 2 Rawle (Pa.), 262.

Held, charter did not authorize borough to establish. Pratt v. Litchfield, 62 Conn., 112; 25 Atl. Rep., 461.

Held sufficient charter power. McCloskey v. Kreling, 76 Cal., 511; 18 Pac. Rep., 433. Ex parte Fiske, 72 Cal., 125; 13 Pac. Rep., 310; Hine v. New Haven, 40 Conn., 478; State v. O'Neil, 49 La. Ann., 1171; 22 So. Rep., 352; Easton v. Covey, 74 Md., 262; 22 Atl. Rep., 266; Knoxville v. Bird, 12 Lea (Tenn.), 121; 47 Am. Rep., 326.

²⁹ Chicago v. Ferris Wheel Co., 58 Ill. Apr., 625.

Where the ordinance fixing fire limits is to be passed on petition of certain property owners, such petition is a necessary prerequisite, to validate the ordinance. Des Moines the extent of the power, what constitute wooden buildings and structures, repairs, additions, new buildings, material alterations, sufficient fire escapes, etc., and their solution will depend upon the proper construction of the charter power and the language of the particular regulations, as will appear from the numerous cases set out in the notes.³⁰

§ 471. Same—Building regulations—Permits. Where the charter power is ample, the local corporation may require a certificate or permit, issued by the proper official as a condition precedent to the erection of new buildings or the material alter-

v. Gilchrist, 67 Iowa, 210; 25 N. W. Rep., 136; 56 Am. Rep., 341.

30 Fire limits may be established. McCloskey v. Kreling, 76 Cal., 511; 18 Pac. Rep., 433.

"Fire district," and "fire limits." Des Moines v. Gilchrist, 67 Iowa, 210; 56 Am. Rep., 341; 25 N. W. Rep., 136.

Ordinance held operative on building begun. Salem v. Maynes, 123 Mass., 372, and building partly burned. State v. Johnson, 114 N. C., 846; 19 S. E. Rep., 599.

Conditions on construction may be imposed. Campion v. Buffalo, 8 N. Y. St. Rep., 329.

Ordinance held too broad under power granted. Marion v. Robertson, 84 Ill. App., 113; Newton v. Belger, 143 Mass., 598; 10 N. E. Rep., 464.

FIRE ESCAPES. Schmalzried v. White, 97 Tenn., 36; 36 S. W. Rep., 393; 32 L. R. A., 782; De Ginther v. New Jersey Home, etc., 58 N. J. L., 354; 33 Atl. Rep., 968; New York Fire Dept. v. Chapman, 10 Daly (N. Y.), 377.

Entrance on street. Armstrong v. Building Inspectors, 4 Pa. Co. Ct. Rep., 477.

BUILDING DISTRICTS, discrimination. Singer v. Philadelphia, 112 Pa. St., 410; 4 Atl. Rep., 28.

Wooden building-one partly of

brick and wood held not to be. Sewart v. Com., 10 Watts (Pa.), 306. Compare N. Y. Fire Dept. v. Buffum, 2 E. D. Smith (N. Y.), 511.

"Wooden" and "Frame" building, meaning of words held to be same. Ward v. Murphysboro, 77 Ill. App., 549, 552.

Width. Philadelphia v. Michener, 10 Phila. (Pa.), 30.

Walls, thickness. Hubbard v. Paterson, 45 N. J. L., 310; 46 Am. Rep., 772.

IRON BUILDING. Charleston v. Reed, 27 W. Va., 681; 55 Am. Rep., 336.

FIRE WALLS: Langdon v. New York Fire Dept., 17 Wend. (N. Y.), 234

Roof supported by posts held not to be a building. Zimmerman v. Saam, 6 Pa. Co. Ct. Rep., 318.

Rebuilding without consent. Watertown v. Sawyer, 109 Mass., 320.

HEIGHT. People v. D'Oench, 111 N. Y., 359; 18 N. E. Rep., 862; Cleveland v. Lenze, 27 Ohio St., 383.

Distinct buildings. Townsend v. Hoadley, 12 Conn., 541; Langdon v. New York Fire Dept., 17 Wend. (N. Y.), 234.

METALLIC LEADERS on roof for conducting water. New York Fire Dept. v. Wendell, 13 Daly (N. Y.), 427.

ations or additions to buildings already erected; but whether such authority exists and the manner of its exercise depend upon the provisions of the charter and legislative acts applicable. Where the charter power is sufficient, an ordinance re-

Violation of terms of construction. Campion v. Buffalo, 8 N. Y. St. Rep., 329.

DWELLING HOUSE. New York Fire Dept. v. Buhler, 1 Daly (N. Y.), 391.

Hotel held not to be dwelling house as used in ordinance as to height of buildings. People v. D'Oench, 111 N. Y., 359; 18 N. E. Rep., 862.

REPAIRS. State v. Schuchardt, 42 La. Ann., 49; 7 So. Rep., 67; Reg. v. Howard, 4 Ont. Rep., 377; 4 Am. & Eng. Corp. Cas., 377.

ERECTION. Ordinance construed as relating to new erections. Buffalo v. Chadeayne, 134 N. Y., 163; 31 N. E. Rep., 443; Reg. v. Howard, 4 Ont. Rep., 377; 4 Am. & Eng. Corp. Cas., 377.

When repairs and alterations do not constitute erection. Booth v. State, 4 Conn., 65; Daggett v. State, 4 Conn., 60; 10 Am. Dec., 100; Stamford v. Studwell, 60 Conn., 85; 21 Atl. Rep., 101.

Additions as erections-New buildings. Montgomery v. Louisville & N. R. Co., 84 Ala., 127; 4 So. Rep., 626; Tuttle v. State, 4 Conn., 68; Delione v. Long Branch, 55 N. J. L., 108; 25 Atl. Rep., 274; Combs v. Lippincott, 35 N. J. L., 481, 483; Hancock's Appeal, 115 Pa. St., 1; 7 Atl. Rep, 773; Appeal of Brice, 89 Pa, St., 85; Harmon v. Cummings, 43 Pa. St., 322; Lightfoot v. Krug, 35 Pa. St., 348; Pretz's Appeal, 35 Pa. St., 349; Nelson v. Campbell, 28 Pa. St., 156; Armstrong v. Ware, 20 Pa. St., 519; Carroll v. Lynchburg, 84 Va., 803; 6 S. E. Rep., 133.

ERECTION. Removal of a wooden building within the forbidden district, held to constitute an erection. Wadleigh v. Gilman, 12 Me., 403; 28 Am. Dec., 188.

Removal, not an erection. Brown v. Hunn, 27 Conn., 332; 71 Am. Dec., 71.

"Rebuilding," what is. First Nat. Bk. v. Sarlls, 129 Ind., 201; 13 L. R. A., 481; 28 Am. St. Rep., 185; 28 N. E. Rep., 434.

"Trussed roof." Diamond State Iron Co. v. Giles, 7 Houst. (Del.), 453; 8 Atl. Rep., 368; 7 Houst. (Del), 557; 11 Atl. Rep., 189.

Application to buildings already erected. Glenn v. Baltimore, 5 Gill & J. (Md.), 424.

BUILDING LINE — ornamental structure. Garrett v. Janes, 65 Md., 260; 3 Atl. Rep., 597.

MATERIAL ALTERATIONS. People v. Marley, 2 Wheeler Cr. Cas. (N.Y.), 74; Douglass v. Com., 2 Rawle (Pa.), 262.

REPAIRS as affect insurance. Cordes v. Miller, 39 Mich., 581; 33 Am. Rep., 430; Brady v. Northwestern Ins. Co., 11 Mich., 425.

REMOVAL OF WOODEN BUILDINGS. City may prevent removal of wooden buildings into fire limits. Kaufman v. Stein, 138 Ind., 49; 37 N. E. Rep., 333; 46 Am. St. Rep., 368.

Buildings erected in violation of fire ordinances may be removed by city without resort to judicial proceedings, since such power is merely a police regulation.

Arkansas — McKibbin v. Ft. Smith, 35 Ark., 352.

Connecticut—Hine v. New Haven, 40 Conn., 478.

quiring a permit in order to alter or repair wooden buildings within the fire limits will be held constitutional.³¹ Under the St. Louis charter and ordinances the commmissioner of public buildings has not the power to restrict the use of a building for which a permit to erect has been issued; the construction of

Illinois—King v. Chicago, etc., R. R. Co., 98 Ill., 376, 385; King v. Davenport, 98 Ill., 305; 38 Am. Rep., 89.

Indiana—Baumgartner v. Hasty, 10 Ind., 575; 50 Am. Rep., 830; 8 Am. & Eng. Corp. Cas., 353.

Iowa—Lemmon v. Guthrie Center, 113 Iowa, 36; 84 N. W. Rep., 986.

Missouri—Eichenlaub v. St. Joseph, 113 Mo., 395; 21 S. W. Rep., 8. Compare Allison v. Richmond, 51 Mo. App., 133.

Pennsylvania—Klinger v. Bickel, 117 Pa. St., 326; 11 Atl. Rep., 555; Aronheimer v. Stokley, 11 Phila. (Pa.), 283.

Utah—Eureka City v. Wilson, 15 Utah, 67; 48 Pac. Rep., 150.

Washington—Baxter v. Seattle, 3 Wash., 352; 28 Pac. Rep., 537.

The agents of the corporation, removing without judicial investigation wooden buildings under an ordinance, must, to exonerate themselves from liability, show first, that the building was erected or permitted to remain in violation of law, and, second, that in tearing down the same reasonable care was taken to preserve the materials. Eichenlaub v. St. Joseph, 113 Mo., 395; 21 S. W. Rep., 8.

Injunction to restrain the corporation from removing will lie, when. Lemmon v. Guthrie Center, 113 Iowa, 36; 84 N. W. Rep., 986.

Order to remove and notice to owner under particular provisions construed. Thompson v. Evans, 49 Ill. App., 289; Ward v. Murphysboro, 77 Ill. App., 549. Removal of building partly destroyed by fire. When notice to owner required. Louisville v. Webster, 108 Ill., 414; 5 Am. & Eng. Corp. Cas., 367.

REWARD FOR INCENDIARY. In absence of express authority city cannot offer reward for detection of incendiaries. Crofut v. Danbury, 65 Conn., 294; 32 Atl. Rep., 365; see sec. 74, supra.

31 Ex parte Fiske, 72 Cal., 125; 13 Pac. Rep., 310; Hine v. New Haven, 40 Conn., 478; Welch v. Hotchkiss, 39 Conn., 140; 12 Am. Rep., 383; Easton v. Covey, 74 Md., 262; 22 Atl. Rep., 266, mandamus denied to compel issuance of permit, as commissioners had discretion. Olympia v. Mann, 1 Wash., 389; 25 Pac. Rep., 337; 32 Am. & Eng. Corp. Cas., 418; Hasty v. Huntington, 105 Ind., 540; 5 N. E. Rep., 559.

Certificate to be issued by city engineer, after approval of plans and specifications. Ordinance held void, under charter of New Orleans, which made it a misdemeanor to erect building without such certificate. State v. Zurich, 49 La. Ann., 447; 21 So. Rep., 977.

The ordinance requiring permit must provide a uniform rule. State v. Tennant, 110 N. C., 609; 28 Am. St. Rep., 715; 15 L. R. A., 423; 14 S. E. Rep., 387.

Ordinance requiring permit to repair, held void. Newton v. Belger, 143 Mass., 598; 3 New Eng. Rep., 722; 10 N. E. Rep., 464.

Permit to remove wooden building. State v. Kearney, 25 Neb., 262; 41 N. W. Rep., 175; 13 Am. St.

a building is one thing and its use after construction is an entirely different matter.³² Charter power to regulate the granting of permits does not authorize the delegation to an officer or committee of power to make restrictions and regulations.³³

The necessity of reasonable regulations respecting the construction of buildings in crowded centers has been long recognized. Restrictions as to height,³⁴ use of sidewalks and streets for building material and reasonable precautions to prevent injury to those properly on the public ways, have been sustained. Thus charter power "to control and regulate the construction of buildings," "to regulate the manner of using the streets and pavements," etc., confers authority to enact an ordinance providing that "any owner or contractor who shall hereafter build or cause to be built" any building abutting on a public sidewalk shall, after the completion of the first story, cause a roofed passageway to be built in front of the building upon the sidewalk, under penalty of fine or imprisonment. Such ordinance is reasonable.³⁵ Ordinances regulating steam boilers,

Rep., 493; Willow Springs v. Withaupt, 61 Mo. App., 275.

Ordinance conferring arbitrary and despotic power in this respect, held void. State v. Tenant, 110 N. C., 609; 14 S. E. Rep., 387; 28 Am. St. Rep., 715; 15 L. R. A., 423.

³² St. Louis v. Dorr, 136 Mo., 370, 375; 37 S. W. Rep., 1108; 145 Mo., 466; 41 S. W. Rep., 1094; 46 S. W. Rep., 976.

If permit is illegal, no rights are acquired thereunder. Brooklyn v. Furey, 9 Misc. Rep. (N. Y.), 193; 30 N. Y. Suppl., 349.

After a permit to erect has been issued and the erection of the building begun thereunder, power to rescind, denied. Buffalo v. Chadeayne, 134 N. Y., 163; 31 N. E. Rep., 443.

33 Eureka City v. Wilson, 15 Utah, 67; 62 Am. St. Rep., 904; 48 Pac. Rep., 150; Troy v. Winters, 4 Thomp. & C. (N. Y.), 256.

Reasonable conditions in permit 40 to 42, supr

are valid. Harper v. Jonesboro, 94 Ga., 801; 22 S. E. Rep., 139.

34 The New York Legislative act operative in New York city, requiring that the height of all dwelling houses and of all other houses, used or intended to be used as dwellings for more than one family * * * shall not exceed * * * 80 feet upon all streets or avenues exceeding sixty feet in width, held not to apply to hotels, but related mainly to tenements and apartment houses. People v. D'Oench, 111 N. Y., 359; 18 N. E. Rep., 862.

35 Damages resulting to pedestrian properly upon the sidewalk because of failure to observe the regulation creates a cause of action. Smith v. Milwaukee Builders' & Traders' Exch., 91 Wis., 360, 367; 64 N. W. Rep., 1041; 51 Am. St. Rep., 912.

As to ordinance creating civil rights and liabilities, see sections 40 to 42, supr

elevators, hoistways, hatchways, etc., in buildings are clearly within the police power.³⁶

§ 472. Gunpowder and explosives—Blasting. The storage of oil, combustibles and explosives, such as gunpowder, giant powder, nitroglycerin, dynamite, blasting powder, etc., within the corporate limits, being dangerous, its regulation falls properly within the police power.³⁷ The removal of powder magazines beyond the municipal boundaries may be required. In a

36 Elevators, hatchways, etc. New York v. Williams, 15 N. Y., 502; 4 D. E. Smith (N. Y.), 516; Hirst v. Ringen Real Estate Co., 169 Mo., 194; 69 S. W. Rep., 368; Wendler v. People's House Fur. Co., 165 Mo., 527; 65 S. W. Rep., 737.

STEAM BOILERS—requiring engineers to be licensed, etc., valid. St. Louis v. Meyrose Lamp Co., 139 Mo., 560; 41 S. W. Rep., 244; 61 Am. St. Rep., 474.

Compare State v. Robertson, 45 La. Ann., 954; 40 Am. St. Rep., 272; 13 So. Rep., 164, which holds that the general welfare clause does not authorize an ordinance providing for the inspection of steam boilers, tanks, pipes, apparatus, etc., creating a board of examiners and inspectors of engineers in charge of the same, etc. The case alludes to the distinction between regulations of this character and the exercise of the police power, to preserve the public health.

Use of steam boilers in a populous community is not a nuisance per se. Baltimore v. Radecke, 49 Md., 217; 33 Am. Rep., 239; Rhodes v. Dunbar, 57 Pa. St., 274; 98 Am. Dec., 221.

STEAM BOAT. Spark catcher and screens, etc., attached to smoke stack—Regulation held unreasonable. Atkinson v. Goodrich Transp. Co., 60 Wis., 141; 50 Am. Rep., 352; 18 N. W. Rep., 764.

37 Richmond v. Dudly, 129 Ind.,

112; 28 N. E. Rep., 312; Standard Oil Co. v. Danville, 199 Ill., 50; 64 N. E. Rep., 1110; Laflin & Rand Powder Co. v. Tearney, 131 Ill., 322; 19 Am. St. Rep., 34; 7 L. R. A., 262; 23 N. E. Rep., 389; Wright v. Chicago & N. W. Ry. Co., 7 Ill. App., 438; Waters-Pierce Oil Co. v. New Iberia, 47 La. Ann., 863; 17 So. Rep., 343; Reg. v. Listers, 3 Jur. (N. S.), 572; 26 L. J. M. C. (N. S.), 196.

Under general power, city may regulate the manner of keeping. "The ordinance regulating the keeping of gun powder in the city is, in our judgment, necessary for the security and welfare of the inhabitants in the city. It is a sanitary police regulation for the benefit and safety of the persons and property within the limits thereof, and is fully authorized by the act of incorporation." Williams v. Augusta, 4 Ga., 509, 512.

Powder magazine in a populous city held to be a nuisance per se. Cheatham v. Shearon, 1 Swan (Tenn.), 213; 55 Am. Dec., 734.

Powder magazine not nuisance per se. Dumesnil v. Dupont, 18 B. Mon. (Ky.), 800; 68 Am. Dec., 750.

Question fully considered in Kinney v. Koopman, 116 Ala., 310; 22 So. Rep., 593; 37 L. R. A., 497.

Whether nuisance is one of fact. Heeg v. Licht, 80 N. Y., 579; 36 Am. Rep., 654.

Transportation of giant powder

Virginia case it was held that the judgment of the municipal authorities as expressed in an ordinance requiring such removal was conclusive upon the courts.³⁸ Power to maintain the internal police and to "make all such salutary and needful by-laws as towns by the laws of this commonwealth have power to make," was held in Massachusetts to confer authority to pass an ordinance forbidding, under penalty, the blasting of rock

as a nuisance. Walker v. Chicago, R. I. & P. R. R. Co., 71 Iowa, 658; 33 N. W. Rep., 224.

Negligent keeping is a nuisance per se. Myers v. Malcolm, 6 Hill (N. Y.), 292; 41 Am. Dec., 744; People v. Sands, 1 Johns (N. Y.), · 78; 3 Am. Dec., 296; Bradley v. People, 56 Barb. (N. Y.), 72.

Nuisance per se to keep in large quantities near dwelling houses. McAndrews v. Collerd, 42 N. J. L., 189: 36 Am. Rep., 508.

Powder magazines declared public nuisance by statute in Illinois. Chicago, W. & V. Coal Co. v. Glass, 34 Ill. App., 364.

Mill for manufacturing gunpowder and other explosives, held a nuisance. Wilson v. Phoenix Powder Mfg. Co., 40 W. Va., 413; 21 S. E. Rep., 1035.

Statute regulating the keeping is constitutional. Foote v. New York Fire Dept., 5 Hill (N. Y.), 99.

control as against Municipal state, considered. Harley v. Heyle, 2 Cal., 477.

Powder magazine maintained in violation of an ordinance is a nuisance. Hazard Powder Co. v. Volger, 58 Fed. Rep., 152; 12 U. S. App., 665.

Ordinance declaring forfeiture of gunpowder kept in violation thereof, without hearing, void. Cotter v. Doty, 5 Ohio, 393.

feiture required. § 170 et seq., supra.

When storing may be abated as a nuisance. Wier's Appeal, 74 Pa. St., 230.

Keeping in large quantities in crowded population is nuisance per se. Rex v. Taylor, 2 Strange, 1167.

An indictable offense in England. Crowder v. Tinkler, 19 Ves. Jr., 617; 1 Russell on Crimes, 321.

STRAW. Ordinance may forbid the keeping of more than five tons of straw on one block, unless protected by fireproof enclosure. Clark v. South Bend, 85 Ind., 276; 44 Am. Rep., 13.

Petroleum-Regulations of board of health. Metropolitan Board of Health v. Schmades, 3 Daly (N. Y.), 282.

 \mathbf{or} EXPLOSION GIANT POWDER kept by a corporation within the city limits renders corporation liable for damages caused thereby. Cameron v. Kenyon-Connell C. Co., 22 Mont., 312; 44 L. R. A., 508; 56 Pac. Rep., 358.

38 An ordinance requiring the removal of powder magazines in a city, the sites whereof were sold by the city council to vendees for the purpose of erecting theron such magazines does not impair the obligation of a previous valid contract with that council and does not take private property without compensa-It is constitutional and a tion. valid exercise of the police power. Express power to declare for Davenport v. Richmond, 81 Va., 636; 59 Am. Rep., 694.

with gunpowder within the town limits without written consent from the board of aldermen.³⁹

§ 473. Power to regulate operation of locomotives, trains and cars in streets. Reasonable police regulations concerning the operation of locomotives, trains and cars in the public ways, in the interest of public safety, comfort and convenience, are sanctioned on the ground of necessity. Corporations and individuals maintaining tracks and running cars in the public thoroughfares may be compelled to do whatever is, within reason, required, to promote these objects.⁴⁰ The power to enact and enforce salutary laws for these purposes is vested in the sovereign, and the people, through their legally constituted authorities, may exercise it at any time for the public good. The power is continuing and no grant that can be made legally will or can destroy it.⁴¹ Therefore, the municipal corporation in granting franchises for the use of streets may not divest itself of the authority of control and regulation.⁴² It is true, under

39 Com. v. Parks, 155 Mass., 531; 30 N. E. Rep., 174, per Holmes, J. 40 San Jose v. San Jose & S. C. R. Co., 53 Cal., 475; Louisville City R. Co. v. Louisville, 8 Bush. (Ky.), 415, 417; St. Louis v. St. Louis, etc., R. Co., 89 Mo., 44; 1 S. W. Rep., 305; 58 Am. Rep., 82; 14 Mo. App., 221; Hudson River Tel. Co. v. Watervliet Turnpike, etc., Co., 135 N. Y., 393; 31 Am. St. Rep., 838; 32 N. E. Rep., 148; Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y., 524; Frankford, etc., P. R. Co. v. Philadelphia, 58 Pa. St., 119; 98 Am. Dec., 242.

⁴¹ St. Louis & S. F. Ry. Co. v. Gill, 156 U. S., 649, 657.

42 Glasgow v. St. Louis, 87 Mo., 678; 15 Mo. App., 112; Lockwood v. Wabash R. R., 122 Mo., 86; 26 S.
W. Rep., 698; Sherlock v. K. C. Belt Ry. Co., 142 Mo., 172; 43 S.
W. Rep., 629; State ex rel. v. Murphy, 134 Mo., 548; 31 S. W. Rep., 784; 34 S. W. Rep., 51; 35 S. W. Rep., 1132; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.,

101 Mo., 192; 13 S. W. Rep., 822; 82 Mo., 121, 126; Matthews v. Alexandria, 68 Mo., 115; Western Savings Fund Society v. Philadelphia, 31 Pa. St., 175, 182; Presbyterian Church v. New York, 5 Cow. (N. Y.), 538, 540, 542; *In re* Opening of First Street, 66 Mich., 42; 33 N. W. Rep., 15; Pennsylvania R. R. Co. v. Riblet, 66 Pa. St., 164, 168; Boyd v. Alabama, 94 U. S., 645.

The city has power to make the regulations apply to all street railways, regardless of the motive power, subject to the limitation that such power must be reasonably exercised. Fath. v. Tower Grove & Lafayette R. R. Co., 105 Mo., 537; 16 S. W. Rep., 913; Lamb v. S. L. C. & W. Ry. Co., 33 Mo. App., 489.

The ordinance of the City of St. Louis regulating the running of street cars within the limits of the city imposes certain duties on the companies, and the violation of these duties is negligence. Liddy v. St. Louis Ry. Co., 40 Mo., 506.

The city may subject railroad

our constitutional system, that, neither vested rights can be destroyed, nor the obligation of contracts impaired.⁴³ But public necessity may, legally, limit or control these fundamental rights, only, however, in the reasonable exercise of the sovereign police power.⁴⁴ The police power to regulate comprehends all necessary and convenient regulations designed to protect life or limb, or to promote the comfort of the public in the use of the streets and thoroughfares. Not only does such power exist, but the duty to exercise it is imposed as a solemn obligation upon the municipal authorities.⁴⁵

§ 474. Same—Enumeration of regulations. Within the po-

companies to reasonable regulations as to running cars. Springfield Ry. Co., v. Springfield, 85 Mo., 674.

Where a street railway adopts and publishes reasonable regulations as to where its cars shall stop for leaving and taking on passengers, the latter are bound to take notice of such regulations. Jackson v. Grand Ave. Ry. Co., 118 Mo., 199; 24 S. W. Rep., 192. See Sira v. Wabash Ry. Co., 115 Mo., 127; 21 S. W. Rep., 905; Alcorn v. C. & A. Ry. Co., 108 Mo., 81; 18 S. W. Rep., 188.

A city ordinance entitled "public carriers" may properly provide for the regulation of street railway cars. Senn v. Southern Electric Ry. Co., 124 Mo., 621; 28 S. W. Rep., 66.

Where power to regulate is vested in the state, without express grant, ordinances regulating are unauthorized. Brooklyn Crosstown R. R. v. Brooklyn, 37 Hun. (N. Y.), 413; Ravenna v. Pennsylvania Co., 45 Ohio St., 118; 12 N. E. Rep., 445.

- 43 § 232 et seq., supra.
- 44 § 430 et seq., supra.
- 45 The power to regulate the use of streets falls under the head of the police power, and they belong emphatically to that class of objects which demand the application

of the maxim, salus populi suprema est lex and they are to be attained and provided for by such appropriate means as the discretion of those who officially represent and act for the municipal corporation may devise from time to time. In the language of the Supreme Court of the United States that discretion may no more be bargained away than the power itself. Beer Co. v. Massachusetts, 97 U. S., 25, 33

"If one portion of the legislative power may be sold, another may be disposed of in the same way. the power to raise revenue may be sold to-day, the power to punish for crimes may be sold to-morrow, and the power to pass laws for the redress of civil rights may be sold the next day. If the legislative power may be sold, the executive and judicial powers may be put in the market with equal propriety. The result to which the principle must inevitably lead proves that the sale of any portion of governmental powers is utterly inconsistent with the nature of our free institutions, and totally at variance with the object and general provisions of the constitution of the * * * It is a question of constitutional authority, and not a case of confidence in the fidelity

lice power, reasonable ordinances may be passed and enforced regulating the rate of speed at which cars propelled by steam,⁴⁶

of the legislature." Mott v. Penn. R. R. Co., 30 Pa. St., 9, 27, 28.

Georgia—Western & A. R. Co. v. Young, 81 Ga., 397; 7 S. E. Rep., 912; 12 Am. St. Rep., 320.

Illinois—Lake View v. Tate, 130 Ill., 247; 22 N. E. Rep., 791; Chicago, B. & Q. R. Co. v. Haggerty, 67 Ill., 113; Lake Shore, etc., R. Co. v. Probeck, 33 Ill. App., 145.

Indiana—Cleveland, C., C. & I. Ry. Co. v. Harrington, 131 Ind., 426; 30 N. E. Rep., 37; Whitson v. Franklin, 34 Ind., 392.

Iowa—Meyers v. Chicago, etc., R.Co., 57 Iowa, 555; 42 Am. Rep., 50;10 N. W. Rep., 896.

Louisiana—Denied. State v. Miller, 41 La. Ann., 53; 5 So. Rep., 258; 7 So. Rep., 672.

Massachusetts—Com. v. Worcester, 3 Pick. (Mass.), 462.

Michigan—People v. Little, 86 Mich., 125; 48 N. W. Rep., 693.

Missouri—Kempinger v. St. Louis & Iron Mountain Ry. Co., 3 Mo. App., 581; Merz v. Mo. Pa. Ry. Co., 88 Mo., 672: 14 Mo. App., 459; Prewitt v. M., K. & T. Ry. Co., 134 Mo., 615; 36 S. W. Rep., 667; Jackson v. K. C., F. S. & M. R. R., 157 Mo., 621; 58 S. W. Rep., 32; Moore v. St. Louis Transit Co., 95 Mo. App., 728; 75 S. W. Rep., 699.

New York—Buffalo v. New York, etc., R. Co., 6 Misc. (N. Y.), 630.

South Carolina — Boggero v. Southern Ry. Co., 64 S. C., 104, 114; 41 S. E. Rep., 819.

The delegation to a city of the power to regulate the speed of trains need not be in express terms, but may be implied from the power of the city to abate nuisances and provide for the general welfare.

Bluedorn v. Mo. Pac. Ry. Co., 108 Mo., 439; 18 S. W. Rep., 1103; 32 Am. St. Rep., 615.

The authority of a city, under its police power, to regulate the speed of railroad trains within its limits, is not restricted to its streets and crossings. Prewitt v. M., K. & T. Ry. Co., 134 Mo., 615; 31 S. W. Rep., 667; Bluedorn v. Mo. Pac. Ry. Co., 108 Mo., 439; 18 S. W. Rep., 1103; 32 Am. St. Rep., 615.

The ordinance will apply to the private switch yards of a railroad company within the city limits. Grube v. Mo. Pac. Ry. Co., 98 Mo., 330; 11 S. W. Rep., 736; 14 Am. St. Rep., 645. Or to the uninclosed private property of the company. Merz v. Mo. Pac. Ry. Co., 88 Mo., 672; 14 Mo. App., 459.

That a railroad company is authorized by the legislature to lay its tracks along the streets of a city does not prevent such city from limiting the rate of speed of the trains run thereon. Neier v. Mo. Pac. Ry. Co., 12 Mo. App., 25.

The reasonableness of an ordinance regulating the speed of trains is a question for the court upon all the facts, and not for the jury. Zumault v. K. C. & I. Air Line, 71 Mo. App., 670. See Glenville v. St. Louis Ry. Co., 51 Mo. App., 629; Liddy v. St. Louis Ry. Co., 40 Mo., 506; Hickman v. U. D. Ry. Co., 47 Mo. App., 65.

The regulation of the speed of trains is subject to judicial review as to the oppressiveness or unreasonableness of the ordinance. Zumault v. K. C. & I. Air Line, 71 Mo. App., 670.

The running of a train in excess

and street cars, whose motive power may be horse, mule, elec-

of the speed prescribed by ordinance is negligence per se. Thompson on Negligence, 588; Dahlstrom v. St. L., I. M. & S. Ry. Co., 108 Mo., 525; 18 S. W. Rep., 919; Schlereth v. Mo. Pac. Ry. Co., 115 Mo., 87; 21 S. W. Rep., 1110; Keim v. Union Ry. & Transit Co., 90 Mo., 314; 2 S. W. Rep., 427; Kellny v. Mo. Pac. Ry. Co., 101 Mo., 67; 13 S. W. Rep., 806.

That, under a franchise, the railroad company has laid its tracks with so short a curve and at such a grade that it cannot conveniently move trains at a speed fixed by ordinance, is no defense to an action for damages to an individual, occasioned by a greater rate of speed. Neier v. Mo. Pac. Ry Co., 12 Mo. App., 25.

Running trains at a speed in violation of law is competent evidence to support a charge of negligence. Robertson v. W., St. L. & P. R. R., 84 Mo., 119; Lynn v. Chicago, R. I. & Pac. R. R. Co., 75 Mo., 167; Goodwin v. C., R. I. & P. R. R. Co., 75 Mo., 73. Other regulations, Fath v. T. G. & L. Ry. Co., 105 Mo., 537; 16 S. W. Rep., 913.

It does not require an expert to testify as to how fast a car is running. Any one who sees a car running may testify as to its speed. Walsh v. Mo. Pac. Ry Co., 102 Mo., 582; 14 S. W. Rep., 873; 15 S. W. Rep., 757; Covell v. Wabash Ry. Co., 82 Mo. App., 180, 187.

Street car companies must have skillful servants in charge of their cars. Olsen v. Citizens' Ry. Co., 152 Mo., 426; 54 S. W. Rep., 470. An ordinance of Kansas City limiting the speed at which trains may run to six miles per hour through agricultural lands where there are

no streets and little travel, is unreasonable, in restraint of suburban travel, and cannot be upheld. Zumault v. K. C. & I. A. L. Ry. Co., 71 Mo. App., 670.

An ordinance of St. Louis limiting the rate of speed at which trains may run to six miles per hour is not void as being in conflict with the franchise of the Mo. Pac. Ry. Co., Neier v. Mo. Pac. Ry. Co., 12 Mo. App., 25. Such ordinance is not unconstitutional. Merz v. Mo. Pac. Ry. Co., 88 Mo., 672.

An ordinance limiting the speed of trains to six miles per hour is both reasonable and humane. Gratiot v. Mo. Pac. Ry. Co., 116 Mo., 450; 21 S. W. Rep., 1094.

An ordinance of Kansas City limiting the speed of trains from Grand Central Depot to the eastern city limits to six miles per hour was held unreasonable and oppressive. Zumault v. K. C. & I. Air Line, 71 Mo. App., 670.

The restriction of the speed at which trains may run to four miles per hour is unreasonable and void. White v. St. Louis & S. F. Ry. Co., 44 Mo. App., 540.

Unreasonableness must be clear before the court will declare the ordinance void. Four miles per hour within limits of St. Paul held reasonable. Knoblach v. C., M. & St. P. Ry. Co., 31 Minn., 402; 18 N. W. Rep., 106.

Where the right of way is fenced on both sides, and the locality is sparsely settled, and no platted streets were opened across the track, an ordinance limiting the rate of speed to six miles per hour was held unreasonable as applied to that part of the road. Burg v. C., R. I. & P. Ry. Co., 90 Iowa, 106; 57

tricity or cable, may be run within the corporate limits;⁴⁷ prohibiting trains and cars from obstructing streets;⁴⁸ forbidding

N. W. Rep., 680, approving Meyer v. Chicago, etc., R. Co., 57 Iowa, 555; 42 Am. Rep., 50; 10 N. W. Rep., 896.

Where a general state law limits the rate of speed in all incorporated places to six miles an hour, an ordinance fixing the limit at five miles per hour in certain parts of the city is void. Horn v. Chicago & N. W. Ry. Co., 38 Wis., 463.

⁴⁷ Municipal Code of St. Louis, sec. 1760.

Authority given to run cars at a certain rate of speed does not give the company a license to run at such rate of speed under any and all circumstances if the ordinance also imposes the duty of exercising a "vigilant watch" and to stop the car in case of danger to pedestrians. Schmidt v. St. Louis R. R. Co., 149 Mo., 269; 50 S. W. Rep., 921.

If a crowd of children come on the street the gripman must regulate the speed of the car and handle the appliance for its control, as one capable of handling with skill such a machine and mindful of his responsibility would do. Schmidt v. St. Louis R. R. Co., 149 Mo., 269; 50 S. W. Rep., 921.

It has been held by division No. 2 of the supreme court of Missouri that the general provision limiting the speed of street cars to eight miles per hour is not applicable where a special ordinance provides for a greater rate of speed, notwithstanding the city charter (sec. 28, art. III) definitely provides that no special or general ordinance which is in conflict or inconsistent with general ordinances of prior date shall be valid or effectual un-

til such prior ordinance or the conflicting parts thereof are repealed by express terms." The court says that a special ordinance in such case is a part of the charter or franchise of the company and is to be regarded as an exception to the city charter and general ordinances. Ruschenberg v. Southern Electric Ry. Co., 161 Mo., 70; 61 S. W. Rep., 626.

⁴⁸ Obstructing Street. The city has the right to limit the time that railway trains may block a street. Burger v. Mo. Pac. Ry. Co., 112 Mo., 238; 20 S. W. Rep., 439. For ordinance regulations as to obstructing streets, etc., see Municipal Code of St. Louis, sec. 1753.

Ordinance forbidding trains to stand at street crossing more than one minute, except in case of accident, held valid. McCoy v. Philadelphia, W. & B. R. Co., 5 Houst. (Del.), 599.

Ordinance providing a two-minute limit, sustained.

"The necessity for some such regulation in a city, within whose limits numerous railroad tracks are laid, running at grade through and across its streets, is too obvious to be questioned. If not kept within reasonable limits by some competent controlling authority, these obstructions by street railroad trains would be sure to multiply and to become, in the end, an intolerable annoyance to the inhabitants." State (Long) v. City, 37 N. J. L., 348, 352.

Total prohibition sustained. "It does not follow that the prohibition of the ordinance was unreasonable merely because it may have interfered with a use of the street-crossing, which was a matter of conven-

the use of steam in propelling trains in parts of the city;⁴⁰ requiring a driver and conductor on each car,⁵⁰ and servants of

ience to the railroad company, nor merely because the switching could not be practicably done in this place in any other manner than that adopted on this occasion." Duiuth v. Mallett, 43 Minn., 204; 45 N. W. Rep., 154.

RAILROADS, OBSTRUCTIONS, ETC .-The construction and operation of a railroad over a street so narrow that such use would necessarily destroy it as a public way may be either a public or private nuisance. It is a universal rule that the city cannot create a nuisance in its streets or devote them or any part of them to a purpose inconsistent with the rights of the public or abutting property owners. Lockwood v. Wabash R. R. Co., 122 Mo., 86; 26 S. W. Rep., 698; Dubach v. H. & St. J. R. R. Co., 89 Mo., 483; 1 S. W. Rep., 86; Schopp v. St. Louis, 117 Mo., 131; 22 S. W. Rep., 898; Gates v. K. C. B. & Ter. R'y Co., 111 Mo., 28; 19 S. W. Rep., 957.

Where a railroad track is built on a public street, the escape of soot and smells from the locomotives, the obstruction of the streets with cars and the jarring of the earth and neighboring buildings by passing trains to the inconvenience and discomfort and danger of adjoining proprietors, do not, in law, necessarily constitute a nuisance unless the road is negligently or unskillfully built or operated. Randle v. Pacific R'y Co., 65 Mo., 325.

Railroad tracks constructed by a private corporation and cars run thereon for the transaction of private business constitutes a public nuisance, and in such case a private individual suffering special damages may maintain an action

for damages or have an injunction. Glaessner v. Anheuser-Busch B. Ass'n, 100 Mo., 508; 13 S. W. Rep., 707.

TURNOUTS constructed in pursuance of authority to lay tracks in the streets are not such obstructions as justify their summary removal without notice and hearing; but a resolution of the council declaring them unlawful and directing legal proceedings to removal is valid. Cape May v. Cape May, etc., R. R. Co., 60 N. J. L., 224; 37 Atl. Rep., 892; 39 L. R. A., 609.

40 May regulate mode of running, whether by steam or horse power. Donnaher v. State, 8 Smedes & M. (Miss.), 649.

USE OF STEAM may be forbidden. Railroad Co. v. Richmond, 96 U. S., 521.

General power is sufficient to support such ordinance. North Chicago City R. R. Co. v. Lake View, 105 Ill., 207; 44 Am. Rep., 788; Buffalo & N. Y. R. R. Co. v. Buffalo, 5 Hill (N. Y.), 209.

Whether the use of steam on streets is a nuisance is one of fact. Macomber v. Nichols, 34 Mich., 212; 22 Am. Rep., 522; Vason v. South Carolina R. R. Co., 42 Ga., 631.

50 Ordinance sustained under general power which required a conductor and driver on each car, and provided that in event of failure, that police should cause all cars to be returned to the stables. South Covington & C. Ry. Co. v. Berry, 93 Ky., 43; 18 S. W. Rep., 1026; 40 Am. St. Rep., 161.

Requiring an agent in addition to the driver on each car, held reasonable. State (Trenton Horse R. Co.) v. Trenton, 53 N. J. L., 132; 20 Atl. Rep., 1076.

each train to give danger signals,⁵¹ as ringing of the bell while the locomotive is in motion;⁵² exacting of those who operate street cars to keep a vigilant watch for all vehicles and persons on foot, either on the track or moving towards it, and on the first appearance of danger to stop the car within the shortest

51 The provision requiring railroad companies to have a man stationed on their trains to give danger signals when backing through the city is valid. Bergman v. Mo. Pac. Ry. Co., 88 Mo., 678; Merz v. Mo. Pac. Ry. Co., 14 Mo. App., 459; Rafferty v. Mo. Pac. Rv. Co., 91 Mo., 33; 3 S. W. Rep., 393. But such ordinance does not apply where the employes are simply engaged in setting cars in a car yard. Rafferty v. Mo. Pac. Ry. Co., 91 Mo., 33; 3 S. W. Rep., 393. Such ordinance is not unreasonable. Merz v. Mo. Pac. Ry. Co., 14 Mo. App., 459. And it is negligence for a railroad company to send its detached cars without a brakeman, over its own grounds, which are open to the public, in the City of St Louis. Merz v. Mo. Pac. Ry. Co., 14 Mo. App., 459.

52 The fact that a statute required such signals to be given just before and while crossing highways, does not invalidate such ordinance. Gulf C. & S. F. Ry. Co. v. Calvert, 11 Tex. Civ. App., 297; 32 S. W. Rep., 246.

WHISTLE. Power to regulate the use of streets by street cars "so as to prevent injury and inconvenience to the public," will not authorize an ordinance forbidding the blowing of a steam whistle within the city, where the state statute provides that when any obstruction appears upon a railroad the alarm whistle shall be sounded, etc. The ordinance is no defense for failure to observe the statute. Katzenberger v. Larvo, 6 Pickle (90)

Tenn.), 235; 16 S. W. Rep., 611; 25 Am. St. Rep., 681; 13 L. R. A., 185.

53 The validity of such ordinance rests on the fact that under the state constitution and city charter street railways are allowed to lay their tracks upon the streets of the city upon the condition of yielding obedience to the city ordinances. Fath v. Tower Grove & Lafayette Ry. Co., 105 Mo., 537; 16 S. W. Rep., 913; 39 Mo. App., 447. See Sanders v. R. R. Co., 147 Mo., 411; 48 S. W. Rep., 855; Senn v. Southern Ry. Co., 108 Mo., 142; 18 S. W. Rep., 1007; Day v. Citizens Ry. Co., 81 Mo. App., 471. A violation of these ordinance regulations is negligence per se. Hutchinson v. Mo. Pac. Rv. Co., 161 Mo., 246; 61 S. W. Rep., 635; Weller v. Chicago, M. & St. P. R. R. Co., 164 Mo., 180; 64 S. W. Rep., 141; Prewitt v. M. K. & T. Ry. Co., 134 Mo., 615; 31 S. W. Rep., 667; Gratiot v. Mo. Pac. Ry. Co., 116 Mo., 450; 21 S. W. Rep., 1094; Bluedorn v. Mo. Pac. Ry. Co., 121 Mo., 258; 25 S. W. Rep., 943; Sullivan v. Mo. Pac. Ry. Co., 117 Mo., 214; 23 S. W. Rep., 149; Fiedler v. St. Louis, I. M. & S. Ry. Co., 107 Mo., 645; 18 S. W. Rep., 847; Dahlstrom v. St. Louis, I. M. & S. Ry. Co., 108 Mo., 525; 18 S. W. Rep., 919; Kellny v. Mo. Pac. Ry. Co., 101 Mo., 67; 13 S. W. Rep., 806; Murray v. Mo. Pac. Ry. Co., 101 Mo., 236; 13 S. W. Rep., 817; Schlereth v. Mo. Pac. Ry. Co., 96 Mo., 509; 10 S. W. Rep., 66; Hanlon v. Mo. Pac. Ry. Co., 104 Mo., 381; 16 S. W. Rep., 233; Dickson v. space and time possible;53 compelling the use of fenders,54

Mo. Pac. Ry. Co., 104 Mo., 491; 16 S. W. Rep., 381; Grube v. Mo. Pac. Ry. Co., 98 Mo., 330; 11 S. W. Rep., 736; Eswin v. St. Louis, I. M. & S. Ry. Co., 96 Mo., 290; 9 S. W. Rep., 577; Donohue v. St. Louis, I. M. & S. Ry. Co., 91 Mo., 357; 2 S. W. Rep., 424; 3 S. W. Rep., 848; Keim v. Union Railway & Transit Co., 90 Mo., 314; 2 S. W. Rep., 427; Maher v. Atlantic & Pacific R. R. Co., 64 Mo., 267; Neier v. Mo. Pac., Ry. Co., 12 Mo. App., 25. No rate of speed is negligence per se except where the law of the state, or a municipal corporation authorized to do so, prescribes a limit. Maher v. Mo. Pac. Ry. Co., 64 Mo., 267; Wasson v. McCook, 80 Mo. App., 483; Kreis v. Mo. Pac. Ry. Co., 148 Mo., 321; 49 S. W. Rep., 877. It is the duty of the motorman to stop the car in the shortest time and space possible upon the first appearance of danger to persons or vehicles on the track or moving towards the track. Burnstein v. Cass Avenue & F. G. Ry. Co., 56 Mo. App., 45, 50; Bunyan v. Citizens' Ry. Co., 127 Mo., 12; 29 S. W. Rep., 842; Cooney v. Southern Elec. Ry. Co., 80 Mo, App., 226, 233; Klockenbrink v. St. Louis & M. Riv. Ry. Co., 81 Mo. App., 351; Sweeney v. K. C. Cable Ry. Co., 150 Mo., 385; 51 S. W. Rep., 682. This duty may notwithstanding the ordiexist Schmidt v. St. Louis R. R. nance. Co., 163 Mo., 645; 63 S. W. Rep., 834. Persons have a right to presume that cars will observe ordi-Weller v. Chinance regulations. cago, M. & St. Paul Ry. Co., 164 Mo., 180; 64 S. W. Rep., 141, and cases cited. In damage suits, whether the ordinance has been complied with is a question for the jury. Weller v. Chicago, M. & St. Paul Ry. Co., 164 Mo., 180; 64 S. W. Rep., 141. These provisions do not create a civil liability enforceable at common law. Sanders v. Southern Elec. Ry. Co., 147 Mo., 411; 48 S. W. Rep., 855; Byington v. St. Louis R. R. Co., 147 Mo., 673; 49 S. W. Rep., 876. Compare Fath v. Tower G. & L. Ry. Co., 105 Mo., 537; 16 S. W. Rep., 913, and Senn v. Southern Elec. Ry. Co., 108 Mo., 142, 152; 18 S. W. Rep., 1007. In actions for damages, where a violation of ordinance regulations is relied upon to establish negligence, the introduction of the ordinance as evidence establishes the fact that the ordinance has been adopted by the city, but not its binding effect on the defendant. It has been held that it must be alleged and proved that defendant accepted the ordinance and agreed to be bound by it. Sanders v. Southern Elec. Ry. Co., 147 Mo., 411; 48 S. W. Rep., 855; Byington v. St. Louis R. R. Co., 147 Mo., 673; 49 S. W. Rep., 876; Sheehan v. Citizens' Ry. Co., 72 Mo. App., 524. But in the more recent cases the contrary, it seems, has been declared. Thus, Jackson v. K. C., F. S. & M. Ry. Co., 157 Mo., 621; 58 S. W. Rep., 32, held that it was not necessary to a recovery that there be a contract between the defendant and the city to comply with the ordinances or that the defendant had accepted the ordinance, before a civil liability is shown to a third person; reviewing former cases and refusing to follow Fath v. Tower Grove & L. Ry. Co., 105 Mo., 537; 16 S. W. Rep., 913. To same effect, Weller v. Chicago, M. & St. P. Ry. Co., 164 Mo., 180; 64 S. W. Rep., 141, and

lights on cars,⁵⁵ and lights on railroad tracks;⁵⁶ requiring the fencing or inclosing of tracks at certain points;⁵⁷ providing reasonable regulations at crossings,⁵⁸ as safety railway gates,⁵⁹ and flagmen or watchmen;⁶⁰ compelling street car companies to adopt and use a particular kind of rail;⁶¹ to keep that part of the street between the rails clean;⁶² to remove snow, etc.,

Hutchinson v. Mo. Pac. Ry. Co., 161 Mo., 246; 61 S. W. Rep., 635. It is not necessary to allege and prove the acceptance of a special ordinance. Chouquette v. Southern Elec. Ry. Co., 152 Mo., 257; 53 S. W. Rep., 897, distinguishing Sanders v. Southern Elec. Ry. Co., 147 Mo., 411; 48 S. W. Rep., 855.

54 FENDERS. Failure of a street car company to equip its cars with a fender which would have prevented an injury complained of is not in the absence of ordinance or statute requiring it, negligence. Hogan v. Citizens' Ry. Co., 150 Mo., 36; 51 S. W. Rep., 473.

65 Light on Cars. It is negligence in a railroad company to run its trains in a city in violation of an ordinance requiring a light upon the cars. Easley v. Mo. Pac. R. R. Co., 113 Mo., 236; 20 S. W. Rep., 1073.

56 LIGHTING OF TRACKS. Cincinnati, H. & D. Ry. Co. v. Bowling Green, 57 Ohio St., 336; 49 N. E. Rep., 121; 41 L. R. A., 422.

⁵⁷ Kansas Pac. Ry. Co. v. Mower, 16 Kan., 573.

58 Atlantic, S. R. & G. Ry. Co. v. State (Fla. 1900), 29 So. Rep., 319.

59 Whatever precautions are reasonably incident to the danger from the passing to and fro of trains in a crowded community may be lawfully adopted. Textor v. Baltimore & Ohio R. R. Co., 59 Md., 63.

60 Western & A. R. Co. v. Young,
 81 Ga., 397; 7 S. E. Rep., 912; 12

Am. St. Rep., 320; Pennsylvania Co. v. Stegemeier, 118 Ind., 305; 20 N. E. Rep., 843; 10 Am. St. Rep., 136; State (Delaware, L. & W. R. Co.) v. East Orange, 41 N. J. L., 127.

Red Wing v. Chicago, M. & St. P. Ry. Co., 72 Minn., 240; 75 N. W. Rep., 223; 71 Am. St. Rep., 482, where it was held that general grant followed by specific enumeration was limited, relying on St. Paul v. Traeger, 25 Minn., 248, and distinguishing Green v. Eastern Ry. Co., 52 Minn., 79; 53 N. W. Rep., 808.

Distinction and reasons therefor between regulating the rate of speed at crossings and requiring a flagman to be stationed there are stated in Ravenna v. Pennsylvania Co., 45 Ohio St., 118; 12 N. E. Rep., 445, approved in Red Wing v. Chicago, M. & St. P. Ry. Co., 72 Minn., 240, 245; 75 N. W. Rep., 223; 71 Am. St. Rep., 482.

The object of a city ordinance, in requiring railroads to station a watchman at street crossings used by them, is to prevent travelers from going on the crossing when trains are approaching, and not to give warning of danger when it is too late to avoid it. Dickson v. Mo. Pac. Ry. Co., 104 Mo., 491; 16 S. W. Rep., 381.

61 Washington etc., R. Co. v. Alexandria, 98 Va., 344; 36 S. E. Rep., 385.

62 Chicago v. Chicago Union
 Traction Co., 199 III., 259; 65 N. E.
 Rep., 243.

from tracks;⁶³ and to water tracks so as to lay the dust.⁶⁴ Ordinance may also require cars to be run at specified times,⁶⁵ regulate street railway transfers,⁶⁶ and compel street railway companies to report to city officers at stated times.⁶⁷

4. OFFENCES AGAINST PUBLIC MORALS AND DECENCY.

§ 475. Lewd conduct—Bawdy houses—Prostitution, etc. In the interest of public morals and decency, under sufficient charter power, ordinances may be enacted and enforced to restrain, suppress and punish lewd and indecent conduct and practices, bawdy, assignation and disorderly houses, and prostitution. 68 Regulations of this character are sometimes regarded as within

63 Broadway & S. A. R. R. Co. v.
New York, 49 Hun. (N. Y.), 126;
1 N. Y. Suppl., 646.

e4 Ordinance requiring sustained under general power. The ordinance "embraces all who exercise the same right and work the same inconvenience to occupants of houses on the street," per Jackson, C. J., in City & Suburban Ry. Co. v. Savannah, 77 Ga., 731, 734; 4 Am. St. Rep., 106.

65 New York v. Dry Dock, E. B.
& B. R. R. Co., 133 N. Y., 104; 28
Am. St. Rep., 609; 30 N. E. Rep., 563.

Statute requiring erection of passenger waiting rooms at railroad crossings is a proper exercise of the police power. State ex rel. v. Wabash, St. L. & P. Ry. Co., 83 Mo., 144.

66 Ex parte Lorenzen, 128 Cal., 431; 61 Pac. Rep., 68; 50 L. R. A., 55; Heffron v. Detroit City R. Co., 92 Mich., 406; 16 L. R. A., 345; 52 N. W. Rep., 802; Pine v. St. Paul City R. Co., 50 Minn., 144; 52 N. W. Rep., 392; 16 L. R. A., 347; Mahoney v. Detroit Street R. Co. 93 Mich., 612; 18 L. R. A., 335; 53 N. W. Rep., 793; O'Rourke v. Citizens Street R. Co., 103 Tenn., 124; 52 S. W. Rep., 872; 46 L. R. A., 614. See § 590 post.

67 Section 1778 of the Municipal Code of St. Louis, requiring street railroad companies to make reports under oath to the city register is not void as being unreasonable or in restraint of trade, and does not violate the constitution. Such regulation is within the grant of power conferred by sec. 37, act of Jan. 16, 1860. St. Louis v. St. Louis R. R. Co., 89 Mo., 44; 1 S. W. Rep., 305; 14 Mo. App., 221.

68 New Orleans v. Costello, 14 La. Ann., 37; Municipal No. 1 v. Wilson, 5 La. Ann., 747.

A BAWDY HOUSE IS A PUBLIC NUISANCE per se at common law, and to conduct such places or rent property for such purpose is a public wrong. Givens v. Van Studiford, 86 Mo., 149, 156; Ashbrook v. Dale, 27 Mo. App., 649.

The offense of keeping a brothel is indictable at common law, and is made so by statute. St. Louis v. Mellville, 3 Mo. App., 597.

"House of ill fame" is synonymous with "bawdy house." McAlister v. Clark, 33 Conn., 91.

A house of ill fame is a constant menace to the public peace and good order of the community in which it exists, and is a nuisance, and its keeping a misdemeanor at the exclusive control of the state, but it is undoubtedly true that the State may commit, in whole or in part, such police

common law, and therefore its suppression and punishment are proper subjects of police regulation. Rodgers v. People, 9 Colo., 450; 12 Pac. Rep., 843; 59 Am. Rep., 146. It would be contrary to the act to assert that houses of ill fame in the midst of a city are not dangerous and revolting nuisances which may be suppressed by the local authorities. People v. Hanrahan, 75 Mich., 611, 621; 42 N. W. Rep., 1124; 4 L. R. A., 751.

OWNERS AND LESSORS; when liable. Givens v. Van Studiford, 86 Mo., 149, 156; Ashbrook v. Dale, 27 Mo. App., 649; Childress v. Nashville, 3 Sneed (35 Tenn.), 347.

General power to suppress bawdy houses, will support an ordinance forbidding owners to rent houses for the purpose of being used as bawdy houses, or with a knowledge that they will be so used by the lessee; but the local corporation, under such power cannot define what is such house, or declare a given house a bawdy house. State v. Webber, 107 N. C., 962; 22 Am. St. Rep., 920; 12 S. E. Rep., 598.

A by-law subjecting the owner to a penalty of \$50, where the house was used with his knowledge as a bawdy house, or to his knowledge reputed to be such, and also making him liable, in addition, for maintaining a nuisance, was construed to apply only to such owner as has both knowledge of such improper use and the power to prevent its use as such which he failed to exercise. The by-law was sustained under general power over nuisances. McAlister v. Clark, 33 Conn., 91.

INMATES of bawdy houses who are there for lewd purposes may be

punished by ordinance authority. Perry v. State, 37 Neb., 623; 56 N. W. Rep., 315; Ogden v. McLaughlin, 5 Utah, 387; 16 Pac. Rep., 721.

FREQUENTERS, for immoral purposes may be made subject to ordinance penalty. State v. Botkin, 71 Iowa, 87; 60 Am. Rep., 780; 32 N. W. Rep., 185.

CERTAINTY OF ORDINANCE. An ordinance forbidding any one to "conduct a house of ill-fame in an indecent manner," is not void for uncertainty. Shreveport v. Roos, 35 La. Ann., 1010. See sec. 20, supra. EVIDENCE то ESTABLISH THE CHARACTER of a bawdy house must in most cases be inferential, and hence, must be permitted to take a wide range. State v. Dudley, 56 Mo. App., 450, citing 2 Bishop's Criminal Practice, secs. 115, 116. The fact that the inmates of the house were prostitutes strongly conduces to establish the fact that the house was a bawdy house. State v. Bernard, 64 Mo., 260; State v. Bean, 21 Mo., 267; Clementine v. State, 14 Mo., 112. See State v. Lewis, 5 Mo. App., 465.

Ordinances forbidding bawdy houses, sustained. Robb v. Indianapolis, 38 Ind., 49; Welch v. Stowell, 2 Dougl. (Mich.), 332; Chariton v. Barber, 54 Iowa, 360; 6 N. W. Rep., 528; 37 Am. Rep., 209; Wong v. Astoria, 13 Oregon, 538; 11 Pac. Rep., 295; note to State v. Karstendiek (La.), 39 L. R. A., 520.

PROSTITUTES. Mere presence of, within corporate limits cannot be punished by ordinance. Paralee v. Camden, 49 Ark., 165; 4 S. W. Rep., 654; 4 Am. St. Rep., 35, following Buell v. State, 45 Ark., 336. Compare Shafer v. Mumma, 17 Md., 331.

power to local control,⁶⁹ and the question of the legislative intent in this respect is often presented to the courts for determination. The general subject of municipal control of offenses against the State is treated in the chapter which follows.⁷⁰

Power to suppress and restrain disorderly houses and houses of ill-fame is ample, to sustain an ordinance forbidding under penalty, the keeping of such houses.⁷¹ And it has been held that charter power "to define and prevent disorderly conduct," and to punish disorderly persons as defined by law is sufficient to authorize an ordinance punishing keepers and residents of houses of ill-fame.⁷² Charter power to pass "by-laws, rules and regulations for preserving the peace, order and good gov-

Ordinance prescribing limits for prostitutes, held valid. L' Hote v. New Orleans, 177 W. S., 587; 20 Sup. Ct. Rep., 788.

STREET WALKING. An ordinance forbidding disreputable females from standing or loitering about the streets or stores at night, unless on unavoidable business, was sustained. Braddy v. Milledgeville, 74 Ga., 516; 58 Am. Rep., 443.

An ordinance prohibiting any prostitute from being on the streets or alleys of the city between the hours of 7 p. m. and 4 a. m. without any reasonable necessity therefor is a valid exercise of the police power under a statute giving authority to "restrain and punish prostitutes." Dunn v. Com., 20 Ky. Law, Rep., 1649; 43 L. R. A., 701; 49 S. W. Rep., 813.

CONVERSING WITH LEWD WOMAN, cannot be condemned as an offense by ordinance. Cady v. Barnesville, 2 Cleveland Law Rep., 100; 4 Ohio Dec., 396; 4 Wkly. Law Bull. (Ohio), 101. See § 228 supra.

INDECENT EXPOSURE OF THE PERSON. Ordinance may forbid irrespective of intent. Grand Rapids v. Bateman, 93 Mich., 135; 53 N. W. Rep., 6.

ACT OF LEWDNESS OR INDECENCY;

ordinance condemning, held void. State v. Hammond, 40 Minn., 43; 41 N. W. Rep., 243.

Publication of Obscene Matter, may be forbidden by ordinance. O'Brien v. Cleveland, 1 Cleveland Law Rep., 100; 4 Ohio Dec., 189.

Variety Show. Defined by ordinance as "any place or institution known or recognized as a variety show," held too indefinite. Ex parte Bell, 32 Tex. Cr. Rep., 308; 22 S. W. Rep., 1040; 40 Am. St. Rep., 778. See § 20, supra.

69 People v. Hanrahan, 75 Mich.,611; 4 L. R. A., 751; 42 N. W. Rep.,1124.

Local control not exclusive. State v. Wister, 62 Mo., 592; Davis v. State, 2 Tex. App., 425

70 Chapter XV.

71 Ogden v. Madison, 111 Wis.,
413; 55 L. R. A., 506; 87 N. W.
Rep., 568. Compare Dabbs v. State,
39 Ark., 353; 43 Am. Rep., 275;
McAlister v. Clark, 33 Conn., 91;
L'Hote v. New Orleans, 51 La.
Ann., 93; 24 So. Rep., 608; 44 L.
R. A., 90; Shreveport v. Roos, 35
La. Ann., 1010; Owensboro v.
Simms, 17 Ky. Law Rep., 1393;
34 S. W. Rep., 1085; St. Louis v.
Mellville, 3 Mo. App., 597.

⁷² People v. Miller, 38 Hun. (N. Y.), 82.

ernment," was held in South Carolina, to justify an ordinance, making it unlawful to keep a bawdy house. But general power (general welfare clause) "to improve the morals and order," and special power "to suppress and restrain disorderly houses and houses of ill-fame," was held insufficient in Iowa to support an ordinance punishing, as a misdemeanor, one who keeps a house of ill-fame or assignation. However, it was conceded that the power was ample to authorize municipal legislation for the direct suppression of such houses.

§ 476. Gambling, gaming houses, lotteries, bowling alleys, billiard halls, etc. Ordinances designed to restrain, suppress or control gambling, gaming houses, the sale of lottery tickets, and bowling alleys, billiard halls, etc., conducted for gain, are common.⁷⁵ As gambling is usually an offense against the state,

⁷³ State *ex rel.* v. Williams, 11 S. C., 288.

General power held sufficient to sustain an ordinance restraining bawdy houses. Childress v. Nashville, 3 Sneed (35 Tenn.), 347.

74 Chariton v. Barker, 54 Iowa, 360; 37 Am. Rep., 209; 6 N. W. Rep., 528, following Mt. Pleasant v. Breeze, 11 Iowa, 399, saying, "the decision is not without grave objections as to the reasons upon which it is based. But it has been accepted without question or challenge for more than nineteen years. We ought not, at this late day, disturb it."

An ordinance directed against physical nuisances will not embrace the nuisance of keeping a house of ill-fame. Krickle v. Com., 1 B. Mon. (40 Ky.), 361.

⁷⁵ GAMBLING. State *ex rel* v. Newman, 96 Wis., 258; 71 N. W. Rep., 438.

Keeping open gambling house. State v. Grimes, 83 Minn., 460; 86 N. W. Rep., 449.

"Blind tiger." Bagwell v. Lawrenceville, 94 Ga., 654; 21 S. E. Rep., 903.

"Policy." State v. Flint, 63

Conn., 248; 28 Atl. Rep., 28; State v. Carpenter, 60 Conn., 97; 22 Atl. Rep., 497.

KEEPING COMMON GAMING HOUSE. Where a defendant was found keeping the cashier's chair in a room where a game of keno was in progress, and, when the police entered, sprung up and took the money and chips from the stand, this will warrant an inference that he was in charge of and sat up the game, though no money was seen to pass from any player to him. St. Louis v. Wiley, 8 Mo. App., 597. Occasional games of poker privately played with acquaintances for money in his room does not make him a keeper of a common gaming State v. Mosby, 53 Mo. App., 571. A boat with a cabin equipped with tables, chairs, and such articles and devices as are necessary to carry on a gambling business is included in the term "house" used in the statute against gaming houses. State v. Metcalf, 65 Mo. App., 681. A common gaming house may consist of a single room rented in a house of many rooms, and it need not necessarily be open to the whole public in comlegislative grant is generally necessary to empower the local corporation to deal with the subject.⁷⁶ Municipal control of offenses of this nature is considered elsewhere.⁷⁷ In the absence of express grant of power to enact, ordinance provisions on this subject which are inconsistent with state laws are void.⁷⁸

The power to pass by-laws relating to nuisances has been held

mon, nor the gaming be visible from the exterior, nor need gaming be the only business for which it is used, nor need it be constantly kept for that purpose; and it may be kept without charge or as a business, and may also be used as a sleeping room. State v. Mosby, 53 Mo. App., 571; State v. Mohr, 55 Mo. App., 329. Under an indictment for keeping a common gambling house the general reputation of the defendant as a gambler is admissible as well as general reputation of the frequenters of the house. State v. Mosby, 53 Mo. App., 571. A conviction for gambling is no bar to a conviction for keeping a common gaming house. State v. Mosby, 53 Mo. App., 571.

SETTING UP GAMBLING DEVICE. "Crack Loo" is a gambling device for money within the meaning of an ordinance prohibiting any person from setting up "any gambling device" or playing "at any game whatever for money," etc. Canton v. Dawson, 71 Mo. App., 235; State v. Flack, 24 Mo., 378; R. S. 1889, Mo. sec. 3825. Where it is shown that the game is made by purchasing cards and putting money in a pool and that the defendant was sitting at the table with others, with the gambling devices before him and that the game was in progress, this makes out a prima facie case which warrants the inference that the defendant was gambling, though it does not appear by direct evidence that he had paid for the card before him. St. Louis v. Sullivan, 8 Mo. App., 455. Betting money or property upon the game called "pool," is within the prohibition of the statute against gaming. State v. Jackson, 39 Mo., 420. Indictment under state statutes, see State v. Mohr, 55 Mo. App., 329; State v. Nelson, 19 Mo., 393; State v. Herryford, 19 Mo., 377; State v. Dyson, 39 Mo. App., 297; State v. Gilmore, 98 Mo., 206; 11 S. W. Rep., 620; State v. Scaggs, 33 Mo., 92; State v. Mosby, 53 Mo. App., 571. The repeal of an ordinance to suppress gaming, except as to offenses committed and forfeitures incurred previous thereto, held valid. Kansas City v. White, 69 Mo., 26; Kansas City v. Clark, 68 Mo., 588.

BETTING ON HORSE RACES may be made unlawful. Odell v. Atlanta, 97 Ga., 670; 25 S. E. Rep., 173.

⁷⁶ Gambling. Power to suppress held not to give power to declare by ordinance gambling a misdemeanor and provide punishment. Mt. Pleasant v. Breeze, 11 Iowa, 399.

Charter of Minneapolis held sufficient to sustain an ordinance suppressing gambling. State v. Grimes, 49 Minn., 443; 52 N. W. Rep., 42. Compare Owensboro v. Sparks, 99 Ky., 351; 36 S. W. Rep., 4.

77 Chapter XV.

⁷⁸ Ex parte Solomon, 91 Cal., 440; 27 Pac. Rep., 757, following *In re* Ah You, 88 Cal., 99; 22 Am. St. Rep., 280; 11 L. R. A., 408; 25 Pac. Rep., 974. to authorize a by-law forbidding under penalty, the keeping of bowling alleys for hire. It seems that at common law such keeping is a public nuisance, notwithstanding gambling is expressly prohibited.⁷⁹ Under sufficient charter powers ordinances may make it unlawful to sell lottery tickets within the corporate limits.80

§ 477. Regulating sale of intoxicating liquor. The authority to regulate and license the sale of intoxicating liquor and places

Charter provision may repeal general state law. In re Snell, 58 Vt., 207; 1 Atl. Rep., 566; § 214 supra. In re Lee Tong, 9 Sawyer (U. S.), 333; 18 Fed. Rep., 253.

Pool selling. Ex parte Tuttle, 91 Cal., 589; 27 Pac. Rep., 933; Chicago v. Brownell, 41 Ill. App., 70.

79 "So far as I have been able to discover, erections of every kind adapted to sports or amusements, having no useful end, and notoriously fitted up and continued with a view to make a profit for the owner, are considered in the books as nuisances. Not that the law discountenances innocent relaxation; but because it has become matter of general observation that, when gainful establishments are allowed for their promotion, such establishments are usually perverted into nurseries of vice and crime." Per Cowen, J., in Tanner v. Albion, 5 Hill (N. Y.), 121, 124; 40 Am. Dec., 337.

Bowling Alleys; ordinance may regulate. Smith v. Madison, 7 Ind., 86; State v. Hay, 29 Me., 457; State v. Noyes, 30 N. H., 279.

TENPIN ALLEY. City cannot license without express authority. Goetler v. State, 45 Ark., 454.

BILLIARD HALLS; Municipal control of, sustained. Tarkio v. Cook, 120 Mo., 1; 25 S. W. Rep., 202; Plattsburg v. Trimble, 46 Mo. App., 459. Compare Breninger v. Belvi- issued to each subscriber for their dere, 44 N. J. L., 350.

80 State v. Riley, 49 La. Ann., 1617; 22 So. Rep., 843; Ex parte Kiburg, 10 Mo. App., 442; Seattle v. Let., 19 Wash., 38; 52 Pac. Rep., The fact that an ordinance prohibiting the lottery business provides a more definite fine or penalty than the state statute, does not render such ordinance invalid. Kansas City v. Hallett, 59 Mo. App., 160; Kansas City v. Zahner, 73 Mo. App., 396.

LOTTERY TICKETS. Where the constitution empowers municipal corporations to make and enforce within their limits all such local, police, sanitary and other regulations as are not in conflict with the general law, a city may, by ordinance, forbid persons having possession of lottery tickets. Such ordinance is a proper exercise of the police power. Ex parte McClain, 134 Cal., 110; 66 Pac. Rep., 69.

EVIDENCE. State v. Rothschild, 19 Mo. App., 137; State v. Hindman, 4 Mo. App., 582; State v. Russell, 17 Mo. App., 16; State v. Sellner, 17 Mo. App., 39; State v. Ochsner, 9 Mo. App., 216; State v. Norman, 44 Mo. App., 306; State v. Williams, 44 Mo. App., 302; State v. Bruner, 17 Mo. App., 274; State v. Harmon, 60 Mo. App., 48.

LOTTERY. The proprietors of a newspaper, in pursuance of a prearranged and advertised scheme. paper, in addition to the paper itwhere sold must be derived from the legislature.81 Frequently this power is expressly conferred upon municipal corporations82 The nature and extent of municipal control of the liquor traffic, depend upon the local charter, the legislation and public policy of the state appertaining thereto. Court rulings respecting ordinance regulations of the subject appear in the notes.83

self, and without extra charge, a ticket which entitled the holder to participate in a distribution of prizes offered by the proprietors to all persons who should become subscribers. Held, that the scheme was a lottery, and that it made no difference that the tickets were not sold. State v. Mumford, 73 Mo., 647.

81 §§ 425, 426, supra.

82 Shea v. Muncie, 148 Ind., 14; 46 N. E. Rep., 138; Bennett v. Pulaski, (Tenn. 1899) 47 L. R. A., 278; State v. Pamperin, 42 Minn., 320; 44 N. W. Rep., 251.

Ordinance declaring all liquor kept within the town a nuisance and authorizing removal beyond limits, held void. Darst v. People, 51 Ill., 286; 2 Am. Rep., 301.

Retailing liquor. Ex parte Christensen, 85 Cal., 208; 24 Pac. Rep., 747; State v. Deering, 84 Wis., 585, 54 N. W. Rep., 1104.

Ordinance regulating sale of hop tea tonic, ginger ale, etc., valid. In re Jahn, 55 Kan., 694; 41 Pac. Rep., 956.

Where towns have power to prohibit the sale of such intoxicating liquors only as are not prohibited by statute, an ordinance which forbids the sale of all kinds is invalid as to those kinds forbidden by statute. Cantril v. Sainer, 59 Iowa, 26; 12 N. W. Rep., 753; New Hampton v. Conroy, 56 Iowa, 498; Santo v. State, 2 Iowa, 165.

Amount for license must not be

city; it must not be exorbitant. Columbia v. Beasly, 1 Humph. (Tenn.), 232; 34 Am. Dec., 646.

An ordinance prohibiting keeping intoxicating liquors "in any refreshment saloon or restaurant, within the city for any purpose whatever," held valid. It does not profess to forbid either the use or the sale of liquors altogether. Keeping liquor in a cellar, under a refreshment saloon or restaurant, is a violation of such ordinance. State v. Clark, 28 N. H., 176, approved in State v. Freeman, 38 N. H., 426.

Power to license, regulate, tax or suppress tippling houses and dram shops does not confer power to prohibit the sale of ardent or vinous spirits in any quantities. without a license. The general power contained in the general welfare clause was held not to enlarge the special power given. Tuck v. Waldron, 31 Ark., 462, 465.

Under general power an ordinance forbidding retail grocers, not having a license from keeping at their stores, etc., any wine, malt or spirituous liquors, held valid. Heisembrittle v. Charleston, 2 Mac-Mullan (S. C.), 233.

83 DESIGNATION OF DISTRICTS. within the corporate limits, wherein liquor may be sold, and excluding sales elsewhere. Rowland v. Greencastle, 157 Ind., 591, 707; 62 N. E. Rep., 474, 1103.

Screens, blinds, obstructions of in excess of the necessities of the public view, etc. Steffy v. Monroe

§ 478. Public drunkenness. Drunkenness or intoxication in public places is unquestionably a matter of police regulation, and laws condemning such conduct have been sustained as constitutional.⁸⁴ General charter power to preserve the peace, good order, etc., is sufficient to support ordinances, forbidding, under penalty, public drunkenness.⁸⁵

§ 479. Observance of the Sabbath. Penal ordinances requiring the cessation of certain secular business on the first day of the week, commonly called Sunday, do not violate constitutional principles, and will be sustained where they rest on proper charter power.⁸⁶ In Illinois, power to regulate the po-

City, 135 Ind., 466; 41 Am. St. Rep., 436; 35 N. E. Rep., 121; Champer v. Greencastle, 138 Ind., 339; 35 N. E. Rep., 14; Shultz v. Cambridge, 38 Ohio St., 659; Bennett v. Pulaski (Tenn. 1899) 47 L. R. A., 278.

OTHER BUSINESS forbidden where liquor is sold. State v. Gerhart, 145 Ind., 439; 44 N. E. Rep., 469; 33 L. R. A., 313.

Minors forbidden from entering saloons; ordinance sustained under general charter power. State v. Austin, 114 N. C., 855; 41 Am. St. Rep., 817; 19 S. E. Rep., 919.

HOLIDAYS, etc., prohibiting sale of liquor on. Merchants National Bank v. Jaffray, 36 Neb., 218; 54 N. W. Rep., 258; 19 L. R. A., 317 note.

Music—Females. An ordinance was sustained which forbid noisy amusements, etc., and which prohibited in the night time after 12 o'clock, midnight, any person to play or make a noise upon any musical instrument in any drinking saloon, or beer cellar, or to permit or allow the same by the proprietor, agent or manager thereof, and which also prohibited females to be in such places at such time. Exparte Smith & Keating, 38 Cal., 702.

CIDER. Under general charter

power, it has been held in Kansas that an ordinance regulating the sale of cider which is not intoxicating by prohibiting its sale in less quantities than a gallon, and forbidding the drinking of the same at the place of sale, violates no private rights and does not unreasonably restrain trade. Monroe v. Lawrence, 44 Kan., 607; 24 Pac. Rep., 1113; 10 L. R. A., 520.

84 Sec. 229 supra. State v. Sevier, 117 Ind., 338; 20 N. E. Rep., 245; People ex rel. v. French, 102 N. Y., 583, 587; 7 N. E. Rep., 913; Tipton v. State, 2 Yerg (Tenn.), 542; State v. Smith, 3 Heisk (Tenn.), 465, State v. Cantieny, 34 Minn., 1; 24 N. W. Rep., 458. The legislature may forbid. Com. v. Morrisey, 157 Mass., 471; 32 N. E. Rep., 664.

85 Gallatin v. Tarwater, 143 Mo., 40; 44 S. W. Rep., 750, in effect overruling St. Joseph v. Harris, 59 Mo. App., 122; Green City v. Holsinger, 76 Mo. App., 567; Fairmont v. Meyer, 83 Minn., 456; 86 N. W. Rep., 457; Bloomfield v. Trimble, 54 Iowa, 399; 37 Am. Rep., 212; 6 N. W. Rep., 586.

One may be drunk in a private place in violation of an ordinance. State v. McNinch, 87 N. C., 567.

86 Karwisch v. Atlanta, 44 Ga.,

lice and pass and enforce all necessary police ordinances, has been held sufficient to authorize an ordinance prescribing penalties for non-observance of the Sabbath.87 So, in Florida, a like ordinance was declared valid, enacted under charter power "to pass all ordinances and laws as may be expedient and necessary for the preservation of the public peace and morals."88 The same rule has been announced in Missouri.89 Oregon, general charter power to make ordinances to "secure the health, peace and improvement of the city," was held not to confer power to pass such ordinance. The case affirms that the keeping open of a shop or store on Sunday, and selling ware and merchandise are not acts of a disorderly character, or in any sense within the purview of such acts as tend to disturb the public peace. The court expressed the opinion that the offense was "against public policy, punishable under the laws of the state."90 In other jurisdictions, like ordinances have been pronounced void, where the offense which they condemned was made punishable by state statute.91

Under the general welfare clause, a penal ordinance cannot forbid the conducting of a lawful business, as mercantile, on Christmas day; for only when such business is calculated to

204; Charleston v. Benjamin, 2 Strobh. L. (S. C.), 508; Nashville v. Linck, 12 Lea. (80 Tenn.), 499. Ex parte Abram, 34 Tex. Cr. Rep., 10; 28 S. W. Rep., 818. Sunday ordinance, making certain exceptions, construed. Liberman v. State, 26 Neb., 464; 42 N. W. Rep., 419.

Sunday closing ordinances, held void. Cincinnati v. Rice, 15 Ohio, 225; Canton v. Nist, 9 Ohio St., 439.

No McPherson v. Chebanse, 114
 111., 46; 55 Am. Rep., 857; 28 N. E.
 Rep., 454, affirming 15 Ill. App., 311.

88 Theisen v. McDavid, 34 Fla., 440; 26 L. R. A., 234; 16 So. Rep., 321; ordinance need not necessarily follow state statute, as to exceptions.

89 St. Louis v. Cafferata, 24 Mo., 94, where it was held that a char-

ter provision superseded a general statute on the same subject.

90 "There can be no breach of the peace without a disturbance, acts disorderly or violent in their nature, and the day on which such acts are committed will not alter the nature or quality of such acts in the eye of the law. The keeping open of a store or shop on Sunday, for the purpose of labor or traffic, is not an offense against the public peace, but an offense against public policy, punishable under the laws of the state." Per Lord, C. J. in Corvallis v. Carlisle, 10 Oregon, 139, 143, distinguishing St. Louis v. Cafferata, 24 Mo., 94; State v. Freeman, 38 N. H., 426 and Jones v. Richmond, 18 Gratt (Va), 517,

91 Rothschild v. Darien, 69 Ga.,

interfere with the peace, good order and safety of the community can it be prohibited.⁹²

General power, and special exclusive control of licenses of sale of liquor was held to give power (implied, as a necessary incident thereto) to pass an ordinance forbidding the sale of liquor on Sunday.⁹³ And it is entirely competent, by ordinance, to permit the keeping open of saloons on Sunday for one purpose—furnishing meals and lodgings to travelers and boarders—and forbid their being kept open for other purposes.⁹⁴

§ 480. Regulating hours of business. Charter power to make and establish by-laws on certain enumerated subjects, and "make other by-laws, regulations and ordinances which may seem for the welfare of said city, provided they be not repugnant to the constitution and laws of the state," was held, sufficient in New Hampshire to authorize an ordinance making it unlawful to keep open restaurants after ten o'clock at night. But in North Carolina, general power incident to municipal corporations, and authority conferred by the general welfare clause, was declared insufficient to sustain a penal ordinance requiring business houses to close at 7:30 p. m. 96

503. See Chapter XV. of Municipal Control of Offenses Against State. 92 Watson v. Thomson, 116 Ga., 546; 42 S. E. Rep., 747.

"The right to follow any of the common avocations of life is an inalienable right." Per Mr. Justice Bradley in Butchers' Union, etc. Co. v. Crescent City, etc., Co., 111 U. S., 746, 762.

¹⁹³ Minden v. Silverstein, 36 La. Ann., 912.

Ordinance forbidding sustained, under general power. Megowan v. Com., 2 Metc. (Ky.), 3.

Ordinance held valid under general power, and particular power to regulate "grog shops, and other persons keeping public houses." Gabel v. Houston, 29 Tex., 335.

94 The claim was made that if the ordinance allows a store or saloon to be kept open on Sunday for one kind of business, it necessarily follows that said store or saloon

would thereby be opened for all kinds of business. "This claim is gravely made, but scarcely admits of a grave answer. Every livery stable, every drug store and even any private dwelling house in the city, might lawfully be turned into tippling shops on Sunday if this position has any substance. It is certainly lawful to keep them open for some purposes, as has been done by this ordinance. To 'keep open' within the meaning of the ordinance implies a readiness to carry on the usual business therein, and if this business is not within the exception of the ordinance, the offense is committed." Per Cooley, J. in Lynch v. People, 16 Mich., 472, 477.

95 Per Bell, J. in State v. Freeman, 38 N. H., 426, 428, approving
 State v. Clark, 28 N. H., 176.

96 State v. Ray, 131 N. C., 814; 42
S. E. Rep., 960.

Charter power to regulate saloons and dram shops is usually construed as ample, to justify penal ordinances, prescribing the hours when such places shall open and close.⁹⁷

5. MARKETS-WEIGHTS AND MEASURES.

§ 481. Markets—Establishment and regulation. To promote the health and good government of the inhabitants, municipal corporations are usually endowed with ample charter power, to establish markets and market-places; 98 to forbid within the corporation the sale and purchase of specified

AUCTIONEERS. Charter power to regulate, authorizes an ordinance forbidding the sale of watches at auction after 6 o'clock in the evening. Buffalo v. Marion, 13 Misc. Rep., 639; 34 N. Y. Supp., 945.

97 Ordinance forbidding the sale of liquor after 9 p. m., or after dark, held valid. Smith v. Knoxville, 3 Head. (Tenn.), 245; Maxv. Jonesboro, 11 Heisk (Tenn.), 257. Compare Grills v. Jonesboro, 8 Baxt. (Tenn.), 247; v. Greenville, 8 (Tenn.), 228. Ordinance requiring dram shop to be closed between hours named sustained. Tarkio v. Cook, 120 Mo., 1; 25 S. W. Rep., 202; State (Staats) v. Washington, 45 N. J. L., 318; Ex parte Wolf, 14 Neb., 24, 31, 32; 14 N. W. Rep., 660; Bennett v. Pulaski (Tenn. 1899), 47 L. R. A., 278. Under power to license, and general power (welfare clause) borough may, by ordinance, prohibit the sale of liquor in licensed houses after the hour of ten o'clock p. m. State (Staats) v. Washington, 44 N. J. L., 605, 608, 610. Such ordinance does not take away any vested or constitutional right. "It is merely the reservation of a police power, which the common council may exercise as they deem expedient for the good order and government of the borough, of which

they cannot divest themselves by granting licenses to inn-keepers." Page 608. Reasonableness of such regulations discussed. Page 609.

v. Buckingham, 10 Ohio, 257, per Lane, C. J.; Caldwell v. Alton, 33 Ill., 416, per Breese, J.

ESTABLISHMENT OF MARKETS. Georgia—Atlanta v. White, 33 Ga., 229.

Michigan—Gale v. Kalamazoo, 23 Mich., 344.

Minnesota—Paul v. Coulter, 12 Minn., 41.

New York—People v. Lawber, 7 Abb. Pr. (N. Y.), 158; 28 Barb. (N. Y.), 65; Ketchum v. Buffalo, 14 N. Y., 356.

North Carolina—Smith v. Newbern, 70 N. C., 14; 16 Am. Rep., 766; Wade v. Newbern, 77 N. C., 460.

Ohio-White v. Kent, 11 Ohio St., 550.

Texas—Palestine v. Barnes, 50 Tex., 538.

United States—New Orleans v. Morris, 3 Woods (U. S. C. C.), 103, 107.

Establishment of markets by private individuals. Twelfth Street Market v. Philadelphia, etc. Ry. Co., 142 Pa. St., 580; 21 Atl. Rep., 902, 989.

Power to Establish Continuing; hence markets may be

products at places other than those established; 99 to provide reasonable inspection regulations; to prevent the sale of bad. impure or adulterated articles of food, and, cheats and frauds changed from time to time, within the discretion of the municipal authorities. Jacksonville v. Ledwith, 26 Fla., 163; 7 So. Rep., 885; Cooper v. Detroit, 42 Mich., 584; 4 N. E. Rep., 262; Gall v. Cincinnati, 18 Ohio St., 563; Wartman v. Philadelphia, 33 Pa. St., 202.

MARKET PLACE IN PUBLIC STREET or Square, as a nuisance.

Alabama—State v. Mobile, Port. (Ala.), 279; 30 Am. Dec., 564. Florida-Lutterloch Cedar Keys, 15 Fla., 306.

Georgia-Columbus v. Jaques, 30 Ga., 506.

Michigan-Henkel v. Detroit, 49 Mich., 249; 13 N. W. Rep., 611.

New York-St. Johns v. New York, 3 Bosw. (N. Y.), 483.

·New Jersey-McDonald v. Newark, 42 N. J. Eq., 136; 7 Atl. Rep., 855; State v. Laverack, 34 N. J. L.,

Pennsylvania-Wartman v. Philadelphia, 33 Pa. St., 202.

DELEGATION OF POWER TO ESTAB-LISH private markets, is void. State v. Dubarry, 44 La. Ann., 1117; 11 So. Rep., 718; State v. Deffes, 45 La. Ann., 658; 12 So. Rep., 841.

Ordinance requiring consent of a majority of property owners in block, to open market, held void. State v. Garibaldi, 44 La. Ann., 809; 11 So. Rep., 36.

MARKET-HOUSE. It was early held in Massachusetts that cities and towns had power to establish, without express grant. Spaulding v. Lowell, 23 Pick. (Mass.), 71, per Shaw, C. J.

"CADILLAC SQUARE," Detroit, Michigan; Establishment and history, per Campbell, J., in Attorney-General v. Detroit, 71 Mich., 92;

38 N. W. Rep., 714; People v. Keir, 78 Mich., 98; 43 N. W. Rep., 1039.

ORDINANCES REGULATING MAR-KETS are strictly an exercise of the police power. Lamar v. Weidman. 57 Mo. App., 507; Municipality v. Cutting, 4 La. Ann., 335. Charter power to regulate markets, gives power to provide by ordinance for collection of twenty-five cents for persons occupying stands in markets. Cincinnati v. Buckingham, 10 Ohio, 257.

99 See next succeeding section 482.

¹ ADULTERATED FOOD. State v. Fourcade, 45 La. Ann., 717; 13 So. Rep., 187; 40 Am. St. Rep., 249; Shillito v. Thompson, L. R. 1 Q. B. Div., 12; 33 L. T. (N. S.), 506; 24 Week. Rep., 57. Such food may be seized and destroyed, etc. White Redfern, L. R. 5 Q. B. Div., 15; 41 L. T. (N. S.), 524; 28 Week. Rep., 168; Daly v. Webb. Ir. Rep., 4 C. L., 309; 18 Week. Rep., 631.

INSPECTION OF ANIMALS intended for food. State v. People's Slaughterhouse & R. Co., 46 La. Ann., 1031; 15 So. Rep., 408.

ordinance requiring mortem inspection of animals intended to be slaughtered for use as human food, and providing for a post mortem inspection of the meat of such animals before the same is placed upon the markets for sale is reasonable and valid. New Orleans v. Lozes, 51 La. Ann., 1172; 25 So. Rep., 979.

Offering tainted meat at public sale was a nuisance at common law. Shillito v. Thompson, L. R. 1 Q. B. Div. 12, and indictable. Reg v. Stevenson, 3 F. & F., 106, and each separate exposure or offer for in weights and measures;² and, finally, to make and enforce such other necessary and desirable regulations, consistent with the State laws and local charter, as will best promote the public interest.³

§ 482. Confining sales and purchases to public markets— Forbidding private markets. Charter power "to regulate and manage markets," has been held sufficient to authorize an ordinance forbidding the sale of market commodities at stores, stalls and places in the city outside of the established market

sale was a distinct offense. Emmerton v. Mathews, 7 N. & N., 586; Queen v. Jarvis, 3 F. & F., 108.

Provisions. Power to regulate the vending of meat, held not to give power to make it penal to sell putrid provisions. Rochester v. Rood, Hill & D. Supp. (N. Y.), 146.

COTTON MERCHANTS, dealing in loose cotton cannot be compelled, by ordinance, to keep a daily record to be open to the inspection of the police. Long v. Shelby County Taxing Dist., 7 Lea. (75 Tenn.), 134; 40 Am. Rep., 55.

Delegation. An ordinance cannot delegate to the inspector the power to determine what articles if sold would be injurious to public health or a fraud on the public. Cairo v. Coleman, 53 Ill. App., 680.

BUTTER-OLEOMARGARINE. Statute forbidding the sale of oleomargarine or any other article in imitation of butter or cheese, held constitutional. State v. Addington, 77 Mo., 110; Powell v. Com. 114 Pa. St., 265; 7 Atl. Rep., 913; affirmed 127 U. S., 678. Contra. People v. Marx, 99 N. Y., 377; 2 N. E. Rep., 29, reversing 35 Hun. (N. Y.), 528.

² See § 485 post.

3 Davenport v. Kelley, 7 Iowa, 102, overruled in Le Claire v. Davenport, 13 Iowa, 210; State v. Dubarry, 46 La. Ann., 33; 14 So. Rep., 298; Lamarque v. New Orleans, 1 McGloin (La.), 28; State v. Sarradal, 46 La., 700; 15 So. Rep., 87; 24 L. R. A., 584; Ash v. People, 11 Mich., 347; Hatch v. Pendergast, 15 Md., 251.

Regulations must conform to state law. State v. St. Paul, 32 Minn., 329; 20 N. W. Rep., 243. Mercantile houses and markets. Vosse v. Memphis, 9 Lea. (Tenn.), 294.

Permitting one to remain in market only twenty minutes, unless, etc. Regulation held valid. Com. v. Brooks, 109 Mass., 355.

Hours of opening and closing. Jacksonville v. Ledwith, 26 Fla., 163; 7 So. Rep., 885; 23 Am. St. Rep., 558.

Ice, sale of, on street may be regulated. Com. v. Reid, 175 Mass., 325; 56 N. E. Rep., 617.

Permission required, to occupy place on street to sell produce, which place is a part of the market. *In re* Nightingale, 11 Pick (Mass.), 168.

Oysters, regulating sale of. Municipality No. 1 v. Barnett, 13 La., 344; Morano v. New Orleans, 2 La., 217.

MEAT SHOPS, etc. St. Louis v. Weber, 44 Mo., 547; St. Louis v. Jackson, 25 Mo., 37; St. Louis v. Freivogel, 95 Mo., 533; 8 S. W. Rep., 715; Rockville v. Merchant, 60 Mo. App., 365.

A BUTCHER is one who slaughters

houses.⁴ "The right to establish a public market necessarily covers or embraces the right to prevent the establishment of private markets, and the right to prevent the sale of market commodities within the police regulations of a city for sanitary purposes and convenience. The object, primarily, is to enforce the inspection laws more strictly, and to prevent the sale of articles or provisions that are not sound." Under power to make such prudential laws as may be deemed proper respecting markets, a by-law may deny the privilege of selling meats within the city, except at the public markets and within certain districts thereof. But similar ordinances passed under

animals or dresses their flesh for market, but an ordinance may use the word as the keeper of a meat market. Rockville v. Merchant, 60 Mo. App., 365.

Licensing and regulating butchers, butcher stalls, etc. St. Paul v. Colter, 12 Minn., 41; 90 Am. Dec., 278.

Oppressive Regulations HELD Ordinance forbidding sales on the principal city markets, except from stands leased by sellers, and confines farmers and others. with their vehicles, to other markets, where the accommodations are inadequate and virtually shuts out the latter class of vendors from said markets, without giving them any substitute for it and requires their articles to be sold by the lessees of the stalls, held void. Hughes v. Recorders Court, 75 Mich., 574; 42 N. W. Rep., 984. Compare People v. Keir, 78 Mich., 98; 43 N. W. Rep., 1039, and dissenting opinion of Campbell, J., p. 108.

NECESSITY OF MARKET REGULA-TIONS, per Richardson, J. in State ex rel. Wilkinson v. Charleston, 2 Speers (S. C.), 623, 626; Black, C. J. in Wartman v. Philadelphia, 33 Pa. St., 202, 209.

4 "While the power 'to regulate' does not authorize prohibition in a

general sense, for the very essence of the regulation is the existence of something to be regulated, yet the weight of authority is to the effect, that this power confers the authority to confine the business referred to to certain hours of the day, to certain localities or buildings in the city, and to the manner of its prosecution within those hours, localities and buildings." Per Stone, C. J. in ex parte Byrd, 84 Ala. 17, 20; 4 So. Rep., 397; 5 Am. St. Rep., 328.

To same effect—Natal v. Louisiana, 139 U. S., 621; Jacksonville v. Ledwith, 26 Fla., 163; 7 So. Rep., 885; 23 Am. St. Rep., 558; State v. Barthe, 41 La. Ann., 46; 6 So. Rep., 531; State v. Schmidt, 41 La. Ann., 27; 6 So. Rep., 530; New Orleans v. Stafford, 27 La. Ann., 417; 21 Am. Rep., 563; Newson v. Galveston, 76 Tex., 559; 13 S. W. Rep., 368.

⁵ New Orleans v. Graffina, 52 La. Ann., 1082; 27 So. Rep., 590; 78 Am. St. Rep., 387; State v. Namais, 49 La. Ann., 618; 21 So. Rep., 852; State v. Gisch, 31 La. Ann., 544.

⁶ Buffalo v. Webster, 10 Wend. (N. Y.), 99; Bush v. Seabury, 8 Johns. (N. Y.), 418.

An ordinance prohibiting butchers, not licensees of butchers' stalls, from selling meat in quantities

the general power to establish and regulate markets have been held unauthorized. Thus an ordinance was held void and in restraint of trade which declared it unlawful to keep a private market.7 So under like power, an ordinance forbidding the sale of meat, except in market stalls, the rents of which were fixed and regulated by the city, was vacated.8 So under power "to establish and keep up markets," in the opinion of Lumpkin, J., in an early Georgia case, an ordinance cannot prohibit the sale of marketable articles, within market hours, elsewhere than in the markets.9 And in an early Illinois case, per Breese, J., general power was held to be insufficient to support an ordinance restraining merchants and dealers in family groceries from selling vegetables at their places of business, outside of the market limits.10 But charter power "to regulate the vending of meats brought into the city for sale," and "to license, tax and regulate butchers," confers power to prevent, by ordinance, the retailing of fresh meat from four o'clock, p. m. to nine o'clock, a. m., except by persons duly licensed.11

§ 483. Regulation of hucksters, hawkers, etc. Reasonable ordinances are valid which are intended to restrain and regulate hucksters, hawkers and peddlers.¹² Under sufficient charter power, the peddling of garden and farm products, meat, poul-

less than one quarter, held valid. Bowling Green v. Carson, 10 Bush (Ky.), 64; St. Louis v. Jackson, 25 Mo., 37.

An ordinance forbidding sales of meat, except at public markets, sustained. Winnsboro v. Smart, 11 Rich. Law (S. C.), 551.

An ordinance may forbid the sale of perishable food commodities in the railway stations, depots and landings of the city, except such sale of articles in the unbroken packages in which they are imported into the state. State v. Davidson, 50 La. Ann., 1297; 69 Am. St. Rep., 478; 24 So. Rep., 324.

Of course, ordinance regulations cannot interfere with foreign or interstate commerce. Sec 249 et seq.

⁷ Bloomington v. Wahl, 46 Ill., 489.

- 8 St. Paul v. Laidler, 2 Minn. 190; 72 Am. Dec., 89.
- 9 Bethune v. Hughes, 28 Ga., 560. This case has been much criticised. Compare Badkins v. Robinson, 53 Ga., 613.

¹⁰ Caldwell v. Alton, 33 Ill., 416. ¹¹ Porter v. Water Valley, 70 Miss., 560; 12 So. Rep., 828.

An ordinance may prohibit the sale of milk from vehicles by those not duly licensed. People v. Mulholland, 82 N. Y., 324; 37 Am. Rep., 568.

12 Tomlin v. Cape May, 63 N. J.
L., 429; 44 Atl. Rep., 209; Bush v.
Seabury, 8 Johns. (N. Y.), 418;
Sayre Borough v. Phillips, 148 Pa.
St. Rep., 482; 24 Atl. Rep., 76; 33
Am. St. Rep., 482; Milton v. Hoagland, 3 Pa. Co. Ct. Rep., 283.

Must not discriminate. Danville

try, game, etc., about the streets may be forbidden.¹³ So an ordinance may make it unlawful, during certain months of the year, to hawk about or sell by retail any kind of fish, beef, pork, or mutton, except at the public markets, or within designated limits around the same.¹⁴ Charter power to license and regulate hawkers, peddlers, etc., and the sale of meat, fish and vegetables, has been held to confer power, to forbid, by ordinance, the peddling of fruit and garden and farm products in the public streets between five o'clock in the morning and one o'clock in the afternoon.¹⁵ To prevent obstructing or encumbering the public streets, the time that wagons shall be allowed to stand in the streets, to make sales may be limited.¹⁶

§ 484. Milk inspection and adulteration. Ordinance regulations providing for the inspection of milk sold within the corporate limits and forbidding its sale when below a standard prescribed, and authorizing its destruction if found to be impure, in accordance with such standard, have been sustained.¹⁷ The Supreme Court of Louisiana, in a well considered opinion, held valid an ordinance of the City of New Orleans which required (under penalty in case of refusal) vendors of milk to the public to furnish gratuitously on application of sanitary inspectors samples of milk, not exceeding one-half pint, for inspection and analysis. The ordinance was declared not uncon-

v. Peters, 8 Luz. L. Reg. (Pa.), 272; Hughes v. Recorder's Court, 75 Mich., 574; 42 N. W. Rep., 984. Unreasonable regulations. Dunham v. Rochester, 5 Cow. (N. Y.), 462.

By law forbidding hawkers, etc., on certain streets, held void. Virgo v. Toronto, 22 Canada Sup. Ct. (Duval), 447.

Huckster defined. Mays v. Cincinnati, 1 Ohio St., 268.

13 Shelton v. Mobile, 30 Ala.,540; 68 Am. Dec., 143.

Particular case. Sharon v. Hawthorne, 123 Pa. St., 106; 16 Atl. Rep., 835.

14 Buffalo v. Webster, 10 Wend.(N. Y.), 99, per Savage, C. J.

What constitutes "peddling." Chicago v. Bartee, 100 Ill., 57; Graffty v. Rushville, 107 Ind., 502; 8 N. E. Rep., 609; Duluth v. Krupp, 46 Minn., 435; 49 N. W. Rep., 235.

¹⁵ Buffalo, N. Y. Charter. Buffalo v. Schleifer (Buffalo Sup. Ct. General Term), 2 Misc. Rep. (N. Y.), 216; 21 N. Y. Supp., 913.

16 Com. v. Brooks, 109 Mass.,
355; People v. Keir, 78 Mich., 98;
43 N. W. Rep., 1039.

¹⁷ Deems v. Baltimore, 80 Md.
 164; 45 Am. St. Rep., 339; 26 L.
 R. A., 541; 30 Atl. Rep., 648.

Regulating inspection of milk. Littlefield v. State 42 Neb., 223; 60 N. W. Rep., 724; 47 Am. St. Rep., 697.

An ordinance may adopt a standard to test quality. State v. Fourcade, 45 La. Ann., 717; 13 So. Rep., 187. The burden is upon defend-

stitutional as forcing dairymen to furnish evidence against themselves, as taking private property for public use without compensation and without due process of law, as depriving them and their property of the equal protection of the law, and denying them protection in person and property from unreasonable searches and seizures and authorizing invasion of the same, without warrant founded on oath or affirmation. Nor is such ordinance unreasonable, vexatious or oppressive; it is a legitimate exercise of the police power in the interest of public health. 18

§ 485. Weights and measures. Ordinances regulating the character of weights and measures to be used for coal, hay, lumber, cord wood and other bulky articles, and meat, bread,

ant to show that the standard is unreasonable. Implied power will sustain such ordinance (Arguendo). State v. Stone, 46 La. Ann., 147, 151; 15 So. Rep., 11.

An ordinance requiring in inspection the application of the "tuberculine test," is not unreasonable. State v. Nelson, 66 Minn., 166; 61 Am. St. Rep., 399; 68 N. W. Rep., 1066; 34 L. R. A., 318.

Ordinance forbidding feeding still slops to cows and the vending of milk of cows so fed, is within the police power. Johnson v. Simonton, 43 Cal., 242.

Statutes prohibiting sale of adulterated milk, held constitutional.

Iowa—State v. Schlenker, 112 Iowa, 642; 84 N. W. Rep., 698.

Massachusetts.—Com. v. Wetherbee, 153 Mass., 159; 26 N. E. Rep., 414.

New Hampshire—State v. Campbell, 64 N. H., 402; 13 Atl. Rep., 585.

New York—People v. West, 106 N. Y., 293; 12 N. E. Rep., 610.

Rhode Island—State v. Groves, 15 R. I., 208; 2 Atl. Rep., 384.

Knowledge of adulteration on the part of defendant need not be shown. Com. v. Evans, 132 Mass.,

11; Com. v. Farren, 9 Allen (Mass.), 489; Com. v. Weiss, 139 Pa. St., 247; 21 Atl. Rep., 10.

§ 343 supra relates to proving the intent.

The legislature may forbid the sale of impure or adulterated milk, and provide a standard to test the quality. Com. v. Waite, 11 Allen (Mass.), 264; 87 Am. Dec., 711; Com. v. Farren, 9 Allen (Mass.), 489; People v. Cipperly, 101 N. Y., 634; 4 N. E. Rep., 107; Polinsky v. People, 73 N. Y., 65; People v. Eddy, 59 Hun. (N. Y.), 615; 12 N. Y. Suppl., 628; State v. Smythe, 14 R. I., 100.

An ordinance making it unlawful to sell skimmed milk, is a valid exercise of the police power. Kansas City v. Cook, 38 Mo. App., 660.

Statutes forbidding sale of skimmed milk are constitutional. Com. v. Wetherbee, 153 Mass., 159; 26 N. E. Rep., 414.

18 Per Nichols, C. J. in State v.
 Dupaquier, 46 La. Ann., 577; 15
 So. Rep., 502; 26 L. R. A., 162.

In Massachusetts a statute was held constitutional which authorized inspectors of milk "to enter any place where milk is stored or kept for sale, and all carriages used and other specified market and food products sold and delivered within the corporate limits are strictly an exercise of the police power, and are common in all cities and towns.¹⁹ General charter powers will support an ordinance requiring coal to

for the conveyance of milk; and whenever they have reason to believe any milk found therein is adulterated, they shall take specimens thereof and cause the same to be analyzed, or otherwise satisfactorily tested, the result of which they shall record and preserve as evidence." Com. v. Carter, 132 Mass., 12.

To the same effect, Shivers v. Newton, 45 N. J. La., 469; Blazier v. Miller, 10 Hun. (N. Y.), 435.

The fact that the thing seized may be used as evidence against the person from whom taken is not a violation of the bill of rights. Com. v. Dava, 2 Met. (Mass.), 329.

Statute (relating to sale of liquor) requiring druggists to produce in court, or before any grand jury, all prescriptions compounded "whenever thereto lawfully required," etc., held constitutional. State v. Davis, 117 Mo., 614; 23 S. W. Rep., 759.

The constitutional provision, "that no one shall be compelled to testify against himself in a criminal case," forbids the seizure of one's private books and papers in order to obtain evidence against him. State v. Davis, 108 Mo., 666; 18 S. W. Rep., 894.

¹⁹ Arkansas—Taylor v. Pine Bluff, 34 Ark., 603.

Kentucky—Collins v. Louisville, 2 B. Mon. (Ky.), 134.

Massachusetts—Eaton v. Kegan, 114 Mass., 433; Ritchie v. Boynton, 114 Mass., 431.

Minnesota—Lehigh Coal & Iron Co. v. Capehart, 49 Minn., 539; 52 N. W. Rep., 142. Missouri—Sylvester Coal Co. v. St. Louis, 130 Mo., 323; 32 S. W. Rep., 649; 51 Am. St. Rep., 566; St. Louis v. Priesmeyer, 12 Mo. App., 592.

New Jersey—Hoffman v. Jersey City, 34 N. J. L., 172.

New York—People v. Rochester, 45 Hun. (N. Y.), 102.

North Carolina—State v. Tyson, 111 N. C., 687; 16 S. E. Rep., 238; Raleigh v. Sorrell, 1 Jones (46 N. C.), 49.

Ohio—Huddleson v. Ruffin, 6 Ohio St., 604.

Pennsylvania—Phillips v. Allen, 41 Pa. St., 481; 82 Am. Dec., 486.

South Carolina—Charleston v. Rodgers, 2 McCord L. (S. C.), 495; 13 Am. Dec., 751.

West Virginia—State v. Peel Splint Coal Co., 36 W. Va., 802; 15 S. E. Rep., 1000.

Wisconsin—Yates v. Milwaukee, 12 Wis., 673.

United States—Turner v. Maryland, 107 U. S., 38.

By-law which requires hay to be weighed on public scales, construed to apply to hay only bought within city. Gass v. Greenville, 4 Sneed (Tenn.), 62.

Sales outside of city limits. Lamar v. Weidman, 57 Mo. App., 507.

Ordinance forbidding the sale of any timber brought into the corporation for sale, without a survey, held not to apply to timber delivered there to be used for a specific purpose under a special contract made elsewhere. Briggs v. A Light Boat, 7 Allen (Mass.), 287, 298, per Bigelow, C. J.

Statute forbidding purchase of

be sold by weights and measures.²⁰ A reasonable charge for the service of weighing or measuring is not in the nature of a tax.²¹ Charter power to make provision for weighing coal, confers implied power to provide the means of weighing it, including the authority to maintain public scales.²²

6. MISCELLANEOUS REGULATIONS.

§ 486. Offenses affecting the public order and peace. Under the usual charter powers, ordinances are authorized directed against offenses affecting the public order and peace, as those forbidding riotous assemblies, disturbing the peace, ²³ molesting religious and other lawful meetings, blowing whistles of factories, shops, etc., parading in public thoroughfares with music, etc., without legal permits, ²⁴ ringing bells for auction sales,

lumber not surveyed as required is constitutional though it applies to only part of the state. Pierce v. Kimball, 9 Me., 54.

Ordinances relating to cording wood held to be superseded by State Statute. Com. v. Gillam, 8 Serg. & R. (Pa.), 50.

WEIGHT OF BREAD; regulating. Mobile v. Yuille, 3 Ala., 137; People v. Wagner, 86 Mich., 594; 49 N. W. Rep., 609; 13 L. R. A., 286. Phillips v. Allen, 41 Pa. St., 481; 82 Am. Dec., 486; Paige v. Fazackerly, 36 Barb. (N. Y.), 302.

A city may establish the assize and regulate weight and inspection of bread, under power "to regulate everything which relates to bakers." If unstamped, as ordinance requires or deficient in weight, officers given power to seize such bread and bring offender before court, who in event of conviction, could order forfeiture of bread for use of city work house. Guillotte v. New Orleans, 12 La. Ann., 432.

²⁰ Under general power an ordinance may require coal sold in the city to be weighed by city weighers. Stokes v. New York, 14 Wend. (N. Y.), 87.

21 "We cannot understand how any one can take exceptions either to the reasonableness, lawfulness or constitutionality of a regulation requiring people to buy and sell by lawful weights and measures rather than by guess. A proposition such as this is too plain for discussion; it is determined at once by the application of the ordinary principles of fair dealing and common sense," per Gordon. J in O'Mally v. Freeport, 96 Pa. St., 24, 30; 42 Am. Rep., 527; Fisher v. Harrisburg, 2 Grant (Pa.), 291.

22 St. Charles v. Elsner, 155 Mo.,
 671; 56 S. W. Rep., 291.

One public scale established in a town of six hundred inhabitants, held valid. Davis v. Anite, 73 Iowa, 325; 35 N. W. Rep., 244.

Power to regulate the inspection and weighing of "brick, lumber, firewood, coal, hay and any article of merchandise," does not include articles of merchandise of a stationery store. Cairo v. Coleman, 53 Ill. App., 680.

23 § 487 post.

24 §§ 416 and 466 supra.

etc., playing on hand organs and other musical instruments, giving false alarms of fire, etc.

§ 487. Same—Disturbing the peace. Usual charter powers are sufficient, to authorize ordinances directed against the disturbance of the peace by unusual noises and other boisterous and improper conduct calculated to disturb the tranquillity of citizens.²⁵ Thus the charter of Detroit, which confers power to prevent any disorderly noise or disturbance in the streets or elsewhere within the corporation, was held to be sufficient to support an ordinance punishing "any persons who shall make any disturbance by which the peace and good order of the neighborhood are disturbed," etc.²⁶ So, under the usual charter power, an ordinance is authorized forbidding, under penalty, loud and boisterous cursing and swearing in any street, house, or elsewhere, within the city.²⁷ Obviously, the purpose of such ordinance is to promote good morals, the decencies and

²⁵ Charivari. An ordinance providing that "every person who shall willfully disturb the peace by loud or unusual noise, by blowing horns, trumpets, or other instruments, or by any other device or means whatsoever, shall be deemed guilty of a misdemeanor," is not violated by parties engaged in a "charivari" unless the effect is to disturb the peace and quiet of the citizens or some of them. St. Charles v. Meyer, 58 Mo., 86.

FIRING OFF PISTOL, etc. Washington v. Eaton, 4 Cranch C. C., 352; 29 Fed. Cas. No. 17, 228; Cottonwood Falls v. Smith, 36 Kan. 401; 13 Pac. Rep., 576.

Salvation Army. People ex rel. v. Rochester, 44 Hun. (N. Y.), 166.

BEATING DRUM or tambourine on street or sidewalk. Vance v. Hadfield, 22 N. Y. St., 858. Beating drum or tambourine or making any noise with any instrument for any purpose whatever without a written permit; valid. Roderick v. Whitson, 51 Hun (N. Y.), 620; 4 N. Y. Suppl., 112; Wilkes Barre v.

Garebed, 9 Kulp. (Pa.), 273. People v. Van Houten, 13 Misc. Rep. (N. Y.), 603; People v. Garabed, 20 Misc. Rep. (N. Y.), 127.

Public Meeting or gatherings on the streets may be forbidden, without a permit. Bloomington v. Richardson, 38 Ill. App., 60.

ADDRESSES in public parks, etc., without permission. Com. v. Abrahams, 156 Mass., 57; 30 N. E. Rep., 79; Com. v. Davis, 140 Mass., 485; 4 N. E. Rep., 577.

"Noise" construed to mean an unreasonable noise, of a nature to disturb the community. State v. Cantieny, 34 Minn., 1; 24 N. W. Rep., 458.

26 In re Bushey, 105 Mich., 64;
 62 N. W. Rep., 1036.

²⁷ State v. Cainan, 94 N. C. 880. State v. Earnhardt, 107 N. C., 789; 12 S. E. Rep., 426.

BOISTEROUS AND DISORDERLY CONDUCT—ordinance forbidding, valid. Mt. Sterling (Newport) v. Holly, 108 Ky., 621; 57 S. W. Rep., 491.

Magistrate may fine for. Louisburg v. Harris, 7 Jones L. (52 N.

proprieties of society, prevent nuisances and other criminal offenses that might result from the acts and conduct forbidden.²⁸

- § 488. Same—Carrying concealed weapons. Ordinances forbidding the carrying of concealed weapons have been sustained.²⁹ Such ordinance is not invalid because it fails to include certain exceptions embraced in the state law provided as a defense against the charge.³⁰ And it has been held in Missouri that such ordinance is not void because it provides for a fine less than that fixed by a state statute.³¹
- § 489. **Cruelty to animals**. Under the general welfare clause ordinances may be enacted forbidding cruelty to dumb animals; and this notwithstanding such cruelty is made a misdemeanor by the general laws of the state.³²
- C.), 281. Boisterous assemblages may be forbidden at "any" place within the corporate limits. Vicksburg v. Briggs, 102 Mich., 551; 61 N. W. Rep., 1.

28 OBSCENE OR INDECENT LANGUAGE used in public, may be forbidden. Ex parte Slattery 3 Ark. (3 Pike), 484.

DISORDERLY HOUSE. Centerville v. Miller, 57 Iowa, 56, 225; 10 N. W. Rep., 293, 639.

CONFLICT WITH THE STATE LAW must be avoided. State v. Sherrard, 117 N. C. 716; 23 S. E. Rep., 157.

BREACH OF PEACE; ordinance fixing penalty for, held void, as offense controlled by State Statute. Raleigh v. Dougherty, 3 Humph. (22 Tenn.), 11; 39 Am. Dec., 149.

ASSAULT, ordinances forbidding have been sustained. Amboy v. Sleeper, 21 III., 499; State v. Bruckhauser, 26 Minn., 301; 3 N. W. Rep., 695. Also, held void. Walsh v. Union, 13 Oregon, 589; 11 Pac. Rep., 312; People v. Brown, 2 Utah, 462.

The points involved related to charter power and consistency with State laws and are fully treated in chapter XV.

²⁰ Cottonwood Falls v. Smith, 36
 Kan., 401; 13 Pac. Rep., 576; St.
 Louis v. Vert, 84 Mo. 204; Abbeville v. Leopard, 61 S. C., 99; 39
 S. E. Rep., 248.

By any person other than police officers and travelers, without a permit from police commissioners. Penalty not less than \$250, nor more than \$500, or imprisonment not less than three months, nor more than six months, or both, is valid. Penalty not excessive. Ex parte Cheney, 90 Cal., 617; 27 Pac. Rep., 436.

30 Linneus v. Dusky, 19 Mo. App., 20.

Where the offense is covered by State Statute, it cannot be condemned by ordinance. Collins v. Hall, 92 Ga, 411; 17 S. E. Rep., 622. See Chapter XV. of Municipal Control of Offense Against the State.

31 Ex parte Caldwell, 138 Mo.,
 233; 39 S. W. Rep., 761.

See § 178 supra.

DELEGATION; ordinance forbidding, without permission from the village president held void. McGregor v. Lovington, 48 Ill. App., 211.

32 St. Louis v. Schoenbusch, 95

§ 490. Vagrancy. Charters often confer power in express terms to restrain and punish vagrancy.³³ A charter giving power "to regulate the police" of a city authorizes an ordinance to punish vagrants.³⁴ Under a statute declaring that habitual drunkards, who shall abandon, neglect or refuse to aid in the support of their families, and who may be complained of by their families, shall be deemed vagrants, an ordinance which omits habitual drunkenness, as a constituent element of the offense, is void.³⁵

§ 491. Regulations of various occupations. Reasonable regulations may be imposed on auctioneers,³⁶ as forbidding the sale of watches at auction after six o'clock in the evening;³⁷ junk shops;^{37½} second hand dealers;³⁸ rag pickers, as by for-

Mo. 618; 8 S. W. Rep., 791. See Chapter XV of Municipal Control of Offenses Against the State.

An ordinance fixing the maximum load of a two-horse team and wagon and prescribing a penalty against the contractor employing such team for exceeding such maximum is not void on the ground of partiality. Kansas City v. Sutton, 52 Mo. App., 398.

INTENT. Under section 3896, R. S. Mo., 1889, the intent with which cruelty is inflicted on an animal is immaterial, provided the act itself was willful and not accidental. State v. Hackfath, 20 Mo. App., 614. But evidence that the horse was overdriven does not warrant a conviction under this section, in the absence of proof that the overdriving was willful and not accidental. State v. Roche, 37 Mo. App., 480.

See § 343 supra.

33 Kansas City v. Neal, 49 Mo. App., 72; Withers v. Coyles, 36 Ala., 320.

34 St. Louis v. Bentz, 11 Mo., 61. One cannot be fined as a vagrant because found trespassing on the private premises of another if able to give an account of himself. St. Louis v. Babcock, 156 Mo., 148; 56 S. W. Rep., 732.

A law authorizing a vagrant not accused or convicted for any crime to be hired for six months to the highest bidder after the determination of the fact of such vagrancy by a jury, is violative of both state and federal constitution prohibiting slavery or involuntary servitude except in punishment of crime where the party shall be duly convicted. *In re* Thompson, 117 Mo., 83; 22 S. W. Rep., 863.

35 State v. Burns, 46 La. Ann.,34; 11 So. Rep., 878.

See § 16 supra and Chapter XV. ³⁶ License of auctioneers, § 428 supra.

³⁷ Buffalo v. Marion (Buffalo Sup. Ct. Gen. Term), 13 Misc. Rep. (N. Y.), 639; 34 N. Y. Supp., 945. History of licensing and regulating auctioneers in New York is given by Ruger, C. J., in People ex rel. v. Grant, 126 N. Y., 473; 27 N. E. Rep., 964.

37½ Louisiana—New Orleans v. Kaufman, 29 La. Ann., 283; 29 Am. Rep., 328.

Massachusetts—Com. v. Leonard, 140 Mass., 473; 4 N. E. Rep., 96; 54 Am. Rep., 485. bidding in certain districts the collection, storing or dealing in old rags, old papers, or such other refuse material;³⁹ carpet beating machines, as by forbidding the use of, within one hundred feet of any church, schoolhouse or residence;⁴⁰ rock crushing machine;⁴¹ intelligence offices (under sufficient charter power);⁴² laundries and wash houses, as by specifying districts in which such business shall be conducted,⁴³ prescribing hours,⁴⁴ the character of buildings,⁴⁵ and requiring the due observance of proper sanitary conditions, and providing for in-

Mississippi—Pitts v. Vicksburg, 72 Miss., 181; 16 So. Rep., 418.

Minnesota—Duluth v. Bloom, 55 Minn., 97; 56 N. W. Rep., 580; 21 L. R. A., 689.

Michigan — Grand Rapids v. Braudy, 105 Mich., 670; 64 N. W. Rep., 29; 32 L. R. A., 116; 55 Am. St. Rep., 472.

Ohio-Marmet v. State, 450 Ohio St., 63; 12 N. E. Rep., 463.

South Carolina—Charleston v. Goldsmith, 12 Rich. Law (S. C.), 470.

License of junk dealers, § 428.

³⁸ Marmet v. State, 45 Ohio St., 63; 12 N. E. Rep., 463; State v. Segel, 60 Minn., 507; 62 N. W. Rep., 1134.

DISINFECTION. Dealers in second hand clothing may, by ordinance, be required to turn over to the city, for disinfection, second hand clothing, at specified prices. Rosenbaum v. Newbern, 118 N. C., 83; 32 L. R. A., 123; 24 S. E. Rep., 1.

FURNITURE DEALER. Duluth v. Bloom, 55 Minn., 97; 56 N. W. Rep., 580; 21 L. R. A., 689.

PROHIBITORY ORDINANCE, held void. Greensboro v. Enrenreich, 80 Ala., 579; 60 Am. Rep., 130.

BOOK SELLER, held not a second hand dealer. Eastman v. Chicago, 79 Ill., 178.

39 Ordinance of Worcester, Mass., sustained. Com. v. Hubley, 172 Mass., 58; 70 Am. St. Rep., 242; 51 N. E. Rep., 448. ⁴⁰ Ex parte Lacey, 108 Cal., 326; 41 Pac. Rep., 411; 49 Am. St. Rep., 93; where it is said that the question of the necessity or propriety of such ordinance is alone for the municipal authorities.

⁴¹ Kansas City v. McAleer, 31 Mo. App., 433.

42 INTELLIGENCE OFFICE, to obtain employment for domestic servants and laborers cannot be regulated, if not enumerated in the charter. Keim v. Chicago, 46 Ill. App., 445.

LABOR AGENT; ordinance requiring bond of, held void, in absence of charter power. State v. Von Sachs, 45 La. Ann., 1416; 14 So. Rep., 249.

⁴³ In re Hang Kie, 69 Cal., 149; 10 Pac, Rep., 327.

Delegating power to tax-payers as to location is void. *In re* Quong Woo, 7 Sawyer (U. S.), 526; 13 Fed. Rep., 229.

44 Forbidding in certain block without consent of city authorities, held void. Ex parte Sing Lee, 96 Cal., 354; 31 Pac. Rep., 245; 31 Am. St. Rep., 218; Soon Hing v. Crawley, 113 U. S., 703; 5 Sup. Ct. Rep., 730; Barbier v. Connolly, 113 U. S., 27.

⁴⁵ Construction of, in designated manner. Ex parte White, 67 Cal., 102; 7 Pac. Rep., 186.

Stone or brick buildings. In re Yick Wo, 68 Cal., 294; 58 Am. Rep., 12; 9 Pac. Rep., 139. spection thereof;⁴⁶ hotel porters and runners;⁴⁷ and the business of cutting ice;⁴⁸ but an ordinance regulating department stores, by forbidding the sale of certain articles therein, was held void, without special legislative grant.⁴⁹

§ 492. Pawnbrokers. Reasonable police regulations may be made with respect to the conduct of the business of pawnbroking; but there must be no unreasonable interference with the right of property. And it has been held that the right to regulate such occupation must be conferred by the legislature. An ordinance requiring pawnbrokers to keep a book in which shall be entered a description of all property left with them in pawn, together with the name and description of the person leaving it and to submit such book to the police or other public officers on demand is reasonable, it being a mere police regulation to aid in the detection and prevention of larceny. Such regulation does not contravene the constitutional

46 Reasonable fee to cover city inspection, sustained. "It is neither a tax nor the imposition of a license for revenue purposes * * * This is not the case of the city attempting to use its police power to enforce the collection of revenue." Per Blanchard, J., New Orleans v. Hop Lee, 104 La., 601, 603; 29 So. Rep., 214, approving dissenting opinion of Bermudez, C. J. in State v. Blaser, 36 La. Ann., 363, 366.

⁴⁷ Chillicothe v. Brown, 38 Mo. App., 609.

⁴⁸ The Municipal Code of St. Louis, p. 615, § 914.

⁴⁹ Chicago v. Netcher, 183 III., 104; 55 N. E. Rep., 707; 48 L. R. A., 261.

⁵⁰ *Georgia*—Phillips v. Atlanta, 78 Ga., 773; 3 S. E. Rep., 431.

Illinois—Kuhn v. Chicago, 30 Ill. App., 203.

Michigan — Grand Rapids v. Braudy, 105 Mich., 670; 55 Am. St. Rep., 472; 64 N. W. Rep., 29; Van Baalen v. People, 40 Mich., 258.

North Carolina—Schaul v. Charlotte, 118 N. C., 733; 24 S. E. Rep., 526.

Texas — Heitzelman v. State (Tex. Crim. App., 1894) 26 S. W. Rep., 729.

PAWNBROKER DEFINED. Lobban v. Garnett, 9 Dana (Ky.), 389, 390; St. Paul v. Lytle, 69 Minn., 1; 71 N. W. Rep., 703; Owens v. Kinsey, 7 Jones Law (52 N. C.), 245, 246; Schaul v. Charlotte, 118 N. C., 733; 24 S. E. Rep., 526; Johnson v. Smith, 11 Humph. (Tenn.), 396, 398; National Bank v. Winston, 5 Baxt. (Tenn.), 685, 688; Hurst v. Jones, 10 Lea. (Tenn.), 8, 14; Russell v. Filmore, 15 Vt., 130, 136; Surber v. McClintic, 10 W. Va., 236, 242.

⁵¹ Fulton v. District of Columbia,2 App. Cas. (D. C.), 431.

52 State v. Itzcovitch, 49 La.
 Ann., 366; 21 So. Rep., 544; 62 Am.
 St. Rep., 648.

53 Illinois—Launder v. Chicago,
 111 Ill., 291; 53 Am. Rep., 625.

Indiana—Shuman v. Ft. Wayne, 127 Ind., 109; 26 N. E. Rep., 560; 11 L. R. A., 378.

Kansas—Kansas City v. Garnier, 57 Kan., 412; 46 Pac. Rep., 707. Michigan — Grand Rapids v. provision declaring the people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures.⁵⁴

§ 493. Protection of private property—Trespassing. Regulations for the protection of private property,⁵⁵ as by forbidding trespasses thereon, without the consent of the owner, have been held authorized under general charter power.⁵⁶ In Maine an ordinance imposing a reasonable fine for mutilating or de-

Braudy, 105 Mich., 670; 64 N. W. Rep., 29; 55 Am. St. Rep., 472; 32 L. R. A., 116.

Minnesota—St. Paul v. Lytle, 69 Minn., 1; 71 N. W. Rep., 703.

Missouri—St. Joseph v. Levin, 128 Mo., 588; 49 Am. St. Rep., 577; 31 S. W. Rep., 101.

54 St. Joseph v. Levin, 128 Mo.,588; 31 S. W. Rep., 101; 49 Am. St.Rep., 577.

INTEREST, USURY, etc., usually regulated by law. Hallenbeck v. Getz, 63 Conn., 385; 28 Atl. Rep., 519; Jackson v. Shawl, 29 Cal., 267.

Where a pawnbroker has released his lien upon his security by reason of his usury, the owner of the property is not required to tender the amount of the debt before he brings an action to recover the pledged property; and in an action for conversation, such failure to tender the debt must be availed of, if at all, by the defendant in his answer. Hilgert v. Levin, 72 Mo. App., 48.

Where the pledgee clothed with the appearance of ownership sells to an innocent purchaser, and the pledgor purchases the chattel from such vendee, he is not estopped to maintain an action against the pledgee for illegal conversation of the chattel. Hilgert v. Levin, 72 Mo. App., 48.

The laws of 1891 (Mo.), page

170, apply to and govern pawnbrokers, notwithstanding the general subject, is emphasized in Revised Statutes, chapter 124, which prescribes punishment for the violation of its provisions. Hilgert v. Levin, 72 Mo. App., 48.

License of pawnbrokers, § 428 supra.

55 Crawfordsville v. Braden, 130Ind., 149; 30 Am. St. Rep., 214; 28N. E. Rep., 849.

An ordinance to preserve private property, as a wharf, from encroachment, held *ultra viries*. This is not a public purpose. Such protection must come from the state. Horn v. People, 26 Mich., 221. See § 39 supra.

56 Saxton v. Peoria, 75 Ill. App., 397, following the rule of McPherson v. Chebanse, 114 Ill., 46; 28 N. E. Rep., 454.

Malicious Trespass upon real or personal property; ordinance prohibiting, sustained although there was a state statute on the subject. It was held competent for the ordinance to make farther regulations. Brownville v. Cook, 4 Neb., 101. See Ch. XV., post. Ordinance forbidding deposits or removal of material, substance, earth, dirt, ashes, refuse, turf, or other article from improved real estate does not apply to trespass committed within a building. St. Louis v. Babcock, 156 Mo., 154; 56 S. W. Rep., 731.

stroying ornamental shade trees was declared to be a valid exercise of the police power.⁵⁷ But, according to a New Jersey case, power to declare and define nuisances in the lots and lands, within the corporate limits, will not sustain an ordinance making a mere private trespass on the lands of another penal.⁵⁸ Regulations forbidding the obstruction of windows, shutting out light, etc., by fence and other erections, have been sustained.⁵⁹

§ 494. Regulation of tenement houses, etc. In New York a law was sustained which required tenement houses to be furnished by the owners with water "when they (the owners) shall be directed to do so by the board of health, in sufficient quantities at one or more places on each floor occupied or intended to be occupied by one or more families." This was regarded as a proper exercise of the police power both as a guard to the public health and as a protection against fire. Ordinances are common, especially in the larger cities, providing that lodging and tenement houses shall be sufficiently lighted or ventilated, supplied with water and properly constructed privies or water-closets, and kept in a cleanly and sanitary condition, and unless they are so kept they may be declared public nuisances.

§ 495. Limiting day's work—Eight hour laws. Laws prescribing the number of hours that shall constitute a day's work, and forbidding, under penalty, contracts of employment in violation thereof, in recent years, have received special judicial consideration.⁶² In determining the validity of such laws, the fundamental question involved is: Do they unwarrantably interfere with the freedom of contract? The right to labor or employ labor and make contracts in respect thereto, upon such

62 Under the recent charter of San Francisco, the board of supervisors is given power "to fix the hours of labor or service required of all laborers in the service of the city and county, and to fix their compensation; provided, that eight hours shall be the maximum hours of labor in any calendar day, and that the minimum wages of laborers shall be two dollars a day." Charter of San Francisco, art. 11,

⁵⁷ State v. Merrill, 37 Me., 329.

 ⁵⁸ Bregguglia v. Vineland, 53 N.
 J. L., 168; 20 Atl. Rep., 1082.

⁵⁹ Kansas City v. Young, 85 Mo. App., 381.

⁶⁰ Per Peckham, J. in New York Health Department v. Trinity Church Rectors, etc., 145 N. Y., 32; 45 Am. St. Rep., 579; 39 N. E. Rep., 833.

⁶¹ The Municipal Code of St. Louis, pp. 550, 551, §§ 601, 602

terms as may be agreed to, is both a liberty and a property right, and is embraced within the constitutional guaranty that no person shall be deprived of life, liberty or property without due process of law.⁶³ The right to contract, like all rights, is subject to such reasonable police regulations as spring from the obligation which each individual owes to society. The preservation of the public health and the promotion of the public interests are the primary ideas of organized government. But to secure these, the restrictions imposed by virtue of the sovereign police power must rest upon some reasonable basis; they must be necessary or desirable in advancing the public good, not arbitrary; and they must be impartial and uniform in their operation. In the practical application of these rules the courts are not entirely harmonious, as the decisions in the notes disclose.⁶⁴

An act of the congress declaring "that eight hours shall constitute a day's work for all laborers, workmen and mechanics

ch. 2, sec. 1, par. 24; Codes & Amendments to Stat. of Cal. (1899) p. 250.

63 Per Magruder, J., in Ritchie v. People, 155 Ill., 98, 104; 40 N. E. Rep., 454; 46 Am. St. Rep., 315. Laborers have the constitutional right to make their own contracts which cannot be impaired by legislative enactment. *In re* House Bill No. 203, 21 Colo., 27; 39 Pac. Rep., 431.

RESTRAINTS ON LEGISLATURE. "Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the state who transcends his jurisdiction, are utterly void. The security of life, liberty and property lies at the foundation of the social compact; and to say that this grant of legislative power includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established." Per Bronson, J., in Taylor v. Porter, 4 Hill (N. Y.), 140, 144, 145.

"The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." Per Mr. Justice Story in Wilkinson v. Leland, 2 Peters (U. S.), 627, 657.

64 A STATUTE OF NEBRASKA which, in effect, provided that for all classes of mechanics, servants and laborers, excepting those engaged in farm and domestic labor, a day's work should not exceed eight hours, was held unconstitutional, because, in the opinion of the court, (1) it unjustly discriminated, and (2) it impaired the right or freedom of contract. Low v. Rees Ptg. Co., 41 Neb., 127; 43 Am. St. Rep., 670; 59 N. W. Rep., 362. This case

now employed, or who may hereafter be employed, by or on behalf of the government of the United States," was held, by the Supreme Court of the United States, to be valid and in the nature of a direction by the government to its agents and servants. The act did not specify any sum which should be paid for the labor of eight hours, nor that the price should be more when the hours were greater or less when the hours were

is approved In re House Bill No. 203, 21 Colo., 27; 39 Pac. Rep., 431.

THE OHIO STATUTE provided that the services of all day laborers. workmen and mechanics employed upon any public work of, or work for the State of Ohio, or for any political subdivision thereof, whether such work is done by contract or otherwise, shall be, and is hereby limited, and restricted to eight hours in any one calendar day. The act made it unlawful to refuse or permit them (laborers, etc.), to labor more than eight hours in any one calendar day, except in cases of extraordinary emergency, caused by fire, flood or danger to life or property, and except to work upon public, military or naval works or defenses in time of war, and except in cases of employment of labor in agricultural pursuits. Held unconstitutional because it interfered with the freedom of contract. Cleveland v. Clements Bros. Const. Co., 67 Ohio St., 197; 65 N. E. Rep., 885.

Under the New York Statute which provides that "eight hours shall constitute a day's work for all classes of mechanical workingmen and laborers, excepting those engaged in farm and domestic labor, but overwork for extra compensation by agreement between employer and employe is hereby admitted," one who works ten hours or more per day, and receives his wages regularly and gives receipts therefor, without any expectation

or understanding, express or implied, that extra compensation was to be paid for the extra time, cannot recover extra pay. McCarthy v. New York, 96 N. Y., 1; 48 Am. Rep., 601. See also People ex rel. v. Coler, 166 N. Y., 1; 59 N. E. Rep., 716.

THE MASSACHUSETTS STATUTE which provided that no employer shall impose a fine upon an employee engaged at weaving, or withhold his wages, in whole or in part, "for imperfections that may arise during the process of weaving," was held to be in conflict with the constitution. Com. v. Perry, 155 Mass., 117; 28 N. E. Rep., 1127, Holmes, J. dissenting, p. 123.

Partial and Discriminating Laws. Act forbidding the employment of females in any factory or workshop for more than eight hours a day, held unconstitutional. Per Magruder, J., in Ritchie v. People, 155 Ill., 98; 40 N. E. Rep., 454; 46 Am. St. Rep., 315. Cases fully treated.

Union labor employees. State v. Julow, 129 Mo., 163; 31 S. W. Rep., 781.

Statutes relating to method and times of payment of employees. Law partial as to payment of weekly wages, held unconstitutional. Braceville Coal Co. v. People, 147 Ill., 66; 35 N. E. Rep., 62; 37 Am. St. Rep., 206. "Truck Store" law held unconstitutional. Frorer v. People, 141 Ill., 171; 31 N. E. Rep., 395. "Scrip laws." State v. Loomis,

fewer.⁰⁵ The same construction was given to the Kansas statute which embraced all persons employed by, or in behalf of, the state, a county, township or municipality.⁶⁶

The Supreme Court of the United States sustained the Utah statute which forbid the employment of workingmen for more than eight hours per day in mines and in smelting, reduction, or refining ores or metals, as within the police power of the state. In the opinion of the court, the law was not unconstitutional as an undue interference with the right of private contract, or as a denial of due process of law, or, the equal protection of the laws.⁶⁷

An ordinance making it a misdemeanor for any contractor to employ any person to work more than eight hours a day, or to - employ Chinese labor, where the work is to be performed under any contract with the city, was held void, in California, as an attempt to prevent persons from employing others in a lawful business, and as improperly interfering with the liberty of

115 Mo., 307; 22 S. W. Rep., 350, (principal and dissenting opinions); State v. Goodwill, 33 W. Va., 179; 10 S. E. Rep., 285; 25 Am. St. Rep., 863, 881.

65 "Principals, so far as the law can give the power, are entitled to employ as many workmen, and of whatever degree of skill, and at whatever price, they think fit, and except in some special cases as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested. The statute of the United States does not interfere with this principle." Per Mr. Justice Hunt, in United States v. Martin, 94 U. S., 400, 403.

Extra pay to government letter carrier for more than eight hours' work considered in United States v. Gates, 148 U. S., 134.

66 In re Dalton, 61 Kan., 257; 59 Pac. Rep., 336; State ex rel. v. Martindale, 47 Kan.,147; 27 Pac. Rep., 852, holding that the law did not apply to certain persons.

Particular statute providing for ten hours as a day's work, construed. Brooks v. Cotton, 48 N. H., 50; 2 Am. Rep., 172.

A statute providing that "eight hours of labor performed in any one day by any one person shall be deemed a lawful day's work, unless otherwise agreed by the parties," does not apply to a "week's work," fixed wages by virtue of contract. Luske v. Hotchkiss, 37 Conn., 219; 9 Am. Rep., 314.

67 Per Mr. Justice Brown in Holden v. Hardy, 169 U. S., 366; 18 Sup. Ct. Rep., 383, affirming 14 Utah, 71, 96; 46 Pac. Rep., 756, 1105, Mr. Justice Brewer and Mr. Justice Peckham dissented. Examine In re Morgan, 26 Colo., 415; 58 Pac. Rep., 1071; 77 Am. St. Rep., 269; Commonwealth v. Hamilton Mfg. Co., 120 Mass., 383; State v. Peel Splint Coal Co., 36 W. Va., 802; 15 S. E. Rep., 1000; Leep v. St. Louis, I. M. & S. R. Co., 58 Ark., 407; 25 S. W. Rep., 75.

contract. The court declined to sustain the ordinance as a sanitary or police regulation.⁶⁸

The City of New Orleans may designate the number of hours in which laborers and mechanics shall work upon public work in the city, but cannot make the violation of an ordinance regulating such hours a misdemeanor, for, in the opinion of the Supreme Court of Louisiana, this is an indictable offense, one which the general assembly of the state alone can create.⁶⁹

§ 496. **Miscellaneous**. General charter power will not authorize an ordinance prescribing, under penalty, that it shall be unlawful to insult any officer "while in the discharge of his duty." In Kansas an ordinance was held valid which required keepers of boarding houses, restaurants and hotels to furnish the names of persons liable to poll tax boarding or lodging at their houses."

68 Ex parte Kuback, 85 Cal., 274;
24 Pac. Rep., 737; 20 Am. St. Rep.,
226; 9 L. R. A., 482.

A law which forbid contractors for city work in the City of Buffalo to accept more than eight hours for a day's work, except in case of necessity, held constitutional by the Superior Court of Buffalo. People ex rel. v. Beck, 30 N. Y. Supp., 473, White, J. dissenting.

69 State v. McNally, 48 La. Ann., 1450; 21 So. Rep., 27.

Examine recent case of McChesney v. People ex rel. 200 Ill., 146; 65 N. E. Rep., 626; and note to case in 9 Mun. Corp. Cases, 227.

70 State v. Clay, 118 N. C., 1234;24 S. E. Rep., 492.

71 Topeka v. Boutwell, 53 Kan.,20; 35 Pac. Rep., 819.

CHAPTER XV.

OF MUNICIPAL CONTROL OF OFFENSES AGAINST STATE.

- § 497. State laws and municipal ordinances distinguished.
 - 498. Municipal and state offenses.
- 499. Source of municipal power to legislate on offenses against the state.
- 500. The same act may be made an offense against the state and the municipal corporation.
- Same California Connecticut.

- § 502. Same—Georgia.
 - 503. Same-Illinois.
 - 504. Same-Kentucky.
 - 505. Same-Missouri,
 - 506. Same-North Carolina.
 - 507. Same—Rhode Island—Indiana.
 - 508. Same—Texas.
 - 509. Offenses that may be made both state and municipal enumerated.
 - 510. Can there be two punishments?

State laws and municipal ordinances distinguished. While state laws are designed to furnish a rule of conduct, operating alike on all persons to whom they are intended to apply throughout the limits of the state, such laws are sometimes local or special in their character and apply only to designated portions of its territory.1 The limitation in this respect is controlled entirely by the organic law. Ordinances and bylaws, as we have seen, as concern the limits of the local corporation, may possess the same restrictive characteristics; and by express legislative grant they may be made to operate beyond the corporate boundaries. It is obvious, therefore, that the distinction between such local and state laws is not to be found alone in their territorial operation. The source of power to promulgate is one fundamental distinction, as fully explained in appropriate places throughout this work, particularly in the chapter on the Power to Enact Ordinances. other fundamental difference is that state laws are designed to meet demands, exigencies and conditions which concern all of the people of the state, while ordinances are enacted and en-

¹ It is not necessary that a pubsons within the territorial limits lic act should extend to all parts of described by the statute. Levy v. the state. It is public in charac-State, 6 Ind., 281. ter if it extends equally to all per-

forced for the benefit of the inhabitants of the local community. The purpose of the former is to control state affairs and of the latter to deal with municipal matters.

Municipal and state offenses. Not infrequently do we find matters of essential public concern confided to the municipal corporation, as the enforcement of state tax and election laws, local control of state officers, the preservation of the public peace, the administration of justice, etc. On the other hand, we often find state control of local officers, municipal taxation, license and local improvements, the collection and distribution of revenue in the local community for purely municipal purposes, the control of strictly municipal departments, local parks, waterworks, sewers, the construction of municipal buildings, etc. No general rule can be laid down respecting what matters are state and what are municipal that will apply in all jurisdictions. This is usually made to depend not alone upon the fundamental principles of decentralization in our system of government, and home rule for the local community, but, as well, upon the constitution and course of legislation and judicial decision in the particular state.² In no state is the line very accurately drawn where municipal power ends and state authority begins. This is especially true respecting offenses.3 Most municipal charters authorize the local corporation to levy taxes, prohibit, suppress and license saloons, tippling houses, billiard tables, ten pin alleys, etc., restrain and prohibit houses of prostitution and other disorderly houses and practices, disorderly conduct, breaches of the peace, gaming and gambling houses, desecrations of the Sabbath day, various kinds of public indecencies and many other things treated in part or in

² The constitution does not "define what are state purposes and what are local purposes, but leaves us to find the boundary line between them in right reason, the legislation of the state, and the adjudications of the courts, as developed in the history of the state at the time of its adoption." Per Black, J., in State ex rel. v. Owsley, 122 Mo., 68, 76; 26 S. W. Rep., 659. "It may not always be easy to determine what subjects are local and municipal and what are not.

That difficulty is not a new one." Per Barclay, J., in St. Louis v. Dorr, 145 Mo., 466, 479, 480; 41 S. W. Rep., 1094; 46 S. W. Rep., 976.

3 The municipality "has ample space to legislate without trenching upon the jurisdiction of the state. In all doubtful cases it would be better for the corporate authorities to arrest and commit the offender for trial before the proper state tribunal." Per Lumpkin, C. J., in Jenkins v. Thomasville, 35 Ga., 145, 147.

whole by general state statutes.4 Sometimes the jurisdiction of the state and local corporation is concurrent; sometimes the latter has exclusive control, properly granted by the state, of specified offenses; and sometimes local jurisdiction is denied where the particular offense is fully covered by state statute. or where it is in its essence regarded as a public crime as distinguished from an offense peculiarly municipal. Thus public drunkenness although made a public offense by statute affects especially the morals of the local community; and hence, ordinances denouncing it have been sustained under a general grant of power,5 by courts that have declined to uphold ordinances originating by the same authority relating in like manner to subjects covered by state laws, e.g., sale of intoxicating liquor.6 The decisions on this subject are numerous and conflicting. Perhaps on no single topic of municipal corporation law have there been so many discordant utterances even by the same courts and the same individual judges. But the best considered cases, especially the more recent ones, have properly extended the sphere of activity of the municipal corporation in dealing with police offenses. The necessity of thus enlarging municipal jurisdiction is obvious to the careful student of the conditions and needs of the crowded modern urban centers of population. The earlier conceptions of our courts on this subject are less definite and satisfactory.

§ 499. Source of municipal power to legislate on offenses against the state. Under the usual grant of municipal powers, which, in general terms, includes the authority to enact all necessary ordinances to preserve the peace and advance the

4 Rice v. State, 3 Kan., 141, 164; Gardner v. People, 20 Ill., 430, 433.

5 Bloomfield v. Trimble, 54 Iowa, 399; 6 N. W. Rep., 586. "Municipal government stands between the ramily and the state. It is an aid to both, and partakes of the nature of both. Police ordinances are at once family rules on a large scale, and state laws on a small scale.

* * Many transactions that are made penal by the general laws of the state may, at the same time, afford material for a proper police ordinance. The state may

deal only with the central elements of a transaction which is fringed all round with adjuncts that ought to be prohibited by ordinance as highly mischievous to the quiet of municipal society." Per Bleckley, J., in McRea v. Americus, 59 Ga., 168, 170. Keeping house of ill-fame characterized as an offense peculiarly municipal. Greenwood v. State, 6 Baxter (65 Tenn.), 567.

⁶ Foster v. Brown, 55 Iowa, 686;⁸ N. W. Rep., 654.

local government of the community, the local corporation cannot provide by ordinance for the punishment of an act constituting a misdemeanor or crime by state statute. The cases in the note fully illustrate the rule.⁷ It may only exercise such powers as legitimately belong to the local and internal affairs of the municipality. In the performance of such functions

7 OFFENSES COVERED BY STATE STATUTES; ordinances relating to, void. Kassell v. Savannah, 109 Ga., 491; 110 Ga., 289; 35 S. E. Rep., 147; Moran v. Atlanta, 102 Ga., 840; 30 S. E. Rep., 298; Keck v. Gainsville, 98 Ga., 423, 425; 25 S. E. Rep., 559; Strauss v. Waycross, 97 Ga., 475; 25 S. E. Rep., 329; Kahn v. Macon, 95 Ga., 419; 22 S. E. Rep., 641; Reich v. State, 53 Ga., 73, 75; Vason v. Augusta, 38 Ga., 542; Adams v. Albany, 29 Ga., 56.

Gambling. New Orleans v. Miller, 7 La. Ann., 651. Prohibiting and exhibiting gaming table. Exparte Fagg, 38 Tex. Crim. App., 573; 44 S. W. Rep., 294; 40 L. R. A., 212.

Sale of intoxicating liquor. Commonwealth v. Turner, 1 Cush. (Mass.), 493.

Selling lottery tickets. Ex parte Solomon, 91 Cal., 440; 27 Pac. Rep., 757

Visiting house of ill-fame. In re Ah You, 88 Cal., 99; 25 Pac. Rep., 974.

Opium smoking, etc. *In re* Sic, 73 Cal., 142, 148; 14 Pac. Rep., 405.

Power to pass ordinances to secure the peace does not authorize an ordinance forbidding the keeping open of stores and shops on Sunday. Corvallis v. Carlile, 10 Oreg., 139. Ordinances relating to selling goods on Sunday held void when subject was covered by state; there was no express power to pass the ordinance. Flood v. State, 19 Tex. Crim. App., 584, overruling

Craddock v. State, 18 Tex. Crim. App., 567. Charter power to "close up dram-shops, etc., whenever necessary or expedient," and to "make all needful and proper regulations concerning grog shops," etc., not sufficient to regulate by ordinance Sunday closing, when subject covered by state statute. Angerhoffer v. State, 15 Tex. Crim. App., 613.

Regulating the number of hours in which mechanics and laborers shall be employed each day on public work of the city. Ordinance held void as offense was made indictable by statute. State v. McNally, 48 La. Ann., 1450; 21 So. Rep., 27.

ASSAULT AND BATTERY. Under general power to "regulate the police," etc., an ordinance creating the offense of assault and battery a state offense-and providing for its punishment is unauthorized. The court observed that where "personal rights and liberty are involved," the charter powers are to be strictly construed; that if under simply a general welfare clause, a city can pass ordinances against assaults and batteries, it is difficult to conceive to what extent a city government might not go under such a clause. People ex rel. v. Brown, 2 Utah, 462. Compare Mayor v. Allaire, 14 Ala., 400. Assault on public officer. State v. Keith, 94 N. C., 933. Power "to prevent and restrain disturbances." does not authorize an ordinance permitting punishment crime of assault with a dangerous

much latitude is often permitted. But it is entirely competent for the legislature to confer in express terms such powers as will enable the local corporation to declare by ordinance any given act an offense against its authority, notwithstanding such act has been made by statute a public offense and a crime against the state. And where the regulation of a specific matter has been thus expressly and exclusively given to the local corporation, whether it be intrinsically state or local, the corporation may exercise the power so conferred, unfettered, until such time as it is legitimately withdrawn by the state. The circumstances under which charter or ordinance provisions will supersede state laws on any given subject are fully explained in a former chapter.8 The enforcement of the fundamental rule that the ordinance must be in harmony, or at least not inconsistent, with the state law, has been the source of much confusion on this subject. The true doctrine appears to be that.

weapon. Walsh v. Union, 13 Oreg., 589; 11 Pac. Rep., 312. Ordinance as to breach of peace which is an offense against the state is void under general power. Raleigh v. Dougherty, 3 Hump. (Tenn.), 11.

AN AFFRAY being a petty offense the ordinance forbidding it is valid. Ex parte Freeland, 38 Tex. Crim. App., 321; 42 S. W. Rep., 295, distinguishing Leach v. State, 36 Tex. Crim. App., 248; 36 S. W. Rep., 471.

INJURING PUBLIC PROPERTY. Washington v. Hammond, 76 N. C., 33.

HARBORING AND ENTICING SEA-MEN. Lumpkin, J., who gave the opinion observed that under the general grant of power delegated, "the city authorities may cover all cases not provided for by the paramount authorities of the state. * * Nay, I might go further, and concede, that where the state law defines an offense generally, and prescribes a punishment without reference to the place where it is committed, in town or county, and the act when committed in the public streets and places of the city, would be attended with circumstances of aggravation, such as an affray, for instances, the corporate authorities with a view to suppress the special mischief, might probably provide against it by ordinance; because that ingredient or concomitant of the crime might not be supposed to be included in the state law. And this is going quite far enough." Savannah v. Hussey, 21 Ga., 80, 86. See dissenting opinion pp. 90-97.

STATE AFFAIRS. "I am aware of the necessity of giving extensive powers to these city corporations. There are many regulations of a local nature, in a large populous town, which are not of sufficient importance to the state, to attract the attention of the legislature, but which are, nevertheless, very important to the inhabitants of the town. All these fall within the peculiar province of the city council, but they must not set about regulating the affairs of the state. is an usurpation of the powers of the legislature, in which they are not to be indulged." Per Nott, J. in Schroder v. Charleston 3 Brev. (S. C.), 533, 541,

8 Sections 214 and 215 supra.

whether the city may exercise control of state offenses must be determined by the legislative intent. And such intent must also decide the manner in which the power is to be exercised, and whether such control is to be exclusive or whether it is to be exercised concurrently with that of the state.

§ 500. The same act may be made an offense against the state and the municipal corporation. The general doctrine is supported by the weight of judicial authority that, an act may be made a penal offense under the statutes of the state, and that farther penalties may be imposed for its commission or omission by municipal ordinance. But to authorize such ordinance the local corporation must possess sufficient charter power and such power must be exercised in the manner conferred and consistent with the constitution and laws of the The cases present some discord respecting the nature of the grant of power necessary to sustain such additional regulations. The question of power seems to be the chief source of conflict. Double regulations have been sustained in Alabama,9 Arkansas,10 Colorado,11 Dakota,12 Florida,13 Idaho, 14 Illinois, 15 Indiana, (by statute at present the contrary rule prevails), 16 Iowa, 17 Kansas, 18 Kentucky, 19, Louisiana, 20

9 Alabama—Mobile v. Rouse, 8 Ala., 515; Mobile v. Allaire, 14 Ala., 400.

10 Arkansas — Van Buren v.
 Wells, 53 Ark., 368; 14 S. W. Rep.,
 38; 22 Am. St. Rep., 214.

11 Colorado—McInerney v. Denver, 17 Colo., 302; 29 Pac. Rep., 516; Hughes v. People, 8 Colo., 536; 9 Pac. Rep., 50.

12 Dakota—Elk Point v. Vaughn,
 1 Dak., 113; 46 N. W. Rep., 577.

13 Florida—Theisen v. McDavid,
 34 Fla., 440; 26 L. R. A., 234; 16
 So. Rep., 321; Hunt v. Jacksonville, 34 Fla., 504; 43 Am. St. Rep.,
 214: 16 So. Rep., 398.

14 *Idaho*—State v. Preston (Idaho) 38 Pac. Rep., 694, where authorities are reviewed.

15 Illinois—Hankins v. People, 106 Ill., 628; McPherson v. Chebanse 114 Ill., 46; 28 N. E. Rep., 454; Wragg v. Penn Tp., 94 Ill., 11; 34 Am. Rep., 199; Westgate v. Carr, 43 Ill., 450; Baldwin v. Murphy, 82 Ill., 485; Seibold v. People, 86 Ill., 33; Skidmore v. Bricker, 77 Ill., 164; Severin v. People, 37 Ill., 414; Freeland v. People, 16 Ill., 380; Chicago v. Brownell, 41 Ill. App., 70; Spring Valley v. Spring Valley Coal Co., 71 Ill. App., 432.

16 Indiana—Williams v. Warsaw, 60 Ind., 457; Waldo v. Wallace, 12 Ind., 569, disapproving Madison v. Hatcher, 8 Blackf. (Ind.), 341 and Indianapolis v. Blythe, 2 Ind., 75.

17 Iowa—Bloomfield v. Trimble, 54 Iowa, 399; 6 N. W. Rep., 586; 37

18 Kansas—In re Jahn, 55 Kan.,
 694; 41 Pac. Rep., 956; In re
 Thomas, 53 Kan., 659; 37 Pac. Rep.,
 171; Kansas City v. Grubel, 57
 Kan., 436; 46 Pac. Rep., 714.

Am. Rep., 212.

¹⁹ Kentucky—Taylor v. Owensboro, 98 Ky., 271; 56 Am. St. Rep., 361; 32 S. W. Rep., 948; March v. Commonwealth, 12 B. Mon. (Ky,), 25

20 Louisiana-Monroe v. Hardy,

Massachusetts,²¹ Maryland,²² Michigan,²³ Minnesota,²⁴ Mississippi,²⁵ Missouri,²⁶ Nebraska,²⁷ New Jersey,²⁸ New York,²⁹ Ohio,³⁰ Oregon,³¹ South Carolina,³² South Dakota,³³ Ten-

46 La. Ann., 1232; 15 So. Rep., 696; State v. Fourcade, 45 La. Ann., 717; 40 Am. St. Rep., 249; 13 So. Rep., 187; State v. Clifford, 45 La. Ann., 980; 13 So. Rep., 281; State v. Chase, 33 La. Ann., 287; Board of Police v. Giron, 46 La. Ann., 1364; 16 So. Rep., 190; New Orleans v. Collins, 52 La. Ann., 973; 27 So. Rep., 532.

²¹ Massachusetts — Commonwealth v. Goodnow, 117 Mass., 114.
 ²² Maryland—Shafer v. Mumma, 17 Md., 331; 79 Am. Dec., 656.

²³ Michigan—Wayne Co. v. Detroit, 17 Mich., 390; Fennell v. Bay City 36 Mich., 186; People v. Detroit White Lead Works, 82 Mich., 471; 46 N. W. Rep., 735; People v. Hanrahan, 75 Mich., 611; 42 N. W. Rep., 1124.

24 Minnesota—State v. Lee, 29 Minn., 445; 13 N. W. Rep., 913; State v. Oleson, 26 Minn., 507; 5 N. W. Rep., 959; State v. Ludwig, 21 Minn., 202; State v. Charles, 16 Minn., 474; State v. Bruckhauser, 26 Minn., 301; 3 N. W. Rep., 695. Ordinances relating to gaming does not abrogate or suspend the common law on the subject in the city. State v. Crummey, 17 Minn., 72.

²⁵ Mississippi—Johnson v. State, 59 Miss., 543; Ex parte Bourgeois, 60 Miss., 663; 45 Am. Rep., 420.

26 Missouri—Glasgow v. Bazan,
96 Mo. App., 412; 70 S. W. Rep.,
257; St. Louis v. Vert, 84 Mo., 204;
State v. Cowan, 29 Mo., 330; St.
Louis v. Bentz, 11 Mo., 61; State v.
Walbridge, 119 Mo., 383; 24 S. W.
Rep., 457; 41 Am. St. Rep., 663;
De Soto v. Brown, 44 Mo. App.,
148; Plattsburg v. Trimble, 46 Mo.
App., 459; Kansas City v. Hallett,

59 Mo. App., 160; St. Joseph v. Vesper, 59 Mo. App., 459; St. Louis v. Schoenbusch, 95 Mo., 618; 8 S. W. Rep., 791; Ex parte Hollwedell, 74 Mo., 395; Independence v. Moore, 32 Mo., 392; St. Louis v. Cafferata. 24 Mo., 94; Linneus v. Dusky, 19 Mo. App., 20; Kansas City v. Neal, 49 Mo. App., 72; Piper v. Boonville, 32 Mo. App., 138; St. Louis v. Lee. 8 Mo. App., 598; St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045; Marshall v. Standard, 24 Mo. App., 192; Ex parte Kiburg, 10 Mo. App., 442; Kansas City v. Zahner, 73 Mo. App., 396; Ex parte Caldwell, 138 Mo., 233; 39 S. W. Rep., 761; St. Charles v. Hackman, 133 Mo., 634; 34 S. W. Rep., 878.

Nebraska—Brownville v. Cook,Neb., 101.

²⁸ New Jersey—State (Riley) v. Trenton, 51 N. J. L., 498; 5 L. R. A., 352; 18 Atl. Rep., 116; State (Paul) v. Gloucester, 50 N. J. L., 585; 15 Atl. Rep., 272; State v. Plunckett, 18 N. J. L., 5.

²⁹ New York—Brooklyn v. Toynbee, 31 Barb. (N. Y.), 282; Rogers v. Jones, 1 Wend. (N. Y.), 237; New York v. Hyatt, 3 E. D. Smith (N. Y.), 156.

30 Ohio—Wightman v. State, 10 Ohio, 452; State v. Ulm, 7 Ohio, N. P. 659.

31 Oregon—Wong v. Astoria, 13 Oregon, 538; 11 Pac. Rep., 295; State v. Sly, 4 Oreg., 277; State v. Bergman, 6 Oregon, 341.

v. Williams, 11 S. C., 288; State ex rel. Heise v. Columbia, 6 Rich. Law (S. C.), 404, 406, per O'Neall, J., dissenting from Schroder v. Charleston, 3 Brev. (S. C.), 533, on this point; Greenville v. Kem-

nessee,³⁴ Utah,³⁵ Washington,³⁶ Wisconsin,³⁷ and by the United States courts.³⁸

§ 501. Same—California—Connecticut. It appears that in California no power exists in the municipal corporation to pass an ordinance punishing precisely the same offense as made punishable by the penal laws of the state.³⁹ So in Connecticut it appears the rule obtains that matters regulated by general statutes cannot be covered by municipal ordinance.⁴⁰

§ 502. Same—Georgia. In Georgia where the subject is covered by state statute the municipal corporation cannot deal with it by ordinance, unless expressly authorized,⁴¹ but where the statute does not cover the subject a municipal ordinance is valid.⁴² The fact that the offense is against the common law, as street and night walking by females, does not deprive the city of jurisdiction.⁴³ So where the statute prohibits the keeping of tippling houses or retailing liquor without a license an ordinance may prohibit sales of liquor, since in the opinion

mis, 58 S. C., 427; 36 S. E. Rep., 727; 50 L. R. A., 725; McCormick v. Calhoun, 30 S. C., 93; 8 S. E. Rep., 539.

33 South Dakota — Yankton v. Douglass, 8 S. Dak., 440; 66 N. W. Rep., 923.

34 Tennessee— State ex rel. Karr v. Shelby Co. Taxing Dist., 16 Lea. (84 Tenn.), 240; State v. Mason, 3 Lea. (71 Tenn.), 649; Greenwood v. State, 6 Baxter (Tenn.), 567; 32 Am. Rep., 539.

³⁵ Utah—Ex parte Douglass, 1 Utah, 108.

³⁶ Washington—Seattle v. Chin Let, 19 Wash., 38; 52 Pac. Rep., 324.

87 Wisconsin—State v. Newman,
 96 Wis., 258; 71 N. W. Rep., 438;
 Platteville v. McKernan, 54 Wis.,
 487; 11 N. W. Rep., 798.

38 United States—Moore v. People, 14 How. (U. S.), 13; United States v. Holly, 3 Cranch C. C., 656; McLaughlin v. Stephens, 2 Cranch C. C., 148; United States v. Wells, 2 Cranch. C. C., 45.

89 Ex parte Solomon, 91 Cal.,

440; 27 Pac. Rep., 757; In re Ah You, 88 Cal., 99; 25 Pac. Rep., 974; In re Sic, 73 Cal., 142, 148; 14 Pac. Rep., 405.

40 Examine State v. Welch, 36 Conn., 215; State v. Flint, 63 Conn., 248; 28 Atl. Rep., 28. Ordinances enacted under charter power held abrogated by subsequent legislative act covering the same subject. Taking oysters within the borough. South Port v. Ogden, 23 Conn., 128.

An ordinance of Waterbury forbidding the sale of impure milk within the corporate limits, held ultra vires, because the subject-matter was regulated by general statute. In such case the municipal charter contained an express prohibition. State v. Tyrrell, 73 Conn., 407; 47 Atl. Rep., 686.

⁴¹ See Georgia cases in Sec. 499, supra.

42 Rothschild v. Darien, 69 Ga., 503.

⁴⁸ Braddy v. Milledgeville, 74 Ga., 516, 519.

of the court, the two offenses are not identical.⁴⁴ So municipal corporations in that state may regulate the selling of intoxicating liquor if this subject is not covered by state law.⁴⁵ While the city cannot punish as an offense against it anything which by statute is an offense against the state, where the statute makes the unlawful sale of liquor an offense but does not make the keeping of liquors for unlawful sale an offense, an ordinance legally may provide for the punishment of the latter offense. The ordinance "hovers on the margin of the statute, but nowhere overlaps the text: If there is keeping for unlawful sale, the ordinance is violated, whether any sale is made or not. In case a sale ensues, the statute is also violated; but this does not cancel the violation of the ordinance. An offense committed against one jurisdiction cannot be wiped out by committing another against another jurisdiction." ¹⁴⁶

§ 503. Same—Illinois. General power to enact ordinances does not authorize ordinances covering state offenses. Conferring upon the local corporation power to act concerning the sale of liquor, for example, does not repeal the general law of the state on the same subject.⁴⁷ Unless the city has exclusive power on the subject, as for example, the power to regulate gaming and gambling houses, the general state law prevails. A mere general grant of power on the subject does not repeal the state law relating thereto. The jurisdiction may be concurrent and mere failure of the city to act under the power granted does not prevent the state from exercising jurisdiction.⁴⁸ In Illinois where the power is expressly conferred the municipal ordinance may cover a state offense, and double punishment may be inflicted for the unlawful act.

§ 504. Same—Kentucky. Under the Kentucky constitution, "No municipal ordinance shall fix a penalty for violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to another prosecution for the same offense."

44 Hill v. Dalton, 72 Ga., 314.

45 Paulk v. Sycamore, 104 Ga., 728; 31 S. E. Rep., 200; Brown v. Social Circle, 105 Ga., 834; 32 S. E. Rep., 141; Cunningham v. Griffin, 107 Ga., 690; 33 S. E. Rep., 664. Compare Hood v. Von Glahn, 88 Ga., 405; 14 S. E. Rep., 564.

46 Menken v. Atlanta, 78 Ga., 668, 672; 2 S. E. Rep., 559; Mayson v. Atlanta, 77 Ga., 662, 666.

47 Gardner v. People, 20 Ill., 430. 48 Berry v. People, 36 Ill., 423; Fant v. People, 45 Ill., 259.

⁴⁹ Taylor v. Owensboro, 98 Ky., 271; 56 Am. St. Rep., 361; 32 S. W. Rep., 948.

§ 505. Same—Missouri. The Missouri statute provides that "Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the State law upon the same subject." ⁵⁰

§ 506. Same—North Carolina. Ordinances making acts punishable that are already made penal and punishable under the general law of the state are not favored in North Carolina.⁵¹ The power to pass ordinances is held to be in subordination to the public laws regulating the same matter for the entire state.⁵² "It may be that the legislature has power to authorize a town to make an offense against the state a separate offense against the town, but this could be done only by an express grant of power."⁵³

§ 507. Same—Rhode Island—Indiana. In Rhode Island by statute "no ordinance or regulation whatsoever, made by a town council, shall impose, or at any time be construed to continue to impose, any penalty for the commission or omission of any act punishable as a crime, misdemeanor, or offense, by the statute law of the state."

In like manner the Indiana statute provides that, "whenever any act is made a public offense against the state by any statute and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any incorporated city or town; and any ordinance to such effect shall be null and void, and all prosecutions for any such public offense as may be within the jurisdiction of the authorities of such incorporated cities or towns, by and before such authorities, shall be had under the state law only."55

§ 508. Same—Texas. It has been held in Texas that it is

50 Statute construed to hold that an ordinance concerning breach of the peace did not conflict with the state statute on the same subject. Glasgow v. Bazan, 96 Mo. App., 412, 415; 70 S. W. Rep., 257.

⁵¹ Assault on public officer. State v. Keith, 94 N. C., 933.

Injuring public property. Washington v. Hammond, 76 N. C., 33.

52 Selling liquor on Sunday. State v. Langston, 88 N. C., 692.

53 State v. Brittain, 89 N. C., 574.
 54 Baxter, Petitioner, 12 R. I., 13;
 State v. McCulla, 16 R. I., 196; 14
 Atl. Rep., 81; State v. Pollard, 6
 R. I., 290.

⁵⁵ Whiting v. Doob, 152 Ind., 157; 52 N. E. Rep., 759; Indianapolis v. Higgins, 141 Ind., 1; 40 N.

not competent for the municipal council to create by ordinance and make it an offense against the city, that which is by general law already an offense against the state punishable by fine and imprisonment, as the offense of keeping and exhibiting a gaming table.⁵⁶ But it has also been held in that state that state laws and municipal ordinances may concurrently operate upon the same subject, if not inconsistent, as the offense of assault.⁵⁷ So it has been held that an affray being a petty offense may be made a municipal offense by ordinance although it is by statute an offense against the state.⁵⁸ In that state the legislature cannot confer upon municipal court jurisdiction concurrent with the state courts over violation of state laws within the state.59

Offenses that may be made both state and municipal Under ample charter power, ordinances carrying enumerated. appropriate penalties forbidding acts also made penal by state statutes relating to the following subjects, have been sustained: bawdy houses and houses of ill fame;60 lewd women E. Rep., 671: Zeller v. Crawfordsville, 90 Ind., 262; Clevenger v. Rushville, 90 Ind., 258.

Act held constitutional. Jett v. Richmond, 78 Ind., 316.

Statute applied in case of interference with policeman. Indianapolis v. Huegele, 115 Ind., 581; 18 N. E. Rep., 172.

Statute does not apply to an ordinance making it an offense to sell intoxicating liquors within the city limits without first obtaining a city license. The case proceeds upon the theory that such act was not an offense against the state law. Frankfort v. Aughe, 114 Ind., 77; 15 N. E. Rep., 802.

56 "Under the authorities, we are inclined to the view that, in the face of the constitutional provision * * * where an offense has been made such by state law, notwithstanding it is a petty offense, it must be prosecuted by authority of the state, and against its peace and dignity." But it was unnecessary to decide the question in that case. since the offense, under the law of Texas, was exclusively within the jurisdiction of the state court. Ex parte Fagg, 38 Tex. Crim. App., 573, 589; 44 S. W. Rep., 294; 40 L. R. A., 212.

57 Hamilton v. State, 3 Tex. Crim. App., 643; Ex parte Wilson, 14 Tex. Crim. App., 592.

58 Ex parte Freeland, 38 Tex. Crim. App., 321; 42 S. W. Rep., 295, distinguishing Leach v. State, 36 Tex. Crim. App., 248; 36 S. W. Rep., 471.

THE TEXAS PENAL CODE DEFINES A PETTY OFFENSE as one which a justice of the peace or the mayor or other officer of a city or town may try and punish. Penal Code, Tex., 1895, art. 57.

Ordinance relating to selling goods on Sunday passed without express power held void where it conflicted with the state statute on the same subject. Flood v. State. 19 Tex. Crim. App., 584, overruling Craddock v. State, 18 Tex. Crim. App., 567.

59 Leach v. State, 36 Tex. Crim. App., 248; 36 S. W. Rep., 471.

60 Louisiana — Amite City Holly, 50 La. Ann., 627; 23 So. Rep., 746,

on streets;61 public drunkenness;62 liquor selling;63 liquor selling on Sunday;64 keeping open saloons on Sunday;65 Sunday regulation;66 gaming and gambling;67 keeping gambling house;68 billiard tables;69 sale of lottery tickets;70 nuisances;71 disturbing peace;⁷² assault;⁷³ assault and battery;⁷⁴ carrying concealed weapons;75 cruelty to animals;76 animals running at

Michigan-People v. Hanrahan, 75 Mich., 611; 42 N. W. Rep., 1124; 4 L. R. A., 751.

Minnesota—State v. Lee. Minn., 445; 13 N. W. Rep., 913.

Missouri-State v. Wister, 62 Mo. 592; State v. DeBar, 58 Mo., 395; State v. Clarke, 54 Mo., 17; State v. Thornton, 37 Mo., 360.

Oregon-Wong v. Astoria, Oreg., 538; 11 Pac. Rep., 295.

Wisconsin-Ogden v. Madison, 111 Wis., 413; 55 L. R. A., 506; 87 N. W. Rep., 568.

61 Shafer v. Mumma, 17 Md., 331; 79 Am. Dec., 656.

62 Bloomfield v. Trimble, 54 Iowa, 399; 6 N. W. Rep., 586.

63 Connecticut-State v. Welch, 36 Conn., 215.

Mo., 530.

New Jersey-Howe v. Plainfield, 37 N. J. L., 145.

New York-Blatchley v. Moser, 15 Wend. (N. Y.), 215, per Savage, C. J.; People v. Stevens, 13 Wend. (N. Y.), 341.

Ohio-Wightman v. State, 10 Ohio, 452.

South Carolina-State ex rel. Heise v. Columbia, 6 Rich. (S. C.), 404.

64 Elk Point v. Vaughn, 1 Dak., 113; 46 N. W. Rep., 577; State (Riley) v. Trenton, 51 N. J. L., 498; 5 L. R. A., 352; 18 Atl. Rep., 116; State (Paul) v. Gloucester County, 50 N. J. L., 585; 15 Atl. Rep., 272.

65 Van Buren v. Wells, 53 Ark., 368; 14 S. W. Rep., 38; 22 Am. St. Rep., 214; Seibold v. People, 86 Ill., 33.

66 State v. Ludwig, 21 Minn., 202; St. Louis v. Cafferata, 24 Mo., 94. Sales on Sunday. McPherson v. Chebanse, 114 Ill., 46; 28 N. E. Rep., 454.

67 State v. Crummey, 17 Minn., 72.

Gaming. Greenville v. Kemmis. 58 S. C., 427; 36 S. E. Rep., 727; 50-L. R. A., 725.

"craps." Playing Monroe Hardy, 46 La. Ann., 1232; 15 So. Rep., 696.

68 Greenwood v. State, 6 Baxt. (65 Tenn.), 567; 32 Am. Rep., 539; Robbins v. People, 95 Ill., 175; Ex parte Douglass, 1 Utah, 108.

Keeping gaming table. McLaugh-Missouri-State v. Harper, 58 lin v. Stephens, 2 Cranch C. C., 148; United States v. Holly, 3 Cranch C. C., 656.

> 69 Plattsburg v. Trimble, 46 Mo. App., 459, 461.

70 Ex parte Kiburg, 10 Mo. App., 442.

71 People v. Detroit White Lead Works, 82 Mich., 41; 46 N. W. Rep., 735; 9 L. R. A., 722.

72 St. Charles v. Meyer, 58 Mo., 86; Glasgow v. Bazan, 96 Mo. App., 412; 70 S. W. Rep., 257.

73 Hamilton v. State. Crim, App., 643.

74 State v. Ledford, 3 Mo., 102.

75 Van Buren v. Wells, 53 Ark., 368; 14 S. W. Rep., 38; 22 Am. St. Rep., 214; Opelousas v. Giron, 46 La. Ann. (Pt. 2), 1364; 16 So. Rep., 190.

76 St. Louis v. Schoenbusch, 95 Mo., 618; 8 S. W. Rep., 791.

large;⁷⁷ obstructing highways;⁷⁸ regulating bay windows;⁷⁹ fast and careless driving;⁸⁰ vagrancy;⁸¹ attempting to rescue prisoner from custody of officer;⁸² aiding, counseling and advising prisoner to make escape;⁸³ regulating porters at stations;⁸⁴ selling impure and unwholesome milk;⁸⁵ unlawful trespass on property.⁸⁶

§ 510. Can there be two punishments? A few cases have declared the rule that, when an ordinance and state law prescribe a penalty for the same act, a conviction or acquittal under one is a complete bar to a prosecution under the other. 87 But the decided weight of judicial authority sustains the contrary doctrine. The same act may constitute several crimes or misdemeanors and the trial and punishment of one will be no bar to a prosecution of another, growing out of the same act. 88 Thus it is no bar to a prosecution for riot that one of the accused had been convicted of assault and battery, arising out of the same transaction or offense. 89 So an assault

77 Westgate v. Carr, 43 Ill., 450.
78 Wragg v. Penn Tp., 94 Ill., 11;
34 Am. Rep., 199.

79 Commonwealth v. Goodnow, 117 Mass., 114.

80 State v. Cowan, 29 Mo., 330.

81 St. Louis v. Bentz, 11 Mo., 61; Kansas City v. Neal, 49 Mo. App., 72, 78.

82 Independence v. Moore, 32 Mo., 392.

83 De Soto v. Brown, 44 Mo. App., 148, 152.

84 Chillicothe v. Brown, 38 Mo. App., 609.

85 Polinsky v. People, 11 Hun. (N. Y.), 390.

86 Brownsville v. Cook, 4 Neb., 101

All crimes less than felony at common law may be given to corporation courts. Ex parte Slattery, 3 Ark., 484.

87 Rule suggested in State v. Welch, 36 Conn., 215, 217.

Bar by state constitution. Taylor v. Owensboro, 98 Ky., 271; 56 Am. St. Rep., 361; 32 S.W.Rep., 948. State v. Cowan, 29 Mo., 330; State v. Thornton, 37 Mo., 360.

These cases overruled by later Missouri cases. See Sec. 500.

Conviction under the ordinance bars prosecution under the statute for the same act. Ex parte Freeland, 38 Tex. Crim. App., 321; 42 S. W. Rep., 295. *Contra.* Hamilton v. State, 3 Tex. Crim. App., 643.

QUESTION UNDETERMINED whether one convicted before a justice of the peace for an assault and battery could be tried and punished by the mayor under an ordinance. Burns v. La Grange, 17 Tex., 415.

"It is not necessary in this case to decide whether both can punish for the same act; but we have no doubt but that the one which shall first obtain jurisdiction of the person accused may punish to the extent of its power." Rice v. State, 3 Kan., 141, 164.

State v. Plunkett, 18 N. J. L., 5, question raised but not determined whether there could be two punishments.

88 Freeland v. People, 16 Ill., 380; Gardner v. People, 20 Ill., 430, 434.

89 Freeland v. People, 16 Ill., 380.

committed in the presence of the court may be punished in two ways—first, for contempt of court, and second, as a criminal prosecution for the assault.⁹⁰

The doctrine generally supported may be thus stated: That the single act being made punishable both by the state law and by the municipal ordinance of the place where in it was committed constitutes two distinct and several offenses: an offense against the state and an offense against the municipality. The purpose of the ordinance is to provide a mere police regulation for the enforcement of good order and quiet within the limits of the corporation: the state law has a more enlarged object in view, namely, the maintenance of the peace and dignity of The offenses, although growing out of the same the state. act, are distinguishable and wholly disconnected, prosecution at the suit of each proceeds upon a different hypothesis. This rule finds support in Alabama, 91 Arkansas, 92 Colorado, 93 Georgia, 94 Illinois, 95 Indiana, 96 Louisiana, 97 Maryland,98 Missouri,99 Minnesota,1 New York,2 Oregon,3 Tennessee,4 and in other jurisdictions.5

90 (Arguendo) Wragg v. Penn Township, 94 Ill., 11.

91 Per Collier, C. J. in Mayor, etc., v. Allaire, 14-Ala., 400, 403.

92 Van Buren v. Wells, 53 Ark.,368; 14 S. W. Rep., 38; 22 Am. St.Rep., 214.

93 Hughes v. People, 8 Colo., 536.

94 An acquittal in a state court for assault and battery was held in Georgia to be no defense to an action under an ordinance in the city court for disorderly conduct in fighting, notwithstanding the facts were the same in both trials. McRea v. Americus, 59 Ga., 168; 27 Am. Rep., 390.

95 Hankins v. People, 106 III.,628, 638; Robbins v. People, 95 III.,175.

Contra. Berry v. People, 36 Ill., 423; Bennett v. People, 30 Ill., 389, 394. But these cases are overruled.

96 Offenses are different—One is an action of debt; the other a fine for violation of a criminal law. Indianapolis v. Fairchild, 1 Ind., 315; Levy v. State, 6 Ind., 281; Ambrose v. State, 6 Ind., 351; Waldo v. Wallace, 12 Ind., 569. But at present by statute an ordinance cannot cover the same act covered by state law, § 507.

97 Monroe v. Hardy, 46 La. Ann.,1232; 15 So. Rep., 696.

98 Shafer v. Mumma, 17 Md., 331;79 Am. Dec., 656.

99 State v. Muir, 164 Mo., 610; 65 S. W. Rep., 285, affirming S. C., 86 Mo. App., 642, disapproving State v. Simonds, 3 Mo., 414 and following Kansas City v. Clark, 68 Mo., 588; St. Louis v. Knox, 74 Mo., 79; Ex parte Hollwedell, 74 Mo., 395; Ex parte Boenninghausen, 91 Mo., 301; 1 S. W. Rep., 761; St. Louis v. Weitzel, 130 Mo., 600; 31 S. W. Rep., 1045.

¹ State v. Lee, 29 Minn., 445; 13 N. W. Rep., 913; Mankato v. Arnold, 36 Minn., 62; 30 N. W. Rep., 305; State v. Robitshek, 60 Minn., 123; 61 N. W. Rep., 1023.

² Blatchley v. Moser, 15 Wend.,

(N. Y.), 215, per Savage, C. J.; People v. Stephens, 13 Wend. (N. Y.), 341.

³ State v. Sly, 4 Oreg., 277; Wong v. Astoria, 13 Oreg., 538; 11 Pac. Rep., 295.

⁴ State ex rel v. Shelby County Taxing District 16 Lea (84 Tenn.), 240; State v. Mason, 3 Lea (71 Tenn.), 649; Greenwood v. State, 6 Baxter (65 Tenn.), 567; 32 Am. Rep., 539.

⁵ Texas—A conviction under the one is no bar to a prosecution under the other. Hamilton v. State, 3 Tex. Crim. App., 643. Contra—Ex parte Freeland, 38 Tex. Crim.

App., 321; 42 S. W. Rep., 295. Where the conviction is void under the municipal ordinance it is no bar to a prosecution under the state law. Leach v. State, 36 Tex. Crim. App., 248; 36 S. W. Rep., 471. See Sec. 508, supra.

United States—Act punishable under federal law may also be punishable under state law. Fox v. Ohio, 5 How. (U. S), 410; Moore v. Illinois, 14 How. (U. S.), 13; Cooley's Const. Lim. (6th Ed.), 329; Biggars, Mun. Manual of Canada, pp. 629, 630; Bishop, Crim. Law., sec. 897 A; Bishop, Statutory Crimes, secs. 23, 25,

CHAPTER XVI.

OF PUBLIC IMPROVEMENT ORDINANCES.

- § 511. Nature and purpose of public improvements.
 - 512. Municipal power to make public improvements.
 - 513. Public improvements outside of corporate limits.
 - 514. Nature of power—where vested—state control.
 - 515. Same subject.
 - 516. Only officers duly authorized can provide for improvements.
 - 517. Same—delegation of power forbidden.
 - 518. Improvement by property owner.
 - Discretion of municipal authorities as to improvements.
 - 520. Boulevards.
 - 521. Improvements interfering with franchise rights.
 - 522. Special assessment or taxation for local improvements.
 - 523. Uniformity and equality of special assessments.
 - 524. Purpose of special assessments.
 - 525. Preliminary proceedings.
 - 526. Petition or consent of property owners affected.
 - 527. Opening and establishing streets.
 - 528. Establishment of street grade.
 - 529. Recommendation of ordinance by board.
 - 530. Water and gas pipes in advance of improvements.
 - 531. Estimate of cost of improvement.
 - 532. Submission to, and approval of, electors.

- § 533. Preliminary resolution or ordinance.
 - 534. Declaration of necessity of improvement.
 - 535. Providing for improvement — ordinance, resolution or order.
 - 536. Sufficiency of order for improvement.
 - 537. Ordinance for each distinct improvement.
 - 538. Procedure in passage of ordinance.
 - 539. Recital of authority to pass.
 - 540. Description of the improvement.
 - 541. Sufficiency of description in street improvement ordinances.
 - 542. Sufficiency of description in sewer construction ordinances.
 - 543. Same-Joint district sewer.
 - 544. Specification of material.
 - 545. Description by reference.
 - 546. Matters of detail need not be specified in the improvement ordinance.
 - 547. Ordinance must provide method of payment.
 - 548. Sufficiency of ordinance relating to payment in installments.
 - 549. Sufficiency respecting basis of apportionment of tax.
 - 550. Improvement ordinance must be reasonable.
 - 551. Certainty—Validity.
 - 552. Agreements of citizens and property owners.
 - 553. Ordinances restricting competition—Union labor.

- § 554. Ordinances authorizing patented and monopolized articles.
 - 555. Ordinances providing for maintenance of street for a term of years.
 - 556. Validating void improvement ordinances.
- § 557. Same—Curative power of the legislature.
 - 558. Construction of improvement ordinances.
 - 559. Parol evidence of terms used in improvement ordinances.

§ 511. Nature and purposes of public improvements. Generally speaking, the term "public improvements," as applied to municipal corporations, is limited to improvements which are the proper subject of police and local government regulation, and do not include private affairs or commercial enterprises. What the particular local corporation is authorized to do depends upon the proper construction of its charter, the statutes applicable thereto and the legislative policy of the state respecting municipal government. This subject is fully treated elsewhere.²

Adequate municipal administration necessarily includes the power to provide suitable public buildings for the convenient transaction of business, as a city or town hall,³ fire engine house,⁴ market houses, market places,⁵ hospitals,⁶ dispensaries, and sometimes penal, charitable and eleemosynary institutions, as jail, workhouse, poor houses, houses of refuge, etc. But the public improvements most fruitful of litigation, those in which the property owners, inhabitants and the local administration are most deeply concerned, and those which most municipal corporations have express or implied power to make, relate to the establishment, vacation, sprinkling and cleaning of public ways; paving, repairing and otherwise improving streets and sidewalks; the construction of drains, sewers and watercourses; the lighting of public thoroughfares, squares, parks, places and (sometimes) public buildings and private

¹ Low v. Marysville, 5 Cal., 214; Markley v. Mineral City, 58 Ohio St., 430; 51 N. E. Rep., 28; 65 Am. St. Rep., 776.

Local Improvements. Chicago v. Law, 144 Ill., 569; 33 N. E. Rep., 855; State v. Reis 38 Minn., 371; 38 N. W. Rep., 97; Rogers v. St. Paul, 22 Minn., 494.

² Chapter II.

³ People v. Harris, 4 Cal., 9; Foster v. Worcester, 164 Mass., 419; 41 N. E. Rep., 654; Bates v. Bassett, 60 Vt., 530; 15 Atl. Rep., 200; 1 L. R. A., 166.

4 Torrent v. Muskegon, 47 Mich., 115; 10 N. W. Rep., 132; 41 Am. Rep., 715.

⁵ See Section 481 supra.

^{6 &}quot;Private" hospital cannot be

residences;⁷ providing an adequate and wholesome water supply;⁸ opening and maintaining public parks and other pleasure resorts; constructing or authorizing the constructing of safe

established. Bessonies v. Indianapolis, 71 Ind., 189. See § 445, supra.

⁷ LIGHTING, implied power. See § 66, supra. Nelson v. La Porte, 33 Ind., 258; State v. Hiawatha, 53 Kan., 477; 36 Pac. Rep., 1119; Newport v. Newport Light Co., 84 Ky., 166; Opinion of Justices, 150 Mass., 592; 24 N. E. Rep., 1084; 8 L. R. A., 487; Detroit v. Wayne Co. Cir. Judges, 79 Mich., 384; 44 N. W. Rep., 622; Wade v. Oakmont, 165 Pa. St., 479; 30 Atl. Rep., 959.

Inherent power to furnished light declared. Crawfordsville v. Braden, 130 Ind., 149; 28 N. E. Rep., 849; 30 Am. St. Rep., 214; 14 L. R. A., 268; Ellinwood v. Reedsburg, 91 Wis., 131; 64 N. W. Rep., 885.

Gas works may be erected by city. Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S., 258; 13 Sup. Ct. Rep., 90, affirming 37 Fed. Rep., 832; State v. Hamilton, 47 Ohio St., 52; 23 N. E. Rep., 935; Mauldin v. Greenville, 33 S. C., 1; 11 S. E. Rep., 434; 8 L. R. A., 291.

Private places may be supplied. Thompson-Houston Electric Co. v. Newton, 42 Fed. Rep., 723.

Contra. Ladd v. Jones, 61 Ill. App., 584; Spaulding v. Peabody, 153 Mass., 129; 26 N. E. Rep., 421; 10 L. R. A., 397; Christensen v. Fremont, 45 Neb., 160; 63 N. W. Rep., 364; Mauldin v. Greenville, 33 S. C., 1; 11 S. W. Rep., 434; 8 L. R. A., 291.

Supplying light to residence, held a municipal purpose. Jacksonville Electric Light Co. v. Jacksonville, 36 Fla., 229; 18 So. Rep., 677; 51 Am. St. Rep., 24; 30 L. R. A., 540.

⁸ WATER SUPPLY, § 64 supra. Livingston v. Pippin, 31 Ala., 542; Illinois Trust & Savings Bank v. Arkansas City Water Co., 67 Fed. Rep., 196.

When council may determine necessity of a new system. Austin v. Nalle, 85 Tex., 520; 22 S. W. Rep., 668, 960; Nalle v. Austin (Tex. Civ. App., 1893), 21 S. W. Rep., 375.

WATERWORKS, general power to contract held to confer power to contract for in Rome v. Cabot, 28 Ga., 50. Contra. Greenville Waterworks Co. v. Greenville (Miss. 1890), 7 So. Rep., 409; National Foundry & P. Works v. Oconto Water Co., 52 Fed. Rep., 29.

Legislative power to establish; construction of. Murphy v. Waycross, 90 Ga., 36; 15 S. E. Rep., 817; Dutton v. Aurora, 114 Ill., 138; 28 N. E. Rep., 461; Ysleta v. Babbitt, 8 Tex. Civ. App., 432; 28 S. W. Rep., 702; Springville v. Fullmer, 7 Utah, 450; 27 Pac. Rep., 577; Attorney General v. Eau Claire, 37 Wis., 400.

Inherent municipal power to build, asserted in Ellinwood v. Reedsburg, 91 Wis., 131; 64 N. W. Rep., 885. See § 64 supra.

Legislative power to contract for supply. Burlington Water Works Co. v. Burlington, 43 Kan., 725; 23 Pac. Rep., 1068; Hackensack Water Co. v. Hoboken, 51 N. J. L., 220; 17 Atl. Rep., 307; Andrews v. National Foundry & Pipe Works, 61 Fed. Rep., 782; 10 C. C. A., 60; Fergus Falls Water Co. v. Fergus Falls, 65 Fed. Rep., 586.

DELEGATION. Council cannot authorize committee to contract for hydramt. Tainter v. Worcester, 123

harbors, landings, piers, wharves and docks; the regulation of the placing of poles, wires and electrical appliances, and of the construction and management of conduits, subways, etc. 10

§ 512. Municipal power to make public improvements. Ample power to make public improvements, as already indicated, is possessed by municipal corporations. The power is usually exercised under legislative discretion, but when the work has been determined upon, the construction thereof is merely ministerial. Authority to provide for public improve-

Mass., 311; 25 Am. Rep., 90. See §§ 84 to 89 supra.

CHARTER POWER to furnish, held revoked by law conferring exclusive right upon a private corporation. Gas & Water Co. v. Downingtown, 175 Pa. St., 341; 34 Atl. Rep., 799.

9 PIERS. Marshall v. Guion, 11 N. Y., 461.

BREAKWATER may be constructed by city, under general power, to protect public streets. Miller v. Milwaukee, 14 Wis., 642.

Levees; power to construct denied in Newport v. Batesville & B. Ry. Co., 58 Ark., 270; 24 S. W. Rep., 427.

Public Landing place, held not a way, conferring power to discontinue it. Com. v. Tucker, 2 Pick. (19 Mass.), 44.

Harbon; power to establish denied in Spengler v. Trowbridge, 62 Miss., 46.

WHARVES, LANDING, etc.

Alabama—Webb v. Demopolis, 95 Ala., 116; 13 So. Rep., 289; 21 L. R. A., 62.

California—San Pedro v. Southern Pac. R. Co., 101 Cal., 333; 35 Pac. Rep., 993.

Illinois—Ligare v. Chicago, 139 Ill., 46; 28 N. E. Rep., 934; 32 Am. St. Rep., 179.

Indiana—Snyder v. Rockport, 6 Ind., 237.

Louisiana-Shepherd v. Munici-

pality No. 3, 6 Rob. (La.), 349; 41 Am. Dec., 269; St. Martinsville v. The Mary Lewis, 32 La. Ann., 1293.

Michigan—Backus v. Detroit, 49 Mich., 110; 13 N. W. Rep., 380; 43 Am. Rep., 447.

Missouri—Hannibal v. Winchel, 54 Mo., 172.

Texas—Galveston v. Menard, 23 Tex., 349.

10 See Section 462 supra.

RIVER TUNNEL, Chicago authorized to construct. Chicago v. Rumsey, 87 Ill., 348.

¹¹ Georgia—Fuller v. Atlanta, 66 Ga., 80.

Indiana—Leeds v. Richmond, 102 Ind., 372; 1 N. E. Rep., 711; Kokomo v. Mahan, 100 Ind., 272.

Massachusetts—Collins v. Waltham, 151 Mass., 196; 24 N. E. Rep., 326.

Michigan—Davis v. Jackson, 61 Mich., 530; 28 N. W. Rep., 526; Lansing v. Toolan, 37 Mich., 152; 38 Mich., 315; Detroit v. Beckman, 34 Mich., 125; 22 Am. Rep., 507.

Minnesota—Pye v. Mankato, 36 Minn., 373; 31 N. W. Rep., 863.

Missouri—Donahoe v. Kansas City, 136 Mo., 657, 666; 38 S. W. Rep., 571; Thurston v. St. Joseph, 51 Mo., 510, 519.

New Jersey—Soule v. Passaic, 47 N. J. Eq., 28; 20 Atl. Rep., 346.

New York—Seifert v. Brooklyn, 101 N. Y., 136; 4 N. E. Rep., 321.

United States-Johnston v. Dis-

ments is generally granted in express terms or by necessary implication. It has been held in Pennsylvania that a municipal corporation has authority to pass ordinances for the grading and paving of streets without express grant from the legislature.¹²

Municipal corporations generally have power to condemn private property for public use. In the opening and widening of streets and alleys, the construction of drains, sewers and water courses, and the laying of water pipes, condemnation proceedings are frequently required. They can only be sanctioned legally by express grant from the state, 13 and in the exercise of the sovereign right of eminent domain in condemning property for such use, the constitutional rights of the property owners cannot be invaded. Just compensation must be paid for all property taken or "damaged" (according to some state constitution) for public use. The local corporation in such proceedings acts as the agent of the state under delegated authority, and the exercise of the power is subject to the inflexible rule that the power must be strictly pursued, and, ordinarily, must appear to be so on the face of the proceedings.14

The right to provide for local improvements by the exercise of the extraordinary power of special assessment or taxation, like the right of eminent domain, is a power primarily vested in the state, and can only be invoked by the municipal corporation, under express grant, either delegated by the legislature of the state or conferred by the constitution. Constitutions frequently provide, in substance, that the legislature may vest the corporate authority of cities, towns and villages with power to make local improvements by special assessments or by special taxation of the property benefited.¹⁵

§ 513. Public improvements outside of corporate limits. The general rule is that, without legislative grant, ordinances enacted by a municipal corporation have no force beyond its

trict of Columbia, 118 U. S., 19; Barnes v. District of Columbia, 91 U. S., 540.

Williamsport v. Com., 84 Pa.
 St., 487; 24 Am. Rep., 208.

¹⁸ Associates of Jersey Co. v. Jersey City, 8 N. J. Eq. (4 Halst.), 715.

14 State (Durant) v. Jersey City,25 N. J. L., 309.

Lands for opening and widening street. Dorgan v. Boston, 12 Allen (94 Mass.), 223.

Darst v. Griffin, 31 Neb., 668;
N. W. Rep., 819; State v. Dodge County Court, 8 Neb., 124; 30 Am.
Rep., 819. Secs. 522 to 524, post.

corporate limits.¹⁶ Thus, in the absence of such authority, it cannot open a street,¹⁷ repair a highway,¹⁸ grade an avenue,¹⁹ or aid in the construction of a plank road or bridge,²⁰ without its boundaries.

Under a legislative act authorizing Boston and Cambridge to construct a bridge and avenue across the Charles River, between certain points in each municipality, and prescribing that the location shall be determined by the respective councils of the corporations, "acting separately," and that they shall jointly construct the bridge, in accordance with plans concurrently approved by both councils, and that each city may condemn within its own limits lands for the avenue, and shall respectively defray the expenses of construction on each side of the river, it was held that neither corporation has any voice in the location or construction of that portion of the avenue lying within the limits of the other.²¹

In Michigan, it has been decided that authority to act beyond the corporate boundaries may be implied on the grounds of necessity, as in preserving a stream which bounds the city from deposits of filth, and in conducting drains and sewers without the limits.²² And in Illinois, a law which authorized cities and villages "to make local improvements," was construed to empower a village to levy a special assessment for the construction of a sewer which was partly outside of the corporate limits, where it appeared that it was necessary to so extend the sewer, in order to obtain an outlet.²³ So, in that state it has been decided that an ordinance authorizing the construction of a sewer may provide for the purchase by the corporation of lands outside its limits for the purpose of

16 Secs. 26 and 435, supra.

¹⁷ Municipality No. 1 v. Young, 5 La. Ann., 362.

18 Georgetown v. United States, 2 Hayw. & H. (U. S.), 302; 30 Fed. Cas. No. 18,281. When highway beyond limits may be improved, see *In re* East Syracuse, 20 Abb. N. C. (N. Y.), 131.

19 One side of avenue in the county. Baltimore v. Porter, 18 Md., 284.

20 Montgomery v. Montgomery & W. Plank Road Co., 31 Ala., 76.

FREE BRIDGE across a river may

be constructed by city, when, Dively v. Cedar Falls, 27 Iowa, 227.

²¹ Cambridge v. Railroad Comrs., 153 Mass., 161; 26 N. E. Rep., 241. See *In re* Butler Street, 6 Kulp. (Pa.), 488.

²² Coldwater v. Tucker, 36 Mich., 474; 24 Am. Rep., 601.

²³ Cochran v. Park Ridge, 138
III., 295; 27 N. E. Rep., 939, following Shreve v. Cicero, 129 III., 226;
21 N. E. Rep., 815; Maywood Co. v. Maywood, 140 III., 216; 29 N. E. Rep., 704.

extending the sewer to its outlet.²⁴ It is usual for charters to provide for the construction of sewers which extend, or drain territory, without the limits.²⁵

It has been judicially declared that where the boundary lines of the municipal corporation are uncertain and indefinite at certain points, local improvements may be made legally with reference to any recognized corporate limits.²⁶

§ 514. Nature of power—Where vested—State control. The powers to provide public improvements, like all municipal powers, are held in trust for the public. They cannot be abdicated or surrendered.²⁷ The power is in its nature legislative, not judicial. Thus, unless expressly authorized by law, an action will not lie to change the location of a street which has been established.²⁸ Courts possess only such jurisdiction respecting municipal improvements as may be conferred by the legislature. Powers relative to the subject may be, and frequently are, conferred upon the courts.²⁹ But for the most

²⁴ Callon v. Jacksonville, 147 III.,
 113; 35 N. E. Rep., 223.

²⁵ Charter of St. Louis, art. VI, sec. 22 (amendment of October 22, 1901).

²⁶ Bloomington Cemetery Assn.v. People, 139 Ill., 16; 28 N. E.Rep., 1076.

CORPORATE BOUNDARIES. "Corporations have boundaries or they have no existence. To determine whether they have or not, or what they are, is within the power of the courts." Little Rock v. Parish, 36 Ark., 166. The organization of a municipal government without defined metes would be a nullity. Enterprise v. State ex rel., 29 Fla., 128, 142; 10 So. Rep., 740.

Where the boundaries are uncertain, recognition by the inhabitants in certain limits may be considered by the court. Pidgeon v. McCarthy, 82 Ind., 32; Albia v. O'Harra, 64 Iowa, 297; 20 N. W. Rep., 444; Belknap v. Louisville, 93 Ky., 444; 20 S. W. Rep., 309; State v. Columbia, 27 S. C., 137; 3 S. E. Rep., 55.

Although boundaries may be

vague and indefinite, the court will adopt the lines fixed by the inhabitants in exercising their municipal privileges. Miln v. New Orleans, 13 La., 69.

Boundaries may be defined by long usage, confirmed by legislative recognition. People v. Farnham, 35 Ill., 562.

In ascertaining boundaries due weight should be given to the contemporaneous interpretation of the courts and other lawful authorities, and by the population at large residing therein. Maps published by authority of law may be referred to as evidence. Hamilton v. McNeil, 13 Gratt. (Va.), 389, 393, 394.

Where a road is the boundary line between two towns the separating point is the middle of the road. State v. Thomaston & Rockland, 74 Me., 198.

²⁷ Section 84 et seq. supra. Wabash R. R. Co. v. Defiance, 52 Ohio St., 262; 40 N. E. Rep., 89.

²⁸ De Witt v. Duncan, 46 Cal., 342.

29 Surveyor of highway appoint-

part these appertain to the condemnation of private property for public use, which is essentially a judicial proceeding. prevailing practice is to invest the municipal government with all the requisite powers, to provide all necessary and desirable public improvements.30 However, laws exist which confer power respecting public highways, although within the limits of a municipal corporation, upon officers other than municipal, variously styled county commissioners, supervisors, highway surveyors, road boards, etc. These generally apply to small cities, towns and villages.31 Occasionally, legislative acts provide for the creation of special commissioners or boards, to administer certain functions belonging to the municipality, e. g., to devise a system of parks and boulevards, 32 a plan of sewerage, or to provide an adequate and wholesome water ed by court. Pancoast v. Troth, 34 N. J. L., 377.

Power of county court over highways and bridges under legislative Norwich v. Story, 25 Conn., 44.

Powers of court of quarter session in Pennsylvania. In re Osage Street, 90 Pa. St., 114; In re Road, 14 Serg. & R. (Pa.), 447; In re Callowhill St., 32 Pa. St., 361; In re Twenty-eighth St., 102 Pa. St., 140; In re Road Sterrett Tp., 123 Pa. St., 231; 16 Atl. Rep., 777; In re Vacation of Henry St., 123 Pa. St., 346; 16 Atl. Rep., 785; In re Vacation of Union St., 140 Pa. St., 525; 21 Atl. Rep., 406. Examine Knowles v. Muscatine, 20 Iowa, 248; Brandt v. Milwaukee, 69 Wis., 386; 34 N. W. Rep., 246.

30 Illinois-People v. Chicago & N. W. Ry. Co., 118 Ill., 520; 8 N. E. Rep., 824; Shields v. Ross, 158 Ill., 214; 41 N. E. Rep., 985.

Indiana-Sparling v. Dwenger, 60 Ind., 72; State v. Mainey, 65 Ind., 404; Anderson v. Endicutt, 101 Ind., 539.

Iowa-Gallaher v. Head, 72 Iowa, 173; 33 N. W. Rep., 620.

Kansas-Ottawa v. Rohrbough, 42 Kan., 253; 21 Pac. Rep., 1061.

Michigan-Comrs. of Highways v. Willard, 41 Mich., 627; 3 N. W. Rep., 164.

Mississippi-Blocker v. State, 72 Miss., 720; 18 So. Rep., 388.

New Jersey-Campbell v. Hale. 25 N. J. L., 324; Cross v. Morristown, 18 N. J. Eq., 305; Keyport v. Cherry, 51 N. J. L., 417; 18 Atl. Rep., 299; Cherry v. Keyport, 52 N. J. L., 544; 20 Atl. Rep., 970; In re Public Road, 54 N. J. L., 539; 24 Atl. Rep., 759.

Pennsylvania-In re Road in Borough of Easton, 3 Rawle (Pa.), 195; In re Jackson Street, 83 Pa. St., 328.

Texas—State v. Jones, 18 Tex., 874; Norwood v. Gonzales County, 79 Tex., 218; 14 S. W. Rep., 1057.

Vermont-Bennington v. Smith, 29 Vt., 254.

31 In re Hanson, 51 Me., 193; Washington v. Fisher, 43 N. J. L., 377; Carroll v. Irvington, 50 N. J. L., 361; 12 Atl. Rep., 712; People v. Queens County Supervisors, 62 Hun. (N. Y.), 619; 16 N. Y. Supp., 705; Wells v. McLaughlin, 17 Ohio, 99; Butman v. Fowler, 17 Ohio, 101.

32 West Chicago Park Comrs. v. Western Union Tel. Co., 103 Ill., supply.³³ Unless the state constitution forbids, laws of this character are often sustained.

§ 515. Same subject. As yet purely municipal questions have not been clearly differentiated in all cases. As these questions arise the courts announce certain principles, suggesting particular limits on both the legislature and the local corporation, but for the most part these rules are applicable only in the jurisdiction in which they are declared. As relates to legislative control, the tendency of the courts seems to be to regard everything within the administrative competence of cities as municipal in character. However, this does not and should not go to the extent of the entire destruction of uniformity, or what has been termed state unity in government, and the establishment of imperia in imperio.34 The theoretically omnipotent parliament which opposes the idea of local autonomy has long been a principle of the English law; and, to a considerable degree, notwithstanding our constitutional system of precise division of governmental powers, the principle has been incorporated, as a heritage, into our jurisprudence. From this theory the careful enumeration of municipal powers and the rule of strict construction naturally followed, which of necessity has resulted in frequent appeals to the legislature on the part of local authorities to exercise doubtful, desirable or indispensable powers through officers selected by the city or appointed by the state. When these occasions arose, the city's proper sphere of activity as distinguished from that of the state, was not, as a rule, considered; hence the confusion existing on this subject. But many courts, notably in recent years, have rigidly enforced the right of the local community to exercise local self-government, unrestrained by improper legislative interference.

It has been held that the following matters are of exclusive local control: street improvements,³⁵ condemnation proceedings to acquire lands for streets, parks, water works, sewers, etc.,³⁶ establishment and maintenance of boulevards,³⁷ assess-

^{33;} In re Central Park Comrs., 51 Barb. (N. Y.), 277; 35 How. Pr. (N. Y.), 255.

³³ In re Zborowski, 68 N. Y., 88; Clark v. Lyon, 68 N. Y., 609.

³⁴ Goodnow, Municipal Problems, ch. IV.

³⁵ Murnane v. St. Louis, 123 Mo.

^{479; 27} S. W. Rep., 711; State ex rel. v. Field, 99 Mo., 352, 356; 12 S. W. Rep., 802.

³⁶ Kansas City v. Marsh Oil Co., 140 Mo., 458, 472; 41 S. W. Rep., 943; Harward v. St. Clair, etc. Co., 51 Ill., 130.

³⁷ St. Louis v. Dorr, 145 Mo.,

ing damages and benefits for grading and regrading streets,³⁸ the establishment and control of parks,³⁹ fire department,⁴⁰ water works,⁴¹ gas works,⁴² and the assessment and collection of costs for street improvements.⁴³

The Supreme Judicial Court of Massachusetts, although regarding the system of water works, the markets, hospitals, cemeteries, library and the system of parks of Boston as established and maintained essentially "for the benefit of the public," yet declares that they are "held more like property of a private corporation," and therefore protected from legislative interference.⁴⁴ Other illustrations appear from the cases in the note.⁴⁵

466, 480; 41 S. W. Rep., 1094; 46 S. W. Rep., 976.

38 State ex rel. v. Field, 99 Mo., 352, 356; 12 S. W. Rep., 802.

39 State ex rel. v. Schweickardt, 109 Mo., 496; 19 S. W. Rep., 47; Kansas City ex rel. v. Scarritt, 127 Mo., 642; 29 S. W. Rep., 845; 30 S. W. Rep., 111; People v. Chicago, 51 Ill., 17; People ex rel. v. Detroit, 28 Mich., 228; 15 Am. Rep., 202; Oren v. Bolger, 128 Mich., 355; 87 N. W. Rep., 366; 8 Det. Leg. News., 675. Contra. State v. Smith, 44 Ohio St., 348; 7 N. E. Rep., 447; 12 N. E. Rep., 829. Legislature may provide for construction of park system to be paid for by local assessments. In re Adams, 165 Mass. 497; 43 N. E. Rep., 682. Legislative mandatory act is valid which requires city to purchase lots or condemn land for a park. Baltimore v. Reitz, 50 Md., 574.

40 State ex rel. v. Denny, 118 Ind., 382; 21 N. E. Rep., 252; 24 Am. & Eng. Corp. Cas., 165; State v. Fox, 158 Ind., 126; 63 N. E. Rep., 19; Lexington v. Thompson, 24 Ky. Law. Rep., 384; 68 S. W. Rep., 477; State v. Moores, 55 Neb., 480; 76 N. W. Rep., 175, overruling State v. Seavey, 22 Neb., 454; 35 N. W. Rep., 228. Compare Redell v. Moores, 63 Neb., 219; 55 L. R. A., 740; 88 N. W. Rep., 243.

⁴¹ State *ex rel.* v. Barker, 116 Iowa, 96; 89 N. W. Rep., 204.

42 Western Sav. Fund Sac. v. Philadelphia, 31 Pa. St., 175, 183. 43 Murnane v. St. Louis, 123 Mo., 479; 27 S. W. Rep., 711. Contra. Legislature may authorize assessments for local improvements. Lent v. Tillson, 72 Cal., 404; 14 Pac. Rep., 71; Thomason v. Ruggles, 69 Cal., 465; 11 Pac. Rep., 20; People v. Bartlett, 67 Cal., 156; 7 Pac. Rep., 417; Oakland Pav. Co. v. Rier, 52 Cal., 270. In re House Bill No. 165, 15 Colo., 593; 26 Pac. Rep., 141; In re Van Antwerp, 56 N. Y., 261; Seanor v. Whatcom County Comrs., 13 Wash., 48; 42 Pac. Rep., 552.

Power to assess city property for local improvements may be delegated by the legislature to a board of assessors, acting independently of city council. Little Rock v. Board of Improvement, 42 Ark., 152.

The legislature may relieve property improperly assessed for a local improvement and compel the city to pay the sum. State v. Hoffman, 35 Ohio St., 435.

44 "In establishing all of these the city has not acted strictly as an agent of the state government for the accomplishment of the public or political purposes but with § 516. Only officers duly authorized can provide for improvements. Public improvements can be legally provided for only by the officers, boards or departments, duly empowered. Municipal charters differ widely in the manner of vesting the several municipal functions; changes in this respect are frequent; and oftentimes laws are so drawn, amended and repealed, that judicial construction is necessary to inform those

special reference to the benefit of its own inhabitants." Mt. Hope Cemetery v. Boston, 158 Mass., 509, 519; 33 N. E. Rep., 695.

⁴⁵ Bridges and Ferries. May provide for establishment of bridge and ferry, and compel city to pay without its consent. Simon v. Northrup, 27 Oreg., 487; 40 Pac. Rep., 560; 30 L. R. A., 171; Philadelphia v. Field, 58 Pa. St., 320. Legislature may compel levy of taxes for bridges. Talbot Co., v. Queen Anne Co., 50 Md., 245, 259.

COURT HOUSE. The legislature cannot compel a city at its sole expense to erect a court house in the county in which the city is situate, but may authorize the city to do so. Callam v. Saginaw, 50 Mich., 7; 14 N. W. Rep., 677.

Sewers. Legislature may regulate the manner in which city sewers shall be constructed. *In re* N. Y. P. E. Public Schools, 46 N. Y., 178. Legislature may compel city to pay damages in making improvements. *In re* Reynolds, 21 N. Y. Supp., 592; Tocci v. New York, 25 N. Y. Supp., 1089.

Public Health. May make provision for disposition of sewage from a number of towns and cities, and compel cities and towns to pay expenses therefor—matter relates to public health—area contained 1-6 of state population. *In re* Kingman, 153 Mass., 566; 27 N. E. Rep., 778; 12 L. R. A., 417; S. P. King v. Reed, 43 N. J. L., 186.

COMMISSIONERS, to perform mu-

nicipal functions forbidden by constitutions of many states, as in California, Pennsylvania and Washington. Transferring duties of construction, maintenance and regulation of highways to commissioners is prohibited in Pennsylvania. Porter v. Shields, 200 Pa. St., 241; 49 Atl. Rep., 785.

But a legislative act creating a commission to investigate and report as to certain improvements, was decided in California not to violate the constitution forbidding the delegation of power to a special commission. Under the act the report was only effective and binding when approved by the council. Davis v. Los Angeles, 86 Cal., 37; 24 Pac. Rep., 771. As to what constitutes delegation of power see §§ 84 to 89 supra.

CLAIMS. May exercise power to tax to pay claims. Guthrie National Bank v. Guthrie, 173 U. S., 528; Guthrie v. Territory ex rel. Losey, 1 Okla., 188; 31 Pac. Rep., 190; Coast Co. v. Spring Lake Borough, 56 N. J. Eq., 615; 36 Atl. Rep., 21.

Funds and Revenue. Act requiring council to levy special tax to create a fund for pensioning crippled and disabled firemen and the families of deceased members, held void. McDonald v. Louisville, 24 Ky. Law. Rep., 271; 68 S. W., 413.

40 Brooklyn v. Meserole, 26 Wend. (N. Y.), 132, reversing Meserole v. Brooklyn, 8 Paige (N. interested of their true meaning.47 A slight departure or an immaterial irregularity will not invalidate the proceedings.48 As an ordinance cannot change legally a provision of the charter. 49 power conferred upon officers by this instrument cannot be limited or restricted by ordinance or resolution. Thus where the charter authorizes the board of street commissioners to provide for the lighting of the city, an ordinance directing that the board shall make provisional contracts, subject to the approval of the council, for the erection or lighting of street lamps, should be construed either as directory merely, or as an unauthorized limitation of the board's powers, and therefore void. 50 So, where under the charter, the mayor and council have power to widen and extend the streets and open new ones, and authority to grade, repair and otherwise improve them, ordinances forbidding the removal of earth in the city during the summer months, without the permit of the board of health, which do not expressly name the mayor and council as subject thereto, are not operative upon them when acting as a municipal body in improving or repairing the streets.⁵¹

§ 517. Same—Delegation of power forbidden. The rule forbidding the delegation of legislative power, stated and ex-

Y.), 198; Van Doren v. New York, 9 Paige (N. Y.), 388; O'Rourke v. Hart, 9 Bosw. (22 N. Y. Super. Ct.), 301; King v. Brooklyn, 42 Barb. (N. Y.), 627.

⁴⁷ Regulating grade of streets transferred from department of public works to council. *In re* Roberts, 89 N. Y., 618, affirming 25 Hun. (N. Y.), 371.

Power to contract for water works vested in mayor and council, changed to water commissioner. Wells v. Atlanta, 43 Ga., 67.

Contract for water pumping machinery to be authorized by council. Chicago v. Fraser, 60 Ill. App., 404

⁴⁸ Dorey v. Boston, 146 Mass., 336; 15 N. E. Rep., 897.

Change of grade, held not altering street. Callender v. Marsh, 1 Pick. (18 Mass.), 418.

The charter gave power as to

drains and sewers to the council, and a legislative act to the mayor and alderman; held that an order of the latter was not rendered void because the council concurred. Woodbridge v. Cambridge, 114 Mass., 483.

Where the charter provides that the board of public works cannot change plats which have been approved by it, unless authorized by the council, the board cannot vacate plats. Campau v. Detroit Board of Public Works, 86 Mich., 372; 49 N. W. Rep., 39.

49 Section 15, supra.

⁵⁰ Hartford v. Hartford Electric Light Co., 65 Conn., 324; 32 Atl. Rep., 925. Examine Minneapolis Gaslight Co. v. Minneapolis, 36 Minn., 159; 30 N. W. Rep., 450.

⁵¹ Brunswick v. King, 91 Ga.,522; 17 S. E. Rep., 940.

plained elsewhere,⁵² is well illustrated in improvement ordinances, as appears from the numerous cases in the notes dealing with various kinds of improvements.⁵³

Thus where the council or legislative body is required by charter to determine the nature, character, location, material to be used and the manner in which the improvement should be made, such authority cannot be delegated by ordinance or resolution, either by recital or omission in specification, or otherwise, to any officer of the city or committee⁵⁴ of

52 Sections 86 to 88, supra.

⁵³ DELEGATION OF POWER AS TO IMPROVEMENTS, forbidden.

California—Richardson v. Heydenfeldt, 46 Cal., 68.

Illinois—Foss v. Chicago, 56 Ill., 354; Jenks v. Chicago, 56 Ill., 397; Lake Shore & M. S. Ry. Co. v. Chicago, 56 Ill., 454; Moore v. Chicago, 60 Ill., 243; Wright v. Chicago, 60 Ill., 312; Bryan v. Chicago, 60 Ill., 507; Page v. Chicago, 60 Ill., 441; Rich v. Chicago, 152 Ill., 18; 38 N. E. Rep., 255.

Kentucky—Hydes v. Joyes, 67 Ky. (4 Bush), 464; 96 Am. Dec., 311; Murray v. Tucker, 73 Ky. (10 Bush), 240.

Maryland—Baltimore v. John Hopkins Hospital, 56 Md., 1; Moale v. Baltimore, 61 Md., 224.

Massachusetts—Taber v. New Bedford, 135 Mass., 162.

Michigan—Scofield v. Lansing, 17 Mich., 437.

Missouri—Thomson v. Boonville, 61 Mo., 282; Sheehan v. Gleeson, 46 Mo., 100; St. Louis v. Clemens, 43 Mo., 395; St. Joseph v. Wilshire, 47 Mo. App., 125; St. Louis v. Gleason, 15 Mo. App., 25.

New Jersey—Bodine v. Trenton, 36 N. J. L., 198; State v. Newark, 54 N. J. L., 62; 23 Atl. Rep., 129.

New York—Merritt v. Portchester, 29 Hun. (N. Y.), 619; Birdsall v. Clark, 73 N. Y., 73; 29 Am. Rep., 105, reversing 7 Hun. (N. Y.), 351;

Phelps v. New York, 112 N. Y., 216; 19 N. E. Rep., 408; 2 L. R. A., 626; Van Nest v. New York, 113 N. Y., 652; 21 N. E. Rep., 414; People v. Haverstraw, 137 N. Y., 88; 32 N. E. Rep., 1111.

Rhode Island—Rounds v. Mumford, 2 R. I., 154.

South Carolina—Charleston v. Pinckney, 3 Brev. (S. C.), 217.

Tennessee—Whyte v. Nashville, 2 Swan (32 Tenn.), 364.

54 Delegation of certain authority to street committee sustained. Hitchcock v. Galveston, 96 S., 341; Brewster v. Davenport, 51 Iowa, 427; 1 N. W. Rep., 737; Dorman v. Lewiston, 81 Me., 411; 17 Atl. Rep., 316; Reuting v. Titusville, 175 Pa. St., 512; 34 Atl. Rep., 916. Compare Macon v. Patty, 57 Miss., 378; 34 Am. Rep., 451; Thompson v. Schermerhorn, Barb. (N. Y.), 152, affirmed 6 N. Y., 92; 55 Am. Dec., 385; Gulf C. & S. F. Ry. v. Riordan (Tex. Civ. App. 1893), 22 S. W. Rep., 519; McCrowell v. Bristol, 89 Va., 652; 16 S. E. Rep., 867; 20 L. R. A., 653.

Sidewalk, construction of, may be given to an officer. Bowers v. Barrett, 85 Me., 382; 27 Atl. Rep., 260; Attorney General v. Boston, 142 Mass., 200; 7 N. E. Rep., 722.

Agents may be employed to supervise the work. Collins v. Holyoke, 146 Mass., 298; 15 N. E. Rep., 908.

the council.55 Hence an ordinance which omits to name the material for the receiving basins and manholes contravenes this rule, and as a result the tax bills issued to the contractor for the work will be held void as to such basins and manholes, but valid as to the rest. 56 So, an ordinance which leaves the determination of the dimensions of a sewer to an officer or the contractor, in violation of the charter requiring the ordinance to fix such dimensions, is clearly void.⁵⁷ But where the charter merely provides that the size of the sewer to be constructed shall be prescribed by ordinance, and contains no such requirement as to inlets, manholes, etc., nor of the material to be used in their construction, the latter are mere appendages and may be regarded as matters of detail not necessary to be specified in the ordinance.⁵⁸ In one case an ordinance provided that a sidewalk might, at the option of the contractor, be constructed of pine, white or burr oak, of certain dimensions. Here it was held that the ordinance did not constitute a delegation of the authority as to material with which the sidewalk was to be constructed. The court observed that by allowing the walks to be constructed of one or the other material a

Ordinance as to construction of railroad may designate officers, to execute its provisions. Northern Central R. Co. v. Baltimore, 21 Md., 93.

55 Ruggles v. Collier, 43 Mo., 353; King-Hill Brick Mfg. Co. v. Hamilton, 51 Mo. App., 120, 125; Galbreath v. Newton, 30 Mo. App., 380. See cases in last note.

"The trust is an important and delicate one. * * * In effect, it is a power of taxation which is the exercise of sovereign authority: and nothing short of the most positive and explicit language can justify the court in holding that the legislature intended to confer such power on a city officer or committee. The statute not only contains no such language, but on the contrary, clearly, to my mind, expresses the intention of confining the exercise of this power to the common council, the members

of which are elected by and responsible to those whose property they are thus allowed to tax." Thompson v. Schermerhorn, 6 N. Y., 92, 96.

Authority to let contracts canbe delegated to a Meuser v. Risdon, 36 Cal., 239.

Reletting contract; same course usually as in first letting. Ib.

Time of completion of contract; the fixing of is generally a legislative function, and, hence, cannot Ayers v. Schmohl, be delegated. 86 Mo. App., 349.

56 St. Joseph v. Wilshire, 47 Mo. App., 125.

57 St. Louis v. Clemens, 52 Mo., 133; St. Louis v. Clemens, 43 Mo., 395; Sheehan v. Gleeson, 46 Mo., 100.

58 St. Joseph to use, etc. v. Owen, 110 Mo., 445; 19 S. W. Rep., 713.

larger competition in bidding would likely be opened up, and the work therefore done at a lower price.⁵⁹

§ 518. Improvements by property owners. Under ample charter power, penal ordinances have been sustained compelling abutting property owners on streets to construct and maintain sidewalks and footways when necessary to the safety or convenience of pedestrians. This has been adjudged as a proper exercise of the police power, 60 and not unconstitutional as an unwarranted delegation of the taxing power. 61 On the other hand, such laws have been declared void. 62 In

⁵⁹ Gallagher v. Smith, 55 Mo. App., 116, 121, 122, distinguishing Galbreath v. Newton, 30 Mo. App., 380; Ruggles v. Collier, 43 Mo., 353.

Culvert, ordinance may confer power on city engineer to fix dimensions. Young v. Kansas City, 27 Mo. App., 101.

60 Palmer v. Way, 6 Col., 106;
Macon v. Patty, 57 Miss., 378; 34
Am. Rep., 451; Wilson v. Philippi,
39 W. Va., 75; 19 S. E. Rep., 553.

61 Arkansas — James v. Pine Bluff, 49 Ark., 199; 4 S. W. Rep., 760.

California—Hart v. Gaven, 12 Cal., 476.

Kentucky—Paris v. Berry, 2 J. J. Marsh (25 Ky.), 483.

Pennsylvania — Greenburg v Young, 53 Pa. St., 280.

Tennessee—Franklin v. Maberry, 6 Humph (25 Tenn.), 368; 44 Am. Dec., 315; Washington v. Nashville, 1 Swan (31 Tenn.), 177.

Virginia—Sands v. Richmond, 31 Gratt. (Va.), 571; 31 Am. Rep., 742.

Particular provisions construed. Arkansas—Little Rock v. Fitzgerald, 59 Ark., 494; 28 S. W. Rep., 32; 28 L. R. A., 496.

Connecticut—Norwich v. Hubbard, 22 Conn., 587; Yale College v. New Haven, 57 Conn., 1; 17, Atl. Rep., 139; Hillhouse v. New Haven,

62 Conn., 344; 26 Atl. Rep., 393.

Indiana—Wiles v. Hoss, 114 Ind., 371; 16 N. E. Rep., 800; Keith v. Wilson, 145 Ind., 149; 44 N. E. Rep., 13.

Iowa—Buell v. Ball, 20 Iowa, 282.

Kansas—Emporia v. Gilchrist, 37 Kan., 532; 15 Pac. Rep., 532.

Massachusetts — Charlestown v. Stone, 15 Gray (81 Mass.), 40; Nute v. Boston, etc., Co., 149 Mass., 465; 21 N. E. Rep., 881.

Missouri—McCormack v. Patchin, 53 Mo., 33; Estes v. Owen, 90 Mo., 113; 2 S. W. Rep., 133, affirming Farrar v. St. Louis, 80 Mo., 379.

New Jersey—Paxson v. Sweet, 13 N. J. L., 196; Bergen v. Van Horne, 32 N. J. L., 490.

Pennsylvania—Findley v. Pittsburg (Pa. 1887), 11 Atl. Rep., 678; Smith v. Kingston Borough, 120 Pa. St., 357; 14 Atl. Rep., 170. Rhode Island—Swan v. Colville,

19 R. I., 161; 32 Atl. Rep., 854.

DRAINS, REPAIRS. Compelling property owners to make. Bangor v. Lansil, 51 Me., 521.

62 Port Huron v. Jenkinson, 77
 Mich., 414; 43 N. W. Rep., 923; 18
 Am. St. Rep., 409; 6 L. R. A., 54.

SIDEWALK REPAIRS; city cannot compel abutting owner to make. Chicago v. Crosby, 111 Ill., 538; Woodward v. Boscobel, 84 Wis.,

Illinois, a regulation of a board of public works was sustained which required citizens desiring to use the water of the city flowing through the main pipes, to lay down, at their own expense, the necessary service pipes. The court expressed the opinion that the regulation was just and reasonable, and in harmony with the principle upon which special assessments are based.⁶³

It is usual for laws of this character to provide for due notice to the property owners that the construction or repairing is necessary, and thus give them an opportunity to do the work, within a time named, and in event of default the municipal authorities may proceed to have the work done at the expense of the property. These conditions must be, in substance, observed, as they are jurisdictional.⁶⁴

In Missouri, an ordinance of St. Louis which provided that "the board of public improvements may, upon the application" of the abutting property owner, grant him permission "to construct the sidewalk in front of such property, but without such permission no sidewalk shall be constructed by any person other than the contractor having the annual contract for constructing new sidewalks," was construed as investing the board with discretion to permit the abutting owner the right to construct a sidewalk in front of his property or deny to him that

226; 54 N. W. Rep., 332. Contra. Buell v. Ball, 20 Iowa,, 282; Warren v. Henly, 31 Iowa, 31.

63 Prindiville v. Jackson, 79 Ill., 337.

Piers—Marshall v. Guion, Denio (N. Y.), 581.

64 Manning v. Gen., 90 Cal., 610; 27 Pac. Rep., 435; Newbery v. Fox, 37 Minn., 141; 33 N. W. Rep., 333; 5 Am. St. Rep., 830; Covington v. Bishop, 10 Ky. Law. Rep., 939; 11 S. W. Rep., 199; Cowen v. West Troy, 43 Barb. (N. Y.), 48; Galveston v. Heard, 54 Tex., 420.

NOTICE generally necessary; sufficiency of service. Shrum v. Salem, 13 Ind. App., 115; 39 N. E. Rep., 1050; Tufts v. Charlestown, 98 Mass., 583; Leach v. Cargill, 60 Mo., 316; Carroll v. Irvington, 50

N. J. L., 361; 12 Atl. Rep., 712; Rathbun v. Acker, 18 Barb. (N. Y.), 393; Moore v. Fairport, 11 Misc. Rep. (N. Y.), 146; 32 N. Y. Supp., 633; Philadelphia v. Edwards, 78 Pa. St., 62; Philadelphia v. Donath, 13 Phila. (Pa.), 4; Philadelphia v. Meighan, 159 Pa. St., 495; 28 Atl. Rep., 304; Simmons v. Gardiner, 6 R. I. 255; Galveston v. Heard, 54 Tex., 420; Rogers v. Milwaukee, 13 Wis., 610; Myrick v. La Crosse, 17 Wis., 442; Johnston v. Oshkosh, 21 Wis., 184.

TIME within which the work is to be done by property owner. Particular instances. Loughridge v. Huntington, 56 Ind., 253; Nugent v. Jackson, 72 Miss., 1040; 18 Rep., 493; Fass v. Seehawer, 60 Wis., 525; 19 N. W. Rep., 533,

permission, hence mandamus to compel the board to issue a permit was denied. 65

§ 519. Discretion of municipal authorities as to improvements. It is a fundamental rule that discretionary powers vested in public officers are not subject to judicial control. 66 Ordinances providing for public improvements give frequent occasion for the application of the rule. 67 Unless legal limitations exist, power to open, improve, and pave streets is discretionary with the municipal authorities and if the law has been observed substantially their action therein is not subject to judicial review. 68 In other words, where a power touching local improvements is expressly granted to municipal authorities, as a rule, they are, in the reasonable exercise of it, beyond the control of the courts. 69 Ordinarily, courts will not interfere on the ground that a given improvement is unnecessary, and that the ordinance providing for it is therefore oppressive and unreasonable. 70 In the absence of constitutional or charter

65 State ex rel. v. St. Louis, 158
 Mo., 505; 59 S. W. Rep., 1101.

Ordinance sustained which authorized property owners to construct their own sidewalks. Zalesky v. Cedar Rapids (Iowa Dec. 17, 1902), 92 N. W. Rep., 657.

Mandatory and Directory provisions, construction of "may", "shall", etc., see sections 82 and 83, supra.

66 Secs. 76 and 77, supra. Limitations of rule sec. 78, supra.

MANDATORY AND DISCRETIONARY POWERS distinguished. Secs. 82 and 83, supra.

Mandatory law requiring the modification of grade of certain street. People v. San Francisco, 36 Cal., 595.

67 § 77 supra and notes.

68 Barber A. P. Co. v. French,158 Mo., 534; 58 S. W. Rep., 934.

Charter prevails over state law, when. Hill v. St. Louis, 159 Mo., 159; 60 S. W. Rep., 116.

69 California—Harney v. Benson, 113, Cal., 314; 45 Pac. Rep., 687.

Illinois—Curry v. Mount Sterling, 15 Ill., 320; English v. Danville, 150 Ill., 92; 36 N. E. Rep., 994; Shannon v. Hinsdale, 180 Ill., 202; 54 N. E. Rep., 181; Church v. People, 179 Ill., 205; 52 N. E. Rep., 554; Davis v. Litchfield, 145 Ill., 313; 33 N. E. Rep., 888.

Kentucky—Worthington v. Covington, 6 Ky. Law Rep., 237.

Missouri—Skinker v. Heman, 64 Mo. App., 441; Estes v. Owen, 90 Mo., 113; 2 S. W. Rep., 133; Farrar v. St. Louis, 80 Mo., 379; Mc-Cormack v. Patchin, 53 Mo., 33.

New Jersey—Taintor v. Morristown, 33 N. J. L., 57.

70 Georgia—Bacon v. Savannah,
 105 Ga., 62; 31 S. E. Rep., 127.

Iowa—Miller v. Wester City, 94
Iowa, 162; 62 N. W. Rep., 648; In re Cedar Rapids, 85 Iowa, 39; 51
N. W. Rep., 1142.

Illinois—Chicago v. Nichols, 177 Ill., 97; 52 N. E. Rep., 359; Chicago & N. W. R. Co. v. Cicero, 154 Ill., 656; 39 N. E. Rep., 574. restrictions, municipal discretion includes the extent and nature of the improvement,⁷¹ the material for construction,⁷² and the vacation of streets and public ways.⁷³

Indiana—Elkhart v. Wickwire, 121 Ind., 331; 22 N. E. Rep., 342.

Missouri—Saxton v. St. Joseph, 60 Mo., 153; Morse v. Westport, 110 Mo., 502; 19 S. W. Rep., 831; 136 Mo., 276; 33 S. W. Rep., 182; Marionville v. Henson, 65 Mo. App., 397.

New York— Kelsey v. King, 32 Barb. (N. Y.), 410; 11 Abb. Pr. (N. Y.), 180.

Pennsylvania—Oil City v. Oil City Boiler Works, 152 Pa. St., 348; 25 Atl. Rep., 549.

OPENING STREET, necessity. Detroit v. Beecher, 75 Mich., 454; 42 N. W. Rep., 986; 4 L. R. A., 813; *In re* Folts Street, 46 N. Y., Suppl. 43; 18 App. Div. (N. Y.), 568.

SEWERS AND DRAINS, necessity. Carr v. Doley, 122 Mass., 255; Paulson v. Portland, 16 Oregon, 450; 19 Pac. Rep., 450; 1 L. R. A., 673.

CONDEMNATION—Public Use. In re Condemnation of Independence Ave. Boulevard, 128 Mo., 272; 30 S. W. Rep., 773.

MUNICIPAL OFFICERS, how far agents of the property owners in authorizing improvements. Schum v. Seymour, 24 N. J. Eq., 143, 147; Barber Asphalt P. Co. v. Hezel, 76 Mo. App., 135, 152.

71 NATURE AND EXTENT, streets and public ways. Murphy Peoria, 119 Ill., 509; 9 N. E. Rep., 895; Lightner v. Peoria, 150 80; 37 N. E. Rep., 69; III., Louisville & N. R. Co. v. East St. Louis, 134 Ill., 656; 25 N. E. Rep., 962; Brown v. Barstow, 87 Iowa, 344; 54 N. W. Rep., 241; Boston & M. R. Co. v. Lawrence, 2 Allen (84 Mass.), 107; Dunker v. Stiefel, 57 Mo. App., 379; State v. Portage, 12 Wis., 562.

The improvement of a street need not extend to the sidewalk. Moran v. Lindell, 52 Mo., 229, 232, where only a carriage way on each side of the street was macadamized, and the material did not cover the whole street, and the sidewalk, distinguishing Philadelphia v. Eastwick, 35 Pa St., 75.

Sewers. Hoboken v. Chamberlain, 37 N. J. L., 51,

One sewer district may be planned; whole city need not be laid out into sewerage districts. *In re* Protestant Episcopal Public School, 40 How. Pr. (N. Y.), 198; 47 N. Y., 556. Compare, 46 N. Y., 178; reversing 58 Barb. (N. Y.), 161; 40 How. Pr. (N. Y.), 139.

72 Material for Construction. Illinois—Cunningham v. Peoria, 157 Ill., 499; 41 N. E. Rep., 1014; Cram v. Chicago, 138 Ill., 506; 28 N. E. Rep., 757; Shannon v. Hinsdale, 180 Ill., 202; 54 N. E. Rep., 181; Louisville & Nashville R. R. v. East St. Louis, 134 Ill., 656; 25 N. E. Rep., 962; Illinois Central R. R. Co. v. Chicago, 141 Ill., 586; 30 N. E. Rep., 1044.

Iowa—Burlington & M. R. R. Co. v. Spearman, 12 Iowa, 112.

Louisiana—Gunning Gravel & P. Co. v. New Orleans, 45 La. Ann., 911; 13 So. Rep., 182.

Michigan — Grand Rapids v. Board of Public Works, 87 Mich., 113; 49 N. W. Rep., 481; 99 Mich., 392; 58 N. W. Rep., 335; Shimmons v. Saginaw, 104 Mich., 511; 62 N. W. Rep., 725.

Missouri—Gallagher v. Smith, 55 Mo. App., 116.

It has been held that the passage of the ordinance is usually conclusive as to the necessity of the work.⁷⁴

§ 520. **Boulevards.** Express power is often conferred upon the municipal authorities to establish and open boulevards, or change existing streets into boulevards, and fix the width thereof, and the manner of laying out and improving the same; to regulate the traffic thereon by excluding heavy driving thereon or any kind of vehicle therefrom; to forbid the erec-

New York—Berg v. Grace, 1 N. Y. St. Rep., 418; Schenectady v. Union College, 66 Hun. (N. Y.), 179; 21 N. Y. Suppl., 147; reversed 144 N. Y., 241; 39 N. E. Rep., 67; 26 L. R. A., 614.

Pennsylvania—Schenley v. Com., 36 Pa. St., 29; 78 Am. Dec., 359; Philadelphia v. Evans, 139 Pa. St., 483; 21 Atl. Rep., 200.

Wisconsin—Benson v. Waukesha, 74 Wis., 31; 41 N. W. Rep., 1017.

Property owners may select—Waiver of right. Moale v. Baltimore, 61 Md., 224.

72 VACATION of STREET for benefit of private individual or corporation, held not illegal. Meyer v. Teutopolis, 131 Ill., 552; 23 N. E. Rep., 651; Marshalltown v. Forney, 61 Iowa, 578; 16 N. W. Rep., 740.

Street can only be vacated when no longer required for public use. Smith v. McDowell, 148 Ill., 51; 35 N. E. Rep., 141; 22 L. R. A., 393.

No implied power exists to close a public alley for a money consideration against the will of those owning lots in the square through which the alley runs, and who have the right of passage over it. Louisville v. Bannon, 99 Ky., 74; 35 S. W. Rep., 120.

The power to vacate streets cannot be exercised arbitrarily; it must be in the interest of the public. Whitsett v. Union Depot & R. Co., 10 Colo., 243; 15 Pac. Rep., 339.

Contract with a railroad company in vacating a street, prohibiting the city from condemning property for street in future, held ultra vires. Grand Rapids v. Grand Rapids & I. R. Co., 66 Mich., 42; 33 N. W. Rep., 15.

Vacating an alley in consideration of a division with the city of the property after the erection of a building thereon by the owner of the fee, held void. Horton v. Williams, 99 Mich., 423; 58 N. W. Rep., 369.

Reducing the width of a street one half and giving an abutting owner permission to inclose the excess, held illegal, as attempting to give for private purposes a portion of a public street. St. Vincent Female Orphan Asylum v. Troy, 76 N. Y., 108; 32 Am. Rep., 286.

Where power to vacate exists, the question whether or not it should be exercised is solely one of legislative discretion. Knapp-Stout & Co. v. St. Louis, 156 Mo., 343; 56 S. W. Rep., 1102.

74 Seibert v. Tiffany, 8 Mo. App., 33; Bohle v. Stannard, 7 Mo. App., 51. But in Corrigan v. Gage, 68 Mo., 541, it was held that an ordinance for a sidewalk in an uninhabited portion of a city, and disconnected with any other street or sidewalk, was unnecessary and oppressive; and such facts might be shown in an action on the special tax bill.

tion, establishment or maintenance of any business house, or the carrying on of any business vocation on the property fronting on such boulevard; to establish a building line to which all buildings, fences or other structures thereon shall conform; and to provide for grading, improving, constructing, reconstructing, maintaining, cleaning, sprinkling, the planting of trees, shrubbery, and other things of that description and nature thereon. Usually, the entire cost connected with all such work is levied, assessed and collected, as a special tax or assessment on the property fronting or bordering on such boulevard, according to some just method of apportionment, specified in the charter or legislative act applicable. The restriction is common that no franchise for the occupancy or use of such boulevard, or any part thereof, shall be granted, except with the consent, in writing, of the owners of a certain proportion (generally two-thirds) in frontage of the property fronting or bordering thereon.75

In view of the prevailing constitutional provision that private property shall not be taken (or damaged) for public use, without just compensation, to be ascertained in a manner specified, it is essential that such laws should make adequate provision for the ascertainment and allowance of just compensation to the owners of property fronting or bordering thereon for damages occasioned by the establishment of a building line on such boulevard and by the use to which such property may be put by the owners thereof. All laws relating to the use of boulevards and streets set aside for pleasure drives must operate generally and impartially, and provide a permanent and uniform rule. Thus an ordinance forbidding the use of such ways for heavy hauling, or for any of the purposes above mentioned, except on the special permission of certain municipal officers, as for example, the board of trustees, is unreasonable, since it invests in such board an unregulated official discretion.77

Charter provisions also exist for the discontinuance of boule-

75 Charter of St. Louis, Art. VI., Sec. 1 (amendments, Oct. 22, 1901). Cicero Lumber Co. v. Cicero, 176 Ill., 9; 51 N. E. Rep., 758.

76 St. Louis v. Hill, 116 Mo., 527; 22 S. W. Rep., 861; 21 L. R. A., 226; St. Louis v. Dorr, 145 Mo., 466, 485; 41 S. W. Rep., 1094; 46 S. W. Rep., 976; Philadelphia v. Linnard, 97 Pa. St., 242; *In re* Chestnut Street, 118 Pa. St., 593; 12 Atl. Rep., 585.

77 Cicero Lumber Co. v. Cicero,176 Ill., 9; 51 N. E. Rep., 758.

vards legally established, under specified conditions, having in view the public interest and the constitutional rights of the property owners. Where the boulevard is to become an ordinary street, to be treated in all respects as this class of public thoroughfares, it would seem that special legal authority is necessary, to give the change due sanction. If the boulevard is to be vacated and cease to exist as a public way for any purpose, the paramount public control of highways, or the special provisions (if any) relative to the vacation of streets, would doubtless support such action.

Improvements interfering with franchise rights. Ordinances granting to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, as for railroad tracks, poles, wires, gas and water pipes, when accepted and acted on by the grantees thereof become, as stated elsewhere, contracts, the obligations of which cannot be impaired constitutionally by act of the municipality.79 However, such rights are held in subordination to the superior rights of the public. As explained in a prior chapter, all necessary and desirable police ordinances, which are reasonable, may be enacted and enforced, to protect the public health, safety and convenience, notwithstanding the enforcement of such regulations may interfere with legal franchise rights.80 Thus a water company, placing its pipes in the streets under a franchise contract with the local corporation, does so in subordination to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets, whenever and wherever the public interest demands: and if, in consequence of the exercise of this right, the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursement on account there-But the location of sewers must be reasonable, with

to an averment that the corporation acted unreasonably or maliciously. National Waterworks Co. v. Kansas City, 28 Fed. Rep., 921.

Interference with operations of a railroad by constructing and repairing sewers is authorized. Dry Dock, E. B. & B. R. Co. v. New York, 55 Barb. (N. Y.), 298.

⁷⁸ Charter of St. Louis, art. VI., sec. 1 (amendment Oct. 22, 1901).

^{79 §§ 197, 200} and 201, 238 to 242, supra.

⁸⁰ Chapter XIV.

⁸¹ In such action, a mere allegation that the sewer might have been placed properly in another part of the street, is not equivalent

respect to franchise rights. Thus where other parts of the street are equally suitable, the location of a sewer in a part of the street occupied with tracks by a railway company, under valid ordinance, which compels the company to suspend operations, greatly to its damage, will be held unreasonable.82 So, in the exercise of the undoubted right in constructing sewers. a municipal corporation cannot compel a street railway company to tear up its tracks laid in the center of a street, pursuant to ordinance authority, to permit the placing of a sewer under it, where it appears that the company has expended large sums in constructing its roadbed, and the contemplated action would impair the value of the property, and cause inconvenience to the public, and it would be just as suitable to lay the sewer on one side of the track.83

The municipality cannot, by any franchise it may grant, relinquish any of its rightful authority over its streets.84 or. indeed, any municipal function whatever.85 Every franchise conferred by it is subject to this limitation, whether expressed therein or not.

Cases involving the grading, constructing, repairing and otherwise improving streets fully illustrate and explain the rule.86 Thus the legal right of a water company to lay its pipes

82 Clapp v. Spokane, 53 Fed. Rep., 515.

83 Des Moines City Ry. Co. v. Des Moines, 90 Iowa, 770; 58 N. W. Rep., 906; 26 L. R. A., 767.

A sewer may be constructed in the center of the street, notwithstanding the presence of tracks by legal authority, though there was space on either side of the tracks, to allow its construction without disturbing the railway. Spokane Street Ry. Co. v. Spokane, 5 Wash., 634; 32 Pac. Rep., 456. The consequences of the removal of the tracks therefore are damnum abseque injuria. Kirby v. Citizens' Ry. Co., 48 Md., 168.

84 §§ 458 et seq. 473 and 474 post. Ch. XVII.

85 Sec. 84 supra.

Co. v. Quincy, 136 Ill., 563; 27 N. E. Rep., 192.

Missouri-National Waterworks Co. v. Kansas City, 20 Mo. App., 237. New Jersey-Townsend v. Jersey City, 26 N. J. L., 444.

Ohio-Columbus Gaslight Coke Co. v. Columbus, 50 Ohio St., 65; 33 N. E. Rep., 292; 40 Am. St. Rep., 648; 19 L. R. A., 510; Wabash R. Co. v. Defiance, 52 Ohio St., 262; 40 N. E. Rep., 89.

Pennsylvania-North Pennsylvania R. Co. v. Stone, 3 Phila. (Pa.), 421; 8 Am. Law Reg., 112; Monongahela v. Monongahela Electric Light Co., 3 Pa. Dist. Rep.,

Virginia-Roanoke Gas Co. v. Roanoke, 88 Va., 810; 14 N. E. Rep., 665.

The fact that a railroad com-86 Illinois-Chicago, B. & Q. R. pany agreed to so improve the through the streets, "in such a manner as not to obstruct or impede travel thereon," does not impair the obligation of the municipal corporation to repair its streets. This may be done in the ordinary and proper manner, although in so doing the pipes of the water company become exposed, necessitating their being sunk deeper at considerable expense to the company, to protect them from frost and other dangers. But the power to improve streets, like that in locating and constructing sewers, must be reasonably exercised. It is not an arbitrary power. Vested rights must be protected. 88

§ 522. Special assessments or taxation for local improvements. Special assessments for the payment of the cost of local improvements commonly prevail and are generally sustained under the exercise of the power of taxation. Both the

streets upon which its tracks are laid that it may be safely used for vehicles, does not destroy the right of the local corporation to improve the streets. Chicago, B. & Q. R. Co. v. Quincy, 139 Ill., 355; 28 N. E. Rep., 1069.

87 Rockland Water Co. v. Rockland, 83 Me., 267; 22 Atl. Rep., 166.

88 Seattle v. Columbia & P. S. R. Co., 6 Wash., 379; 33 Pac. Rep., 1048.

Possible injury to vested franchise rights will not invalidate a street improvement ordinance. Chicago, B. & Q. R. Co. v. Quincy, 139 Ill., 355; 28 N. E. Rep., 1069. Outlet of sewer system may pass over private property. Burhans v. Norwood Park, 138 Ill., 147; 27 N. E. Rep., 1088.

89 Astor v. New York, 37 N. Y. Super. Ct. (5 Jones & S.), 539.

Special assessments have no relation to the right of eminent domain. Hence constitutional provisions respecting this right have no application. Gibson v. Owens, 115 Mo., 258; 21 S. W. Rep., 1107; St. Joseph v. Farrell, 106 Mo., 437, 442; 17 S. W. Rep., 497; Keith v.

Bingham, 100 Mo., 300, 306; Garrett v. St. Louis, 25 Mo., 505, 514; People ex rel. v. Brooklyn, 4 N. Y., 419; Nichols v. Bridgeport, 23 Conn., 189; 60 Am. Dec., 636.

Special assessments differ from general taxes. Illinois Central R. R. Co. v. Decatur, 147 U. S., 190; Williams v. Corcoran, 46 Cal., 553; People v. Austin, 47 Cal., 353; McGuire v. Brockman, 58 Mo. App., 307; Chester v. Chester & D. R. R. Co., 3 Del. Co. Rep. (Pa.), 389; Hale v. Kenosha, 29 Wis., 599.

Local assessments prevailed in Engl nd several centuries ago, and the assessments made there by the commissioners of sewers on the l nds affected by their operations was taxation of this character (28 Hen. VIII., Ch. 5, § 5), and it prevailed from an early day in nearly all American States whose jurisprudence is rooted in the common law.

The property is assessed in respect to the benefit derived from the improvement; it is a tax on the property, and is therefore not obnoxious to the constitutional requirement that all property subject to taxation shall be taxed according to its value. * *

federal and state constitutions expressly forbid the taking of private property for public use by the municipal corporation, acting under authority conferred by its charter, or, the legislature of the state, without just compensation being made therefor.90 "The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large would not be an exercise of the taxing power. but an act of confiscation. In effect it would be transferring the property of one individual to another. These are legal truisms which have long been entertained and firmly established.''91 The Supreme Court of the United States in the case of Norwood vs. Baker, determined in 1898,92 thus declares the rule: "The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore

There is a marked difference between general taxation and special assessment for local objects.

The word tax may be used in a contract or in a statute so as not to embrace within its meaning local or special taxes, although both kinds of taxation derive their authority from the general taxing power. Leonard, J., Newby v. Platte, 25 Mo., 258, 269, 272; Lockwood v. St. Louis, 24 Mo., 20, 22; Garrett v. St. Louis, 25 Mo., 505, 513; Neenan v. Smith, 50 Mo., 525, 529.

The foundation of the power to lay a special tax, as for paving, is the benefit which the object of the tax confers on the owner of the property. Wistar v. Philadelphia, 80 Pa. St., 505; 21 Am. Rep., 112.

Special assessments explained and judicial history given in Macon v. Patty, 57 Miss., 378, per George, C. J.

Special assessments as an exercise of the police power. Palmer v. Way, 6 Colo., 106; State (Agens)

v. Newark, 37 N. J. L., 415; Washington v. Nashvile, 1 Swan (Tenn.), 177; McBean v. Chandler, 9 Heisk (Tenn.), 349; Paulsen v. Portland, 149 U. S., 30; Morrison v. Morey, 146 Mo., 543; 48 S. W. Rep., 629; Allen v. Drew, 44 Vt., 174.

Ochicago, etc. R. R. Co. v. Chicago, 166 U. S., 226, 241; Long Island Water Supply Co. v. Brooklyn, 166 U. S., 685, 695.

⁹¹ Per Wagner, J., in McCormack v. Patchin, 53 Mo., 33, 36. McGrath v. Clemens, 49 Mo., 552, 554.

"The tax is local and for local purposes, and is a tax upon benefits and not directly upon property * * * The cost of the public benefit is made a public burden, and the expense of the individual benefit is placed upon the shoulders of the person who receives it." Per Napton, J., in Garrett v. St. Louis, 25 Mo., 505, 513.

92 172 U. S., 269, affirming 74 Fed. Rep., 997.

the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." The principle of the Norwood-Baker case is that a special assessment levied under a rule which makes it possible that the assessment may exceed the benefit to the land in question and in fact does exceed it, is void. In this case the land for the street was taken without compensation, and in addition the property owner was assessed some \$218.58, to pay the cost of the condemnation proceedings.94

The rule that a method of assessment cannot be arbitrary, and must have some relation to the benefits appears reasonable. It would seem that the legislature is competent to judge of benefits. This is assumed by the current of authority. A public improvement having been made, the question of determining the area benefited by such improvement is generally held to be a legislative function, and such legislative determination, unless palpably unjust, is usually conclusive.⁹⁵ The prohibi-

93 Three of the justices dissented through Mr. Justice Brewer (Mr. Justice Shiras and Mr. Justice Gray), who held that the determination of the property to be assessed was solely a legislative function, that it was not at all a judicial question. See comments on Norwood v. Baker, supra, in Sears v. Boston, 173 Mass., 350; 53 N. E. Rep., 876; Cowley v. Spokane, 99 Fed. Rep., 840; Lyon v. Tonawanda, 98 Fed. Rep., 361; Charles v. Marion, 98 Fed. Rep., 166; Loeb v. Trustees Columbia Tp., 91 Fed. Rep., 37; Davidson v. Wight, 16 Dist. of Columbia App., 371; Wood v. Quimby, 20 R. I., 482; 40 Atl. Rep., 161.

94 See State (Agens) v. Newark, 37 N. J. L. 415. Norwood-Baker case followed in Hutcheson v. Storrie, 92 Tex., 685; 51 S. W. Rep., 848; 45 L. R. A., 289.

Misconception and erroneous application in Fay v. Springfield, 94 Fed. Rep., 409.

95 Williams v. Eggleston, 170 U.
S., 304, 311; Ill. Cent. R. R. Co. v.
Decatur, 147 U. S., 190; Spencer
v. Merchant, 125 U. S., 345, 355;
100 N. Y., 585; 3 N. E. Rep., 682;
Hagar v. Reclamation District, 111
U. S., 701.

Where the assessment is against the abutting property, whether it "shall be upon all property found to be benefited, or alone upon the tion is that assessments shall not be levied in excess of the benefits conferred, whether by the valuation, front foot, area, or any other method. The series of decisions of the United States Supreme Court in April, 1901, fully sustain the principle that the question of determining the property or area benefited is one for the legislative department. These principles were declared: 1. The apportionment of the entire cost of a street improvement upon the abutting lots according to their frontage, without any judicial inquiry as to their value or the benefits they receive, may be authorized by the legislature; and this will not constitute a taking of property without due process of law. The legislative act need not provide for a hearing, allowing the property owner to show that his property was not benefited to the amount of the assessment.

abutters, according to frontage or according to the area of their lots is, according to the present weight of authority, (1890) considered to be a question of legislative expediency." 2 Dillon on Mun. Corp. (4th Ed.) sec. 752, approved in Parsons v. District of Columbia, 170 U. S., 45; Astor v. New York, 37 N. Y. Super. Ct. (5 Jones & S.), 539.

⁹⁶ Norwood v. Baker, 172 U. S., 269, 277, 282. On general subject of special assessment see Bell's etc, Co. R. R. v. Pennsylvania, 134 U. S., 232, 237; Scott v. Toledo, 36 Fed. Rep., 385; Kansas City v. Bacon, 147 Mo., 259; 48 S. W. Rep., 860; Schroder v. Overman, 61 Ohio St., 1; 47 L. R. A., 156; 55 N. E. Rep., 158.

Decisions rendered since Norwood-Baker case.

California—Hadley v. Dague, 130 Cal., 207; 62 Pac. Rep., 500.

Illinois—Farrell v. West Chicago Park Comrs., 182 Ill., 250, 254; 55 N. E. Rep., 325.

Indiana—Adams v. Shelbyville, 154 Ind., 467; 57 N. E. Rep., 114.

Kentuchy-Augusta v. McKib-

ben, 22 Ky. Law Rep., 1224; 60 S. W. Rep., 291.

Massachusetts—Sears v. Boston, 173 Mass., 71; 53 N. E. Rep., 138. Michigan—Cass Farm Co. v. Detroit, 124 Mich., 433; 83 N. W. Rep., 108.

Minnesota—Ramsey County v. Robt. P. Lewis, Co., (Minn. 1901) 86 N. W. Rep., 611; 53 L. R. A., 421

Missouri—Barber, A. P., Co. v. French, 158 Mo., 534; 58 S. W. Rep., 934; Heman v. Gilliam, 171 Mo., 258; 71 S. W. Rep., 163.

New York—Conde v. Schnectady, 164 N. Y., 258; 58 N. E. Rep., 130.

Pennsylvania—Harrisburg v. Mc-Pherran, 200 Pa., 343; 49 Atl. Rep., 988.

Wisconsin—Gleason v. Waukesha Co., 103 Wis., 225; 79 N. W. Rep., 249.

97 Tonawanda v. Lyon, 181 U. S.,
389; Cass Farm Co. v. Detroit, 181
U. S., 396.

98 Detroit v. Parker, 181 U. S.,
399; French v. Barber, A. P., Co.
181 U. S., 324; Shumate v. Heman,
181 U. S., 402.

taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or to superficial area or frontage. 99
4. The Congress has power to provide for assessments on abutting lands and lands benefited, of one-half or more of the damages for and in respect of land condemned for the opening of streets, in the District of Columbia. These cases fully explain the Norwood-Baker case and declare that it is "to be limited to its special facts." In the opinion of the majority of the judges, the nature and effect of the proceedings in the case of Norwood-Baker was an attempt, under the guise of legal proceedings, to deprive a citizen of property without due process of law. In the decisions delivered in April, 1901, a dissenting opinion was filed by Mr. Justice Harlan, with whom Mr. Justice McKenna and Mr. Justice White concurred.

§ 523. Uniformity and equality of special assessments. The rule is generally laid down and enforced that, the usual con-

99 Webster v. Fargo, 181 U. S., 394.

¹ Wight v. Davidson, 181 U. S., 371

² Decisions exist which sustain the theory that local assessments for public improvements need not be based on any special benefits to the property assessed. *In re* Bonds of Madera Irrigation Dist., 92 Cal., 296; 28 Pac. Rep., 272, 675; 14 L. R. A., 755; Rolph v. Fargo, 7 N. D., 640; 76 N. W. Rep., 242; 42 L. R. A., 646; Allen v. Davenport, 107 Iowa, 90; 77 N. W. Rep., 532; Dewey v. Des Moines, 101 Iowa, 416; 70 N. W. Rep., 605; and Iowa cases cited on page 423 of state report.

But this theory is rejected by most of the decisions. Asberry v. Roanoke, 91 Va., 562; 22 S. E. Rep., 360; notes to 14 L. R. A., 755 and 42 L. R. A., 636.

Power to levy special assessment for local improvement must exist.

Caldwell v. Rupert, 10 Bush. (73 Ky.), 179, 182.

Cannot be levied for street intersection unless the law so provides. Button v. Kremer, 24 Ky. Law Rep., 1194; 71 S. W. Rep., 332.

REPAIRING SIDEWALKS authorized. Skinker v. Heman, 148 Mo., 349; 49 S. W. Rep., 1026; Wilhelm v. Defiance, 58 Ohio St., 56; 50 N. E. Rep., 18; 65 Am. St. Rep., 745; Warren v. Barber, A. P., Co., 115 Mo., 572, 580; 22 S. W. Rep., 490; Moberly, v. Hogan, 131 Mo. 19; 32 S. W. Rep., 1014; Ross v. Stackhouse, 114 Ind., 200; 16 N. E. Rep., 501.

Objection to reconstruction of sidewalk under valid ordinance must be made before the work is begun and cannot be set up for the first time in the special tax bill suit. Heman v. Ring, 85 Mo. App., 231.

FRONTAGE RULE. Franklin v. Hancock, 204 Pa. St., 101; 53 Atl. Rep., 644.

stitutional mandate enjoining equality and uniformity in taxation does not apply to special assessments or taxation for local improvements.⁴ "Charges for the costs of a local improvement against the property benefited by the improvement, although an exercise of the taxing power, are not such taxes as are referred to in the various clauses of the constitution * * * and they are neither embraced, nor intended to be embraced in

Benefit; property owner cannot show that improvement is not a benefit to the property. Smith v. Worcester, 182 Mass., 232; 65 N. E. Rep., 40; 59 L. R. A., 728; Keith v. Bingham, 100 Mo., 300; 13 S. W. Rep., 683.

⁴ California—Burnett v. Sacramento, 12 Cal., 76; 73 Am. Dec., 518; Emery v. San Francisco Gas Co., 28 Cal., 345.

Colorado—Denver v. Knowles, 17 Colo., 204; 30 Pac. Rep., 1041; 17 L. R. A., 135, following Palmer v. Way, 6 Colo., 106.

Florida—Edgerton v. Green Cove Springs, 19 Fla., 140.

Georgia—Speer v. Athens, 85 Ga., 49; 11 S. E. Rep., 802; 9 L. R. A., 402.

Illinois—Murphy v. People, 120 Ill., 234; 11 N. E. Rep., 202; Hundley v. Lincoln Park Com'rs, 67 Ill., 559.

Indiana—Rienken v. Fuehring, 130 Ind., 382; 30 N. E. Rep., 414; 30 Am. St. Rep., 247; 15 L. R. A., 524.

Iowa—Warren v. Henly, 31 Iowa, 31.

Kansas—Ottawa County Com'rs v. Nelson, 19 Kan., 234; Hines v. Leavenworth, 3 Kan., 186.

Kentucky—Holzhauer v. Newport, 94 Ky., 396; 22 S. W. Rep., 752.

Louisiana—New Orleans v. Elliott, 10 La. Ann., 59; In re New Orleans, 20 La. Ann., 497.

Minnesota—State v. St. Louis

County Dist. Ct., 61 Minn., 542; 64 N. W. Rep., 190.

Mississippi—Daily v. Swope, 47 Miss., 367.

North Carolina — Hilliard v. Asheville, 118 N. C., 845; 24 S. E. Rep., 738; Raleigh v. Peace, 110 N. C., 32; 14 S. E. Rep., 521; 17 L. R. A., 330; Cain v. Davie County Com'rs, 86 N. C., 8; Shuford v. Lincoln County Com'rs., 86 N. C., 552.

Ohio—Gest v. Cincinnati, 26 Ohio St., 275; Bonsall v. Lebanon, 19 Ohio, 418; Ridenour v. Saffin, 1 Handy (Ohio), 464.

Oregon, 580; 27 Pac. Rep., 263; 13 L. R. A., 533; King v. Portland, 2 Oregon, 146.

Pennsylvania—Beaumont v. Wilkes-Barre, 142 Pa. St., 198; 21 Atl. Rep., 888; Chester v. Black, 132 Pa. St., 568; 19 Atl. Rep., 276; 6 L. R. A., 802; Shoemaker v. Harrisburg, 122 Pa. St., 285; 16 Atl. Rep., 366; Huidekoper v. Meadville, 83 Pa. St., 156.

Rhode Island—Bishop v. Tripp, 15 R. I., 466; 8 Atl. Rep., 692.

Texas—Taylor v. Boyd, 63 Tex., 533; Roundtree v. Galveston, 42 Tex., 612.

Virginia—Violett v. Alexandria, 92 Va., 561; 23 S. E. Rep., 909; 53 Am. St. Rep., 825; 31 L. R. A., 382; Richmond & A. R. R. Co. v. Lynchburg, 81 Va., 473; Sands v. Richmond, 31 Gratt. (Va.), 571; 31 Am. Rep., 742.

them."5 It is a fundamental rule that an assessment or a tax for local benefits should be distributed among, and imposed upon, all equally standing in like relations. Hence, one street cannot be improved at the expense of the property owners of another.6 So, an ordinance authorizing the cost of grading a section of a street to be charged against, not only the property fronting on that section, but also against property fronting on another section which has been graded at the cost of that property exclusively is inequitable and unjust.7 So, under a constitutional provision reciting that, "the legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of property benefited; for all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same''—a tax levied upon all the real estate of a city, and not upon personal property, for the purpose of making local improvements, is, in the opinion of the Supreme Court of Nebraska, unconstitutional and void, either considered as a special tax or as a general one.8

The general rule is, that taxation, whether general or special, must be uniform, and must be distributed among those who are required to pay it by a just ratio of apportionment. It hardly need be observed that no system of taxation has ever been devised, and probably never will be, that will lay equal bur-

Washington—Spokane Falls v. Browne, 3 Wash. St., 84; 27 Pac. Rep., 1077; Austin v. Seattle, 2 Wash. St., 667; 27 Pac. Rep., 557.

Wisconsin—Bond v. Kenosha, 17

Wis., 284.

Respecting rule of equality and uniformity examine. Jones v. Detroit Water Comr's., 34 Mich., 273; In re Willis Ave., 56 Mich., 244; 22 N. W. Rep., 871; Mauldin v. Greenville, 42 S. C., 293; 20 S. E. Rep., 842; 46 Am. St. Rep., 723; 27 L. R. A., 284; Washington v. Nashville, 1 Swan. (31 Tenn.), 177; Norfolk v. Chamberlain, 89 Va., 196; 16 S. E. Rep., 730; Lumsden v. Cross, 10 Wis., 282.

⁵ Per Norton, J., in Farrar v. St. Louis, 80 Mo., 379, 387; Kansas City v. Bacon, 147 Mo., 259; 48 S. W. Rep., 860; Lamar, W. & E. L., Co. v. Lamar, 128 Mo., 188; 26 S. W. Rep., 1025; 31 S. W. Rep., 756; St. Joseph v. Owen, 110 Mo., 445; 19 S. W. Rep., 713; Clinton v. Henry County, 115 Mo., 557; 22 S. W. Rep., 494; Adams v. Lindell, 72 Mo., 198, affirming 5 Mo. App., 197. ⁶ Kansas City Grading Co. v. Holden, 32 Mo. App., 490.

⁷ Halpin v. Campbell, 71 Mo., 493.

8 Kittle v. Shervin, 11 Neb., 65;7 N. W. Rep., 861.

dens on all alike. The difficulty of approximating equality in apportioning special assessments or taxes has long been realized. "The question is not whether individual instances of injustice may occur. It is not whether the tax will produce perfect equality of burdens, nor whether the power * * * may not be abused. We know too well that under any system of taxation these things may and do happen. These are evils not within the power of the courts to remedy. It is for the legislature to guard against them." 10

§ 524, Purposes of special assessments. The purposes for which special assessments may be made are controlled by the local laws. The object must be public.¹¹ It has been said that a municipal corporation having power to make local improvements by special assessment and taxation has implied power to declare what are local improvements, where such declaration is not made arbitrarily or unreasonably, or without reference to benefits.¹² But an ordinance declaring that a proposed improvement is a local improvement is not a conclusive determination of the question.¹³ Special assessments are usually imposed for the making of streets and public ways, the construction of drains and sewers, sometimes for street cleaning and sprinkling,¹⁴ and other specified public purposes. Thus in Massachusetts, it has been held that assessments for

Particular Local Improvements under various charters. Municipality No. 2 v. McDonough, 16 La., 553; New Orleans v. McDonough, 9 Rob. (La.), 408; Briggs v. Whitney, 159 Mass., 97; 34 N. E. Rep., 179; People v. Lawrence, 36 Barb. (N. Y.), 177; Krumberg v. Cincinnati, 29 Ohio St., 69; Wilson v. Allegheny, 79 Pa. St., 272.

RAILROAD BRIDGE; right to provide by special taxation denied. Bloomington v. Chicago & A. R. Co., 134 Ill., 451; 26 N. E. Rep., 366.

⁹ Independence v. Gates, 110 Mo.,374, 381; 19 S. W. Rep., 728.

¹⁰ Per Napton, J., in Garrett v. St. Louis, 25 Mo., 505, 513.

[&]quot;As in all applications of the taxing power, it is not always possible to establish a scheme of assessment which shall bear with absolute uniformity on all property subject to the tax. Much latitude of discretion * * * belongs to the legislative department, and the courts will not interfere with it unless there is some manifest abuse." Keith v. Bingham, 100 Mo., 300, 307; 13 S. W. Rep., 683, quoted with approval in St. Joseph v. Farrell, 106 Mo., 437, at p. 442; 17 S. W. Rep., 497.

¹¹ In re Market Street, 49 Cal., 546.

¹² Illinois Central R. R. Co. v. Decatur, 154 Ill., 173; 38 N. E. Rep., 626.

¹³ Morgan Park v. Wiswall, 155Ill., 262; 40 N. E. Rep., 611.

¹⁴ STREET SPRINKLING authorized

sprinkling streets within a specified territory may be made lawfully in Boston upon abutting property, although the sprinkling of other parts of the city is done at the public expense; and that the frontage rule may be applied.¹⁵ So, in Minnesota it has been decided that street sprinkling is a "local improvement" for which special assessments may be made upon the property fronting on the street sprinkled, in proportion to its lineal feet frontage, without regard to its valuation.¹⁶ But in Illinois ¹⁷ and in other jurisdictions a contrary conclusion has been reached.¹⁸ Special assessments upon abutting property for the expense of sweeping streets, including crossings, have been adjudged valid in Indiana, on the ground of special benefit, even where the abutting owners were taxed with the balance of the public for cleaning other streets in which the public alone have an interest.¹⁹

What part of the cost of street construction or reconstruction (whether the total cost or only a part thereof, and what part or parts, and whether for repairs or maintenance after the street is made, and whether after the street is once made it may be

by charter. St. Louis Charter, Art. VI, § 29 (amendment Oct. 22, 1901); Charter Kansas City, Art. IX, § 21.

15 Sears v. Boston, 173 Mass., 71; 53 N. E. Rep., 138; 43 L. R. A., 834, wherein Norwood v. Baker, 172 U. S., 269, is considered and approved, as well as numerous special tax or assessment decisions.

¹⁶ State *ex rel.* v. Reis, 38 Minn., 371; 38 N. W. Rep., 97.

¹⁷ Chicago v. Blair, 149 Ill., 310;
 36 N. E. Rep., 829; 24 L. R. A.,
 412.

18 N. Y. Life Ins. Co. v. Prest, 71 Fed. Rep., 815, where it is said (per Philips, D. J.): "It (the improvements) is as evanescent as the early and later dew, and, in my judgment, it is no more within the power of the municipality thus to create liens on citizens' property than to hire a rainmaker to vex the skies for refreshing show-

ers, and to charge the lots adjacent to the raindrops with the cost thereof. As the sprinkling of the public highways of a city, like the cleaning thereof, contributes much to the comfort and enjoyment of the public, its cost should be made a general and not a special burden."

In Kansas City v. O'Connor, 82 Mo. App., 655, 660, Ellison, J., expressed the opinion that, as a special tax against abutting property is based and sustained on the idea that the work for which the tax is laid is an improvement of the property, sprinkling to keep down the dust, while good for the comfort of the inhabitants, "is too intangible to be denominated an improvement of the property."

To same effect Pettit v. Duke, 10 Utah, 311; 37 Pac. Rep., 568.

Reinken v. Fuehring, 130 Ind.,
 382; 15 L. R. A., 624; 30 N. E. Rep.,
 414; 30 Am. St. Rep., 247,

reconstructed), may be assessed as a special tax must be determined by a proper construction of the local laws applicable.²⁰

§ 525. **Preliminary proceedings.** Prior to the formal ordering of the improvements (which is usually a legislative act, executed by ordinance or resolution) what preliminary proceedings, if any, are required, depends upon the local laws applicable and the nature of the proposed improvement. If the improvement involves the condemnation of private property, or the levying of special assessments against the property assumed to be benefited, strict adherence to all mandatory and jurisdictional provisions are rigidly enforced by the courts, and properly so.²¹ It is a general rule that when measures are authorized by statute or charter "in derogation of the common law, which may result in divesting the title of one person to land, and transferring it to another, that every requisite hav-

²⁰ Discretionary with local authorities. Watson v. Chicago, 115 lll., 78; 3 N. E. Rep., 430.

SPECIAL ASSESSMENTS FOR IMPROVEMENTS MADE.

California—In re Market Street, 49 Cal., 546.

Connecticut—Meriden v. Camp, 46 Conn., 284.

Illinois—McChesney v. Chicago, 152 Ill., 543; 38 N. E. Rep., 767; Weld v. People, 149 Ill., 257; 36 N. E. Rep., 1006; Ricketts v. Hyde Park, 85 Ill., 110; Prindiville v. Jackson, 79 Ill., 337; Dorathy v. Chicago, 53 Ill., 79; Pease v. Chicago, 21 Ill., 500.

Indiana—Elkhart v. Wickwire, 121 Ind., 331; 22 N. E. Rep., 342; Bennett v. Seibert, 10 Ind. App., 369; 35 N. E. Rep., 35; 37 N. E. Rep., 1071.

Massachusetts—Slocum v. Brookline, 163 Mass., 23; 39 N. E. Rep., 351.

New Jersey—Jelliff v. Newark, 48 N. J. L., 101; 2 Atl. Rep., 627; 49 N. J. L., 239; 12 Atl. Rep., 770. New York—In re Cullen, 119 N. Y., 628; 23 N. E. Rep., 1144; affirming 53 Hun. (N. Y.), 534; 6 N. Y. Supp., 625; In re Sackett, 74 N. Y., 95, affirming 4 Hun. (N. Y.), 92; 6 Thomp. & C. (N. Y.), 347; Manice v. New York, 8 N. Y., 120; Wetmore v. Campbell, 2 Sandf. (N. Y.), 341.

Pennsylvania—Appeal of Harper, 109 Pa. St., 9; 1 Atl. Rep., 791

Texas—Alford v. Dallas (Tex. Civ. App., 1896), 35 S. W. Rep., 816.
RECONSTRUCTION AND REPAIRS.
Baltimore v. Scharf, 54 Md., 499;
O'Meara v. Green, 16 Mo. App.,
118; Farrell v. Rammelkamp, 64
Mo. App., 425; Ritterskamp v. Stifel, 59 Mo. App., 510; State ex rel.
v. Corrigan Consolidated Street
Ry. Co., 85 Mo., 263; In re Fulton
Street, 29 How. Pr. (N. Y.), 429.

CROSS-WALKS, INTERSECTIONS AND CONNECTIONS. Gibson v. Kayser, 16 Mo. App., 404.

CURBING. Gibson v. Kayser, 16 Mo. App., 404.

GRADING. Gibson v. Kayser, 16 Mo. App., 404.

ALLEY. St. Louis v. Juppier, 16 Mo. App., 557.

²¹ Indiana—Case v. Johnson, 91 Ind., 477.

ing the semblance of benefit to the owner must be strictly complied with."22

Massachusetts—Northampton v. Abell, 127 Mass., 507.

Missouri—Trenton v. Coyle, 107 Mo., 193; 17 S. W. Rep., 643; Saxton v. St. Joseph, 60 Mo., 153; Stewart v. Clinton, 79 Mo., 603; Werth v. Springfield, 78 Mo., 107; State ex rel. v. Barlow, 48 Mo., 17; State ex rel. v. St. Louis, 56 Mo., 277; Perkinson v. Partridge, 3 Mo. App., 60.

New Jersey—State v. Jersey City, 54 N. J. L., 49; 22 Atl. Rep., 1052; State (Arnett) v. Lambertville (N. J. L. 1886) 6 Atl. Rep., 432.

Oregon — Hawthorne v. East Portland, 13 Oregon, 271; 10 Pac. Rep., 342.

Preliminary proceedings not required. Kelsey v. King, 32 Barb. N. Y., 410; 11 Abb. Pr. (N. Y.), 180; Pooley v. Buffalo, 122 N. Y., 592; 26 N. E. Rep., 16.

Directory provisions. McKune v. Weller, 11 Cal., 49, 54; Steinlein v. Halstead, 52 Wis., 289, 293; 8 N. W. Rep., 881.

A provision that the council "may, by ordinance," prescribe general rules "as to the material to be used and the mode of executing the work," held not mandatory. The council may obtain jurisdiction without observing the condition. Santa Cruz Rock Pavement Co. v. Heaton, 105 Cal., 162; 38 Pac. Rep., 693.

Maps and Surveys of streets, etc., to be laid out, provisions as to, held directory in Coles v. Williamsburgh, 10 Wend. (N. Y.), 659.

²² Per Dixon, C. J., in Kneeland v. Milwaukee, 18 Wis., 411, 418; Atkins v. Kinnan, 20 Wend. (N. Y.), 241.

Plans. Failure to make proper

plans, etc., and failure to let the contract to the lowest bidder are fatal. Wells v. Burnham, 20 Wis., 112. Making and filing of plans and specifications for street and sewer construction held to be conditions precedent to power to proceed with the proposed improvement. Kneeland v. Milwaukee, 18 Wis., 411, 417; Myrick v. La Crosse, 17 Wis., 442.

IRREGULARITIES. Minor irregularities will not invalidate the special tax. Warner v. Knox, 50 Wis., 429; 7 N. W. Rep., 372.

Omissions which do not prejudice the tax payer. Houghton v. Burnham, 22 Wis., 301, 306.

Departure from ordinance in constructing sidewalk, held not material. Steffen v. Fox, 124 Mo., 630; 28 S. W. Rep., 70; 56 Mo. App., 9.

Statute providing that errors in the proceedings in the council shall not exempt from payment after the work has been done. Broadway Baptist Church v. McAtee, 8 Bush. (Ky.), 508.

"Informality, irregularity or defect," enabling it to recover for improvement for sidewalk, means error or omission to do something which in no manner affects the jurisdiction of the city to build the walk. Where a resolution providing therefore is repealed, city has no jurisdiction. Chariton v. Holliday, 60 Iowa, 391; 14 N. W. Rep., 775.

Irregularities in council proceedings in ordering improvement may be corrected by the court, so that no one's property may be improved at the general expense of the city when in equity he should himself pay for the same. Coving-

The manner in which the proceedings shall be instituted and conducted is generally specifically provided by charter or statute. Some charters require certain preliminary steps, as notice to the property owners interested,²³ and hearing before certain municipal officers, committees or boards, as the board of public works or improvements.²⁴ In justice to the property owners when they must bear the burden of the cost of the improvements, they are frequently given by express provision of law an opportunity to protest or remonstrate against the proposed improvement at a hearing duly convened for this purpose before specified officers, committees or boards.²⁵

ton v. Dressman, 6 Bush. (Ky.), 210.

ESTOPPEL. Argenti v. San Francisco, 16 Cal., 255. Too late to object to preliminary proceedings where the land owners with notice of such proceedings have failed to object until after the work is completed and paid for by the city. State (Youngster) v. Paterson, 40 N. J. L., 244.

²³ California—Charter San Francisco, art. VI, ch. 2, §§ 3 and 4; statutes and amendments to Codes of Cal. (1898), pp. 293, 294; Anderson v. De Urioste, 96 Cal., 404; 31 Pac. Rep., 266.

Colorado—Brown v. Denver, 7 Colo., 305; 3 Pac. Rep., 455.

Indiana—Barber A. P. Co. v. Edgerton, 125 Ind., 455; 25 N. E. Rep., 436; Swain v. Fulmer, 135 Ind., 8; 34 N. E. Rep., 639; Kiphart v. Pittsburgh C. C. & St. L. Ry. Co., 7 Ind. App., 122; 34 N. E. Rep., 375.

Michigan—Kundinger v. Saginaw, 59 Mich., 355; 26 N. W. Rep., 634; Osborne v. Detroit, 32 Mich., 282; Mills v. Detroit, 95 Mich., 422; 54 N. W. Rep., 897.

New Jersey—State (Vanatta) v. Morristown, 34 N. J. L., 445, 452; Beam v. Paterson, 47 N. J. L., 15; State v. Jersey City, 27 N. J. L., 536; State v. Jersey City, 35 N. J.

L., 404, 408; State v. Newark, 31 N. J. L., 360.

New York—People ex rel. v. Rochester, 5 Lans. (N. Y.), 11; In re Central Park Comrs., 51 Barb. (N. Y.), 277; In re Anderson, 60 N. Y., 457.

Notice is jurisdictional. Joyce v. Barron, 67 Ohio St., 264; 65 N. E. Rep., 1001.

Notice need not be provided. Davis v. Lynchburg, 84 Va., 861; 6 S. E. Rep., 230; Hawley v. Harrall, 19 Conn., 142.

²⁴ HEARING; where the law requires. Courts are strict in enforcing all legal provisions relating thereto. Gray v. Burr, 138 Cal., 109; 70 Pac. Rep., 1068.

The power conferred upon the council to hear, cannot be delegated, for example, to the clerk, nor can the council limit objections made in writing, where the charter allows a hearing before the council itself. State (Durant) v. Jersey City, 25 N. J. L., 309.

Necessity of hearing on subsequent change of proposed plan. Washburn v. Chicago, 198 Ill., 506; 64 N. E. Rep., 1064.

²⁵ Arkansas—Keel v. Board of Directors, etc., 59 Ark., 513; 27 S. W. Rep., 590.

California—Smith v. Hazard, 110 Cal., 145; 42 Pac. Rep., 465;

§ 526. Petition or consent of property owners affected. Under many charters, where the cost of the improvement is to be paid for by special assessments or taxation against private property, the consent of the property owners whose property must bear the burden is required as a condition precedent to proceed with the contemplated improvement. This is usually evidenced by petition, signed by the requisite number of land owners whose property fronts on the proposed improvement, or those whose property is in the assessment or taxing district. Whether such step is jurisdictional, of course, depends upon the proper construction of the local charter. Many cases construing various charter provisions relating to the several kinds of improvements are set out in the note.²⁶

Los Angeles Lighting Co. v. Los Angeles, 106 Cal., 156; 39 Pac. Rep., 535; Burnett v. Sacramento, 12 Cal., 76; 73 Am. Dec., 518.

Indiana—Kirkland v. Indianapolis, 142 Ind., 123; 41 N. E. Rep., 374; House v. Greensburg, 93 Ind., 533; Spiegel v. Gansberg, 44 Ind., 418.

Kansas—Marshall v. Leavenworth, 44 Kan., 459; 24 Pac. Rep., 975.

Louisiana—Daniels v. New Orleans, 26 La. Ann., 1.

Mississippi—Nugent v. Jackson, 72 Miss., 1040; 18 So. Rep., 493.

Missouri—Forbis v. Bradbury, 58 Mo. App., 506; Fruin-Bambrick Const. Co. v. Geist, 37 Mo. App., 509.

New Jersey—Jersey City Brewery Co. v. Jersey City, 42 N. J. L., 575; Green v. Jersey City, 42 N. J. L., 565; State (Durant) v. Jersey City, 25 N. J. L., 309; Vanderbeck v. Jersey City, 44 N. J. L., 626.

New York—In re Street Opening and Improvement Board, 133 N. Y., 436; 31 N. E. Rep., 316; In re Street Opening Board, 82 Hun. (N. Y.), 580; 31 N. Y. Supp., 732.

Oregon—Clinton v. Portland, 26 Oregon, 410; 38 Pac. Rep., 407.

Utah—Armstrong v. Ogden City, 12 Utah, 476; 43 Pac. Rep., 119.

²⁶ Consent of Property Owners or Petition, required.

California—Mulligan v. Smith, 59 Cal., 206; Dyer v. Miller, 58 Cal., 585; Gately v. Leviston, 63 Cal., 365.

Indiana—Case v. Johnson, 91 Ind., 477; Covington v. Nelson, 35 Ind., 532.

Nebraska—Jones v. South Omaha (Neb. 1902), 94 N. W. Rep., 957.

New York—People v. Rochester, 21 Barb. (N. Y.), 656; In re Banta, 60 N. Y., 165.

United States—Liebman v. San Francisco, 24 Fed. Rep., 705.

Petition. State (Ogden) v. Hudson, 29 N. J. L., 104; Corry v. Gaynor, 22 Ohio St., 584; Anderson v. Hamilton County Comrs., 12 Ohio St., 635.

Petition and notice. Dennison v. Kansas City, 95 Mo., 416; 8 S. W. Rep., 429; Verdin v. St. Louis, 131 Mo., 26; 33 S. W. Rep., 480; 36 S. W. Rep., 52.

Publication of preliminary resolution declaring necessity for, etc. Upington v. Oviatt, 24 Ohio St., 232.

§ 527. Opening and establishment of streets. Public highways may be created (1) by dedication, (2) by prescription, or (3) by condemnation proceedings. The street must be es-

Sometimes the requirement does not apply to all improvements. Ganson v. Buffalo, 2 Abb. Dec. (N. Y.), 236; Philadelphia v. Tryon, 35 Pa. St., 401.

Prescribed vote of council, as two-thirds, may pass, without petition. Lafayette v. Fowler, 34 Ind., 140; Jessing v. Columbus, 1 Ohio Cir. Ct. Rep., 90.

STREET IMPROVEMENTS, required. Indiana—Shrum v. Salem, 13 Ind. App., 115; 39 N. E. Rep., 1050; approving Allen v. Salem, 10 Ind. App., 650; 38 N. E. Rep., 425.

Minnesota—Bradley v. West Duluth, 45 Minn., 4; 47 N. W. Rep., 166.

Nebraska—Von Steen v. Beatrice, 36 Neb., 421; 54 N. W. Rep., 677; State v. Birkhauser, 37 Neb., 521; 56 N. W. Rep., 303.

New York—In re Garvey, 77 N. Y., 523; In re Delaware & H. Canal Co., 60 Hun. (N. Y.), 204; 14 N. Y. Supp., 585; Miller v. Amsterdam, 149 N. Y., 288; 43 N. E. Rep., 632, affirming Smith v. Amsterdam, 78 Hun. (N. Y.), 609; 28 N. Y. Supp., 1021.

Pennsylvania—Pittsburg v. Walter, 69 Pa. St., 365; Philadelphia v. Lea, 5 Phila. (Pa.), 77; In refrederick Street, 11 Pa. Co. Ct. Rep., 114.

Wisconsin—Dean v. Madison, 9 Wis., 402.

Grading street at expense of property. Steinmuller v. Kansas City, 3 Kan. App., 45; 44 Pac. Rep., 600.

Street opening included. Wood-ruff v. Elizabeth, 30 N. J. L., 176; Brooklyn v. Patchen, 8 Wend. (N. Y.), 47.

Private alley; opening. People

v. Judge of Recorder's Ct. of Detroit, 40 Mich., 64.

Paving street. McGuinn v. Peri, 16 La. Ann., 326; Henderson v. Baltimore, 8 Md., 352; Bouldin v. Baltimore, 15 Md., 18; Baltimore v. Eschback, 18 Md., 276.

Re-paving. In re Smith, 99 N. Y., 424; 2 N. E. Rep., 52; Jex v. New York, 103 N. Y., 536; 9 N. E. Rep., 39.

Where property owners petition that street be "graded and graveled," at a cost of \$750; the work can not be changed to macadamizing and guttering, at a cost of over \$5,000 without a new petition. Watkins v. Griffith, 59 Ark., 344; 27 S. W. Rep., 234.

SEWERS. Keese v. Denver, 10 Colo., 112; 15 Pac. Rep., 825; Works v. Lockport, 28 Hun. (N. Y.), 9; Bacon v. Nanny, 55 Hun. (N. Y.), 606; 7 N. Y. Supp., 804; Van Brunt v. Flatbush, 128 N. Y., 50; 27 N. E. Rep., 973, reversing 59 Hun. (N. Y.), 192; 13 N. Y. Supp., 545.

Vacating Streets. Gargan v. Louisville, N. A. & C. Ry. Co., 89 Ky., 212; 12 S. W. Rep., 259; 6 L. R. A., 340; Excelsior Brick Co. v. Haverstraw, 62 Hun. (N. Y.), 620; 16 N. Y. Supp., 681; Pettibone v. Hamilton, 40 Wis., 402; Warren v. Wausau, 66 Wis., 206; 28 N. W. Rep., 187; James v. Darlington, 71 Wis., 173; 36 N. W. Rep., 834.

WIDENING STREET. Carron v. Martin, 26 N. J. L., 594; 69 Am. Dec., 584, reversing Martin v. Carron, 26 N. J. L., 228.

SLIGHT CHANGE OF STREET GRADE, without consent sustained. Auditor General v. Chase (Mich. 1903),

tablished before it can be improved.27 The law respecting the

94 N. W. Rep., 178; 10 Detroit Leg. News, 34.

PETITION. A recital in the ordinance that a majority of the property owners had petitioned for the improvement is *prima facie* evidence that the petition exists. Farrell v. West Chicago, 181 U. S., 404; 21 Sup. Ct. Rep., 609; 45 L. Ed., 924.

CONSENT OR PETITION NOT RE-QUIRED. Spaulding v. Wesson, 84 Cal., 141; 24 Pac. Rep., 377; De Puy v. Wabash, 133 Ind., 336; 32 N. E. Rep., 1016, approving Mc-Eneney v. Sullivan, 125 Ind., 407; 25 N. E. Rep., 540; St. Louis v. Clemens, 36 Mo., 467: State (Mann) v. Jersey City, 24 N. J. L., 662: State (Malone) v. Jersey City, 28 N. J. L., 500; Jelliff v. Newark, 48 N. J. L., 101; 2 Atl. Rep., 627; 49 N. J. L.,239; 12 Atl. Rep., 770; State v. Camden, 53 N. J. L., 322; 21 Atl. Rep., 565; Spring Garden Comrs. v. Wistar, 18 Pa., 195; Beaumont v. Wilkesbarre, 142 Pa. St., 198; 21 Atl. Rep., 888.

Grade of street. Burr v. Newcastle, 49 Ind., 322; State v. Jersey City, 52 N. J. L., 490; 19 Atl. Rep., 1096. By general ordinance, Napa v. Easterby, 76 Cal., 222; 18 Pac. Rep., 253.

Sidewalk. Wilkin v. Houston, 48 Kan., 584; 30 Pac. Rep., 23.

Changing grade. In re Buhler, 32 Barb. (N. Y.), 79; 19 How. Pr. (N. Y.), 317; Mott v. Rush, 2 Hill. (N. Y.), 472; In re Walter, 83 N. Y., 538, affirming 21 Hun. (N. Y.), 533; O'Reilly v. Kingston, 114 N. Y., 439; 21 N. E. Rep., 1004, affirming 39 Hun. (N. Y.), 285.

Does not apply where cost is not to be paid for by special assessments. Goodwillie v. Detroit, 103 Mich., 283; 61 N. W. Rep., 526. Relaying stone pavement with brick, held not to be an original improvement, requiring petition. Reuting v. Titusville, 175 Pa. St., 512; 34 Atl. Rep., 916.

Opening and widening of street. Granger v. Syracuse, 38 How. Pr. (N. Y.), 308.

Extension of street. People v. Port Jervis, 100 N. Y., 283; 3 N. E. Rep., 194.

Dispensing with by charter amendment during pendency of proceedings sustained. Elwood v. Rochester, 43 Hun. (N. Y.), 102.

VACATING STREETS. Excelsion Brick Co. v. Haverstraw, 142 N. Y., 146; 36 N. E. Rep., 819, reversing 66 Hun. (N. Y.), 631; 21 N. Y. Supp., 99.

SEWERS. Park Ecclesiastical Soc. v. Hartford, 47 Conn., 89; St. Louis v. Oeters, 36 Mo., 456; Brewster v. Syracuse, 19 N. Y., 116; Philadelphia v. Tryon, 35 Pa. St., 401; Wood v. McGrath, 150 Pa. St., 451; 24 Atl. Rep., 682; 16 L. R. A., 715.

²⁷ McGinnis v. St. Louis, 157 Mo.,
 191; 57 S. W. Rep., 755.

OPENING STREETS. Preliminary proceedings "are important, to enable the council to properly to decide whether the improvement is proper to be made, as well as to inform the owners of the land to be assessed how it will affect their interests." Preliminary assessment made by the commissioners must be filed within the time prescribed by charter, or the street cannot be opened. State (Ackerman) v. Bergen, 33 N. J. L., 39, 41.

CONDEMNATION. When public property to be condemned for sewer. Kelsey v. King, 32 Barb. (N. Y.), 410; 11 Abb. Pr. (N. Y.), 180.

An alley which is public need not

establishment or opening of streets must be strictly observed.²⁸ Many laws provide that it shall not be lawful to grade, pave or macadamize (to improve) streets, etc., not established and opened according to law and ordinance.²⁹

§ 528. Establishment of street grade. Charters frequently require the council or legislative body to establish by ordinance the location and gradation of streets within the corporate limits. This requirement does not always extend to alleys. Some charters provide that a designated board, as the board of public improvements, shall recommend to the legislative department all ordinances for the establishment or change of grade of streets, public ways, alleys, etc. Under such provision, until the grade of a street or alley is fixed by ordinance the street or alley is not fully established and cannot be ordered to be improved.

Charters generally require the grade to be established before proceedings for the permanent improvement of streets at the expense of property owners shall be commenced.³³ Where the

be condemned when it is to form part of a street, as there is no one to complain. Scotten v. Detroit, 106 Mich., 564; 64 N. W. Rep., 579.

²⁸ People *ex rel*. v. Whitney's Point, 32 Hun. (N. Y.), 508.

²⁹ Particular case. Moran Lindell, 52 Mo., 229.

SEWER may be constructed therein before street is opened. *In re* Fowler, 53 N. Y., 60.

30 Power to open streets implies power to fix grade. Himmelmann v. Hoadley, 44 Cal., 213.

31 Weber v. Johnson, 37 Mo. App., 601. Compare Joyes v. Shadburn, 11 Ky. Law Rep., 892; 13 S. W. Rep., 361.

32 Charter of St. Louis, art VI., sec. 17 (Amendments Oct. 22, 1901.)

33 Napa v. Easterly, 61 Cal., 509; State v. Judges of District Court, 51 Minn., 539; 53 N. W. Rep., 800; 55 N. W. Rep., 122; In re Delaware & H. Canal Co., 60 Hun. (N. Y.), 204; 14 N. Y. Supp., 585, reversing 8 N. Y. Supp., 352. Contract for macadamizing may be let after the contract for the grading has been made and before the grading has been done. Dyer v. Hudson, 65 Cal., 374; 4 Pac. Rep., 231.

If the grade and width of a street have been officially established, it may be ordered planked, though it has not been graded. Knowles v. Seale, 64 Cal., 377; 1 Pac. Rep., 159.

Official grade of all streets may be established by one general ordinance. Napa v. Easterby, 76 Cal., 222; 18 Pac. Rep., 253.

Although the charter requires the grade to be established before the street is paved, the city may order paving and make a contract therefor before the grade is established, where the contract is made with reference to a proposed grade which is established before the work is done. Allen v. Danvenport, 107 Iowa, 90; 77 N. W. Rep., 532.

So, a contract for grading may

grade must be established by ordinance, which is often required,³⁴ the act is legislative,³⁵ and cannot be delegated to executive and administrative officers,³⁶ or to private corporations.³⁷ The doctrine that the legislative body must act as a legal entity, duly convened,³⁸ has been applied to the establishment and change of grade of streets. Thus individual members of the council cannot consent to the placing of dirt on a street and thereby change its grade.³⁹ So the rule, elsewhere explained that, a municipal corporation may ratify the unauthorized acts of its officers and agents which are within the corporate powers,⁴⁰ was applied in Pennsylvania to a change of a grade of a street made by officers without ordinance authority by ratification by the council.⁴¹

In improvement proceedings the question is sometimes presented, What constitutes the establishment of a grade? It has been held in California that the fixing of a definite height of a street at two points does not establish the official grade between such points on an arbitrary straight line drawn between them.⁴² If an ordinance establishes the grade of a street or

be let, although the gradient lines for the street prior to the passage of an order directing the street to be graded have not been fixed. Keough v. St. Paul, 66 Minn., 114; 68 N. W. Rep., 843, reviewing and distinguishing Fitzhugh v. Duluth, 58 Minn., 427; 59 N. W. Rep., 1041; Sang v. Duluth, 38 Minn., 81; 59 N. W. Rep., 878; State v. District Court Judges, 51 Minn., 539; 53 N. W. Rep., 800; 55 N. W. Rep., 122; and State v. District Court, 44 Minn. 244; 46 N. W. Rep., 349.

SIDEWALKS, construction of, to conform to established grade. Burr v. Newcastle, 49 Ind., 322.

Some charters permit sidewalks to be constructed before the street has been graded or macadamized. Challiss v. Parker, 11 Kan., 394.

³⁴ Chicago & N. Pac. R. Co. v. Chicago, 174 Ill., 439; 51 N. E. Rep., 596.

Change of grade to be by ordinance. Kraffe v. Springfield, 86 Mo. App., 530.

Grade established by resolution. State (Meday) v. Rutherford, 52 N. J. L., 499; 19 Atl. Rep., 972.

35 Section 12, supra.

86 Secs. 86 to 89, supra. Chilson
v. Wilson, 38 Mich., 267; Themanson v. Kearney, 35 Neb., 881; 53
N. W. Rep., 1009; Ware v. Rutherford, 55 N. J. L., 450; 26 Atl. Rep., 933.

³⁷ Egbert v. Lake Shore & M. S. Ry. Co., 6 Ind. App., 350; 33 N. E. Rep., 659.

38 Section 91, supra.

³⁹ Denison & Pac. Sub. Ry. Co. v.
 James, 20 Tex. Civ. App., 358; 49
 S. W. Rep., 660.

40 Section 120, supra.

41 McCormick's Appeal, *In re* Shiloh Street, 165 Pa. St., 386; 30 Atl. Rep., 986.

42 Dorland v. Bergson, 78 Cal.,637; 21 Pac. Rep., 537.

ESTABLISHING GRADE. Particular cases. Burr v. Newcastle, 49 Ind., 322; De Soto ex rel. v. Showman, (1903, Mo. App.) 73 S. W. Rep.,

alley at certain elevations between designated points a level cross grade would seem to be intended. If one side of such street or alley should be constructed above the established elevation and the other side below it, then, in such case, the question is presented, whether legislative power has been exercised. In many cases natural conditions require that one side of a street be considerably higher than the opposite side, and the elevation of the side lines determines the relation of the street grades to adjacent property. This is in consequence of the fact that streets have width as well as length and their grade is that of a plane or surface and not of a line. The width of roadway is the distance between curb lines. Therefore, where the fixing of the grade is a legislative act, the elevation of the curb lines should be established by ordinance, either by establishing their elevation at controlling points, or by the adoption, by ordinance, of a general uniform rule fixing the relation of curb grades to center line grades.43

§ 529. Recommendation of ordinance by board. Some char-

257; Kearney v. Andrews, 10 N. J.Eq., 70; Parker v. New Brunswick,30 N. J. L., 395.

Particular laws establishing grades, construed. Gafney v. San Francisco, 72 Cal., 146; 13 Pac. Rep., 467; Lake v. Decatur, 91 Ill., 596; State v. Ramsey County District Court, 33 Minn., 295; 23 N. W. Rep., 222; Yanish v. St. Paul, 50 Minn., 518; 52 N. W. Rep., 925.

An ordinance required that street grade should be estimated from a certain datum line, and "calculated for the middle of the several streets for which they are established." Taking the outer line of the streets as the grade line is a violation of such ordinance. Given v. Des Moines, 70 Iowa, 637; 27 N. W. Rep., 803.

Recital that the street shall be filled up to the "highest grade," insufficiently indicates the grade. Stretch v. Hoboken, 47 N. J. L., 268.

A vote to place the grade as re-

ported by a committee, held not sufficient to establish grade. Gardnier v. Johnson, 16 R. I., 94; 12 Atl. Rep., 888.

Change of grade. Niver v. Bathon-the-Hudson, 27 Misc. Rep., (N. Y.), 605.

Establishment of grade by reference to an ordinance, monument, etc. Chicago & N. Pac. R. Co. v. Chicago, 172 Ill., 66; 49 N. E. Rep., 1006; Carlinville v. McClure, 156 Ill., 492; 41 N. E. Rep., 169; Washington Ice Co. v. Chicago, 147 Ill., 327; 35 N. E. Rep., 378; Bloomington v. Pollock, 141 Ill., 346; 31 N. E. Rep., 146.

As to description of improvement by reference, see Sec. 545, post.

⁴³ Annotated Amended Charter of St. Louis by the author (1902), pp. 48, 49, contribution of Robert E. McMath, President St. Louis Board of Public Improvements, 1893 to 1901, and member of said board for sixteen years.

ters require that the ordinance for the improvement shall be recommended by a designated municipal board, as the board of public works or improvements, before the council or legislative body is authorized to pass such ordinance.⁴⁴ Provisions of this character are usually construed as mandatory.⁴⁵ So sometimes all ordinances resulting in contracts for public work or improvements are required to originate in such board. The requirement of such recommendation is not regarded as a delegation of legislative authority.⁴⁶

§ 530. Water and gas pipes in advance of improvement. Charters sometimes prescribe that water and gas pipes shall be laid before the street shall be paved. The Detroit charter requiring water and gas pipes to be laid at least one year before a street could be ordered paved was adjudged void because inconsistent with the general power of the city to pave streets.⁴⁷

44 St. Louis Charter, art. VI., sec. 14; Municipal Code of St. Louis, p. 260; Amended Charter of St. Louis (Annotated) p. 322; Charter, San Francisco, art. VI., ch. 2, sec. 2; Stat. and Codes of Cal., 1901, page 293; Charter Kansas City, Mo., art. IX., sec. 2; R. S. Mo., 1899, sec. 5390; Rawson v. Chicago, 185 Ill., 87; 57 N. E. Rep., 35; Barber Asphalt P. Co. v. Gaar, 24 Ky. Law Rep., 2227; 73 S. W. Rep., 1106.

The recommendation of the ordinance for passage in *prima facie* evidence that all the preliminary requirements, including the giving of notice of public hearings, have been performed. Chicago Union Traction Co. v. Chicago, 202 Ill., 576, 581; 67 N. E. Rep., 383.

45 Reynolds v. Schweinefus, 27 Ohio St., 311, reversing 1 Cin. Rep., 215; Stephan v. Daniels, 27 Ohio St., 527; Brophy v. Landman, 28 Ohio St., 542; Toledo v. Lake Shore & M. S. Ry. Co., 2 Ohio Cir. Dec., 450; Longworth v. Cincinnati, 23 Wkly. Law Bul. (Ohio), 100.

SEWER; board of health need not recommend. St. Louis v. Oeters, 36 Mo., 456.

BOULEVARD; board of park and boulevard commissioners need not recommend. *In re* Independence Avenue Boulevard, 128 Mo., 272; 30 S. W. Rep., 773.

AMENDMENT. An ordinance is not invalid, although board amended it upon suggestion of assembly and then returned it and recommended its passage, without changing endorsement of estimated cost made on original draft. Bambrick v. Campbell, 37 Mo. App., 460.

⁴⁶ An ordinance providing for the erection of litter boxes in the streets, having originated in the municipal assembly and not by the board, was held void. State *ex rel.* v. Belt, 161 Mo., 371, 375; 61 S. W. Rep., 658.

Proceedings for improvement. Welker v. Potter, 18 Ohio St., 85. ⁴⁷ It appeared that the laying of gas pipes was done by private corporations and the laying of water pipes was in control of the water

§ 531. Estimate of cost of improvement. Where the improvement is to be paid for by special assessment or taxation, the provision is frequent that the total cost thereof shall be estimated by designated officers, and sometimes it is required to be indorsed on the improvement ordinance. This provision is generally regarded as mandatory.⁴⁸

§ 532. Submission to, and approval of, electors. As a condition precedent to the advancement of certain public improvements, many charters and laws provide that the proposition shall first be submitted to, and approved by, a majority of the electors of the municipality.⁴⁹ Such provisions are mandatory and must be observed. Many cases construing laws of this character are given in the note.⁵⁰

board. Goodwillie v. Detroit, 103 Mich., 283; 61 N. W. Rep., 526.

WATER MAINS need not be laid prior to order to pave street. English v. Danville, 150 Ill., 92; 36 N. E. Rep., 994.

⁴⁸ Gilmore v. Hentig, 33 Kan., 156; 5 Pac. Rep., 781; Hentig v. Gilmore, 33 Kan., 234; 6 Pac. Rep., 304; Kinealy v. Gay, 7 Mo. App., 203; Barber-Asphalt Paving Co. v. Hezel, 76 Mo. App., 135; De Soto ex rel. v. Showman (1903, Mo. App.) 73 S. W. Rep., 257; Frosh v. Galveston, 73 Tex., 401; 11 S. W. Rep., 402; Dallas v. Ellison, 10 Tex. Civ. App., 28; 30 S. W. Rep., 1128; Dallas v. Atkins (Tex. Civ. App. 1895), 32 S. W. Rep., 780; Pound v. Chippewa Co. Supervisors, 43 Wis., 63.

Sufficiency of estimate. Cuming v. Grand Rapids, 46 Mich., 150; 9 N. W. Rep., 141; Baisch v. Grand Rapids, 84 Mich., 666; 48 N. W. Rep., 176; Goodwillie v. Detroit, 103 Mich., 283; 61 N. W. Rep., 526; Wewell v. Cincinnati, 45 Ohio St., 407; 15 N. E. Rep., 196; Erie v. Brady, 150 Pa. St., 462; 24 Atl. Rep., 641.

Variance between ordinance and estimate. Chicago v. Singer, 202 Ill., 75; 66 N. E. Rep., 874.

40 Section 152, supra.

50 Lighting. Citizens Gas Light Co. v. Wakefield, 161 Mass., 432; 37 N. E. Rep., 444; 31 L. R. A., 457; Hudson Electric Light Co. v. Hudson, 163 Mass., 346; 40 N. E. Rep., 109; Carthage v. Carthage Light Co., 97 Mo. App., 20; Thompson Houston Electric Co. v. Newton, 42 Fed. Rep., 723, holding that submission of the entire proposition may be made prior to the adoption of the ordinance providing for the lighting plant.

Where the electors have voted in favor of a municipal lighting plant, a contract made thereafter with a private corporation, to furnish light is void. George v. Wyandotte Electric Light Co., 105 Mich., 1; 62 N. W. Rep., 985; Campbell v. Wyandotte, *Id.*

Only the matters expressly directed need be submitted to the voters. Hence, where the law does not so require, the rate of interest of the bonds, their sale at par and the place of payment need not be approved by the electors. Yesler v. Seattle, 1 Wash. St., 308; 25 Pac. Rep., 1014.

Entire proposition may be submitted. Seymour v. Tacoma, 6 Wash., 138; 32 Pac. Rep., 1077.

WATER SUPPLY. Hornby v. Bev-

Preliminary resolution or ordinance. Certain improvements are sometimes begun by a preliminary resolution or ordinance.⁵¹ This constitutes the preliminary expression of opinion that the improvement is necessary or desirable. Usually the resolution is required to be published, in order to advise the property owners, and thus enable them to protest or remonstrate if they think fit.⁵² Under a charter providing that, before ordering any improvement, the council shall pass a resolution of intention so to do, describing the work, a resolution for the improvement of a street, "to consist of the construction therein of granite or artificial stone curbing," confers no jurisdiction to order the work.⁵³ So where the charter requires the resolution authorizing condemnation proceedings to describe the property "with particularity sufficient for an ordinary conveyance thereof," a resolution which does not contain separate descriptions of the property proposed to be condemned, nor the names of the owners, is insufficient.⁵⁴ Whether the

erly, 48 N. J. L., 110; 2 Atl. Rep., 637; Thompson v. Sumner, 9 Wash., 310; 37 Pac. Rep., 450. Ordinance providing for the erection of waterworks may be passed before the approval of the proposition by the voters, and made to take effect on such approval. Taylor v. McFadden, 84 Iowa, 262; 50 N. W. Rep., 1070.

Held under particular law that contract for supply valid, without submission to voters. East Jordan Lumber Co. v. East Jordan, 100 Mich., 201; 58 N. W. Rep., 1012.

"General" or "special" election. Yesler v. Seattle, 1 Wash. St., 308; 25 Pac. Rep., 1014.

Public Work. Assessment of benefits for sewer, held valid, though cost exceeded charter limit, etc. Park Ecclesiastical Soc. v. Hartford, 47 Conn., 89.

Establishing park. People v. Salomon, 46 Ill., 415.

Street improvement; approval of voters not necessary. Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann., 251; 5 So. Rep., 848.

Levee; election held irregular. Byrne v. Parish of East Carroll, 45 La. Ann., 392; 12 So. Rep., 521. Subway for railroad tracks. Prince v. Crocker, 166 Mass., 347; 44 N. E. Rep., 446; 32 L. R. A., 610.

City hall and fire engine house; vote of people not required. Torrent v. Muskegon, 47 Mich., 115; 10 N. W. Rep., 132; 41 Am. Rep., 715; Public School. Decatur v. Wilson, 96 Ga., 251; 23 S. E. Rep., 240.

Vacating street; proposition to be submitted to voters under charter of Mankato, Minn. Lamm v. Chicago, St. P., M. & O. Ry. Co., 45 Minn., 71; 47 N. W. Rep., 455; 10 L. R. A., 268.

Not required. Elma v. Carney,Wash., 466; 37 Pac. Rep., 707.

⁵² Nevada v. Eddy, 123 Mo., 546,558; 27 S. W. Rep., 471.

53 San Jose Imp. Co. v. Auzerais,106 Cal., 498; 39 Pac. Rep., 859.

As to description of improvement, see §§ 540 to 545, post.

54 Owosso v. Richfield, 80 Mich.,328; 45 N. W. Rep., 129.

mayor should sign the preliminary resolution or ordinance depends upon the particular charter. Sometimes this is not necessary.⁵⁵ This subject is fully considered elsewhere.⁵⁶

§ 534. Declaration of necessity of improvement. As elsewhere stated,⁵⁷ the general rule is that, unless required in express terms, the ordinance need not recite the necessity of its enactment. Under some charters the necessity of certain kinds of improvements must be declared. This may be done in the preliminary resolution or ordinance.⁵⁸ Such declaration has been held jurisdictional.⁵⁹ Sometimes it does not apply to condemnation proceedings.⁶⁰ Municipal charters differ as to this requirement, but in construing them most of the decisions are to the effect that neither the ordinance nor resolution providing for the improvement, or any part of the proceedings therefor, need contain a formal declaration of necessity.⁶¹

55 Howeth v. Jersey City, 30 N.
 J. L., 93.

- ⁵⁶ Sec. 100, 149, supra.
- 57 Section 140, supra.

⁵⁸ Michigan Central R. Co. v. Huehn, 59 Fed. Rep., 335.

⁵⁹ McLauren v. Grand Forks, 6 Dak., 397; 43 N. W. Rep., 710; Hoyt v. East Saginaw, 19 Mich., 39; 2 Am. Rep., 76; White v. Saginaw, 67 Mich., 33; 34 N. W. Rep., 255; *In re* Schreiber, 3 Abb. N. C. (N. Y.), 68; Stephan v. Daniels, 27 Ohio St., 527.

60 Caldwell v. Carthage, 49 Ohio St., 334; 31 N. E. Rep., 602; Krumberg v. Cincinnati, 29 Ohio St., 69; Longworth v. Cincinnati, 23 Wkly. Law Bul. (Ohio), 100.

61 Indiana—Barber Asphalt Pav. Co. v. Edgerton, 125 Ind., 455; 25 N. E. Rep., 436; Pittsburg C. C. & St. L. Ry. Co. v. Hays, 17 Ind. App., 261; 44 N. E. Rep., 375.

Maryland—Baltimore v. John Hopkins Hospital, 56 Md., 1.

Maine—Dorman v. Lewiston, 81 Me., 411; 17 Atl. Rep., 316; Cassidy v. Bangor, 61 Me., 434.

Massachusetts—Com. v. Abbott, 160 Mass., 282; 35 N. E. Rep., 782;

Wright v. Boston, 9 Cush. (63 Mass.), 233.

Michigan—Beecher v. Detroit, 92 Mich., 268; 52 N. W. Rep., 731; Davies v. Saginaw, 87 Mich., 439; 49 N. W. Rep., 667; Naegely v. Saginaw, 101 Mich., 532; 60 N. W. Rep., 46.

Minnesota—Cook v. Slocum, 27 Minn., 509; 8 N. W. Rep., 755.

Missouri—Taylor v. St. Louis, 14 Mo., 20; 55 Am. Dec., 89; Miller v. Anheuser, 2 Mo. App., 168.

New York—Elwood v. Rochester, 43 Hun. (N. Y.), 102; Trinity Church v. Higgins, 4 Rob. (27 N. Y. Super. Ct.), 1.

North Carolina — Raleigh v. Peace, 110 N. C., 32; 14 S. E. Rep., 521; 17 L. R. A., 330.

Ohio—Cincinnati v. Mathers, 6 Ohio Dec., 755; 4 Wkly. Law Bul. (Ohio) 273; Strauss v. Cincinnati, 24 Wkly. Law Bul. (Ohio), 422.

Oregon—Clinton v. Portland, 26 Oregon, 410; 38 Pac. Rep., 407; Strowbridge v. Portland, 8 Oregon, 67.

Texas—Kerr v. Corsicana (Tex. Civ. App., 1895), 35 S. W. Rep.,

Providing for improvement—Ordinance, resolution or order. Under most charters improvements cannot be ordered, nor the contract entered into therefor without formal action. either by ordinance or resolution, adopted by the legislative body. Without such action no liability is created to pay for such work, although done under the direction of the municipal officers. 62 Thus entries by the secretary upon the minutes that the work had been duly ordered by the council and a contract therefor legally made, are insufficient. 63 Where an ordinance or resolution is made a condition precedent to the exercise of the power, this, of course, is essential to the validity of the proceedings.64 In proceedings of special assessment or taxation for improvements if the ordinance or resolution should prove to be invalid for any reason the special assessment made thereunder is also void. 65 In many jurisdictions, as in Illinois, the first step, when the improvement is to be paid for by special assessment or taxation, is the enactment of an ordinance specifying the nature, character, locality and description of the improvement and the mode in which its cost shall be collected; and no work can be done or expenses incurred which can become a charge on the property of the land owner before such ordinance is passed. 66 But the sufficiency of the action in providing for a given improvement is to be determined by the local laws. Certain improvements directed by order, 67 or resolution

694; Connor v. Paris, 87 Tex., 32; 27 S. W. Rep., 88.

Wisconsin—Boyd v. Milwaukee, 92 Wis., 456; 66 N. W. Rep., 603.

62 Street grading. Kolkmeyer v. Jefferson City, 75 Mo. App., 678.

63 Waco v. Prather, 90 Tex., 80,81; 37 S. W. Rep., 312.

⁶⁴ Zalesky v. Cedar Rapids
(Iowa, 1902), 92 N. W. Rep., 657;
Nevada v. Eddy, 123 Mo., 546, 588,
589; 27 S. W. Rep., 471.

65 Brown v. Denver, 7 Colo., 305;
3 Pac. Rep., 455; Jacksonville Ry.
Co. v. Jacksonville, 114 Ill., 562;
2 N. E. Rep., 478.

⁶⁶ Davis v. Litchfield, 155 Ill.,
 384; 40 N. E. Rep., 354, distinguishing Carlyle v. Clinton County,
 140 Ill., 512; 30 N. E. Rep., 782,

and East St. Louis v. Albrecht, 150 Ill., 506; 37 N. E. Rep., 934.

67 ORDER SUFFICIENT.

To pave street. Alexandria v. Mandeville, 2 Cranch C. C., 224; 1 Fed. Cas., No. 184.

Construction of sidewalk. State v. Armstrong, 54 Minn., 457; 56 N. W. Rep., 97.

To improve street. Corry v. Campbell, 25 Ohio St., 134.

Specified work on street. Napa v. Easterby, 76 Cal., 222; 18 Pac. Rep., 253.

Ordinary street improvement. Board of Comrs. of Allen County v. Silvers, 22 Ind., 491, 502.

Improvement may be ordered by resolution or order and need not be entered of record. Indianapolis v. Imberry, 17 Ind., 175.

have been sustained under particular charters.⁶⁸ However, if the act is to be regarded as essentially legislative an ordinance is necessary or a resolution passed with all the formalities of an ordinance, which, then, in effect, becomes an ordinance.⁶⁹

68 RESOLUTION SUFFICIENT. Barber Asphalt Pav. Co. v. Edgerton,
125 Ind., 455; 25 N. E. Rep., 436.

To grade and improve street. Wright v. Forrestal, 65 Wis., 341; 27 N. W. Rep., 52; Hall v. Racine, 81 Wis., 72; 50 N. W. Rep., 1094.

Widening and extending street. In re Knaust, 101 N. Y., 188; 4 N. E. Rep., 338.

Opening street. Sower v. Philadelphia, 35 Pa. St., 231.

Street improvement. Indianapolis v. Imberry, 17 Ind., 175; Buckley v. Tacoma, 9 Wash., 253; 37 Pac. Rep., 441.

Change in street grade. State v. Rutherford, 52 N. J. L., 499; 19 Atl. Rep., 972.

Sewer. Grimmell v. Des Moines, 57 Iowa, 144; 10 N. W. Rep., 330; State (Van Vorst) v. Jersey City, 27 N. J. L., 493.

Sewer, without previous formal order. Leominster v. Conant, 139 Mass., 384; 2 N. E. Rep., 690.

Not required to fix bounds of sewer district. Strowbridge v. Portland, 8 Oregon, 67.

Contract for lighting streets, requiring no plant, but post and lamps. Lincoln v. San Vapor Street Light Co., 59 Fed. Rep., 756; 8 C. C. A., 253.

Plans and specifications may be adopted by resolution. Santa Cruz Rock Pav. Co. v. Heaton, 105 Cal., 162; 38 Pac. Rep., 693.

Ordinance is not required, to authorize under permit the removal of deposits from the channel of a natural water course. Weber v. Gill, 98 Cal., 462; 33 Pac. Rep., 330.

Waterworks. Where charter does not require the power to establish a system of waterworks may be exercised prior to the passage of the ordinance. National Tube Works v. Chamberlain, 5 Dak., 54; 37 N. W. Rep., 761.

⁶⁹ DIFFERENCE BETWEEN ORDINANCE AND RESOLUTION and illustrative cases. Sections 2 to 6, supra.

ORDINANCE REQUIRED. Carlyle v. Clinton County, 140 Ill., 512; 30 N. E. Rep., 782; East St. Louis v. Albrecht, 150 Ill., 506; 37 N. E. Rep., 934; Sloan v. Beebe, 24 Kan., 343; Indianapolis v. Miller, 27 Ind., 394; Nevada v. Eddy. 123 Mo., 546; 27 S. W. Rep., 471; Scranton v. McDonough, 1 Lack. Leg. N. (Pa.), 177; Alford v. Dallas (Tex. Civ. App. 1896), 35 S. W. Rep., 816; Waco v. Prather (Tex. Civ. App. 1896), 35 S. W. Rep., 958.

Ordinance or resolution. Hellman v. Shoulters, 114 Cal., 136; 44 Pac. Rep., 915; Los Angeles v. Waldron, 65 Cal., 283; 3 Pac. Rep., 890.

Open and condemn street. Baltimore v. Porter, 18 Md., 284; 79 Am. Dec., 686.

Street improvement, involving deferred payments. Noel v. San Antonio, 11 Tex. Civ. App., 580; 33 S. W. Rep., 263.

Widening Street. In re Powelton Avenue, 11 Phila. (Pa.), 447.

Sidewalk construction. Barron v. Krebs, 41 Kan., 338; 21 Paç. Rep., 235.

Repair of sidewalk. Louisiana v. Miller, 66 Mo., 467.

Altering carriage way of sidewalk. Cross v. Morristown, 18 N. J. Eq., 305.

§ 536. Sufficiency of order for improvement. If the charter requires a resolution "ordering" the work to be done, a resolution declaring it to be the "intention" to improve the street is insufficient. An order of the council directing the removal of fences or other encroachments on certain streets is not an order for laying out or widening a street. So a vote of the council to place the grade of a certain street as reported by a committee does not establish such grade. So a viva voce vote directing officers to proceed, notwithstanding a remonstrance, is insufficient. The order should be given by resolution.

§ 537. **Ordinance for each distinct improvement.** Generally speaking, each separate and distinct improvement requires a separate proceeding and ordinance.⁷⁴ Thus under authority to lay out "any one street" between certain *termini*, etc., only one street may be included in one proceeding.⁷⁵ So where an ordi-

Sewer along a public street to be paid for by private persons. State (Hunt) v. Lambertville, 45 N. J. L., 279, 282.

Street improvement — directing removal of obstructions. Hoboken Land & Imp. Co. v. Hoboken, 35 N. J. L., 205; Story v. Bayonne, 35 N. J. L., 335.

Drawbridge construction: Packard v. Bergen Neck Ry. Co., 48 N. J. Eq., 281; 22 Atl. Rep., 227.

Reconstruction must be authorized by ordinance but repairs of streets may be made by order of street commissioner. Ritterskamp v. Stifel, 59 Mo. App., 510; Farrell v. Rammelkamp, 64 Mo. App., 425.

Grading street. Clay v. Mexico, 92 Mo. App., 611; Fulton v. Lincoln, 9 Neb., 358; 2 N. W. Rep., 724; State v. Brigantine Borough, 54 N. J. L., 476; 24 Atl. Rep., 481; State v. Bayonne, 54 N. J. L., 474; 24 Atl. Rep., 448.

Changing street grade. Kroffe v. Springfield, 86 Mo. App., 530.

To establish system of street lighting. Taylor v. Lambertville, 43 N. J. Eq., 107; 10 Atl. Rep., 809. To make contract for gas. *Ib*.

"An ordinance * * * direct-

ing the construction of a work * * * is a judicial act * * * but the prosecution of the work is ministerial in its character." Logansport v. Wright, 25 Ind., 512.

Resolution, held to be ordinance. Springfield v. Knott, 49 Mo. App., 612.

Commissioners to estimate cost of improvement need not be appointed by ordinance. Scovill v. Cleveland, 1 Ohio St., 126.

70 Kline v. Tacoma, 12 Wash.,657; 40 Pac. Rep., 418.

⁷¹ Somerville v. Middlesex County Com'rs, 122 Mass., 292.

Order laying out a way authorizing assessments for betterments.

Masonic Bldg. Assn. v. Brownell,
164 Mass., 306; 41 N. E. Rep., 306.

Vacating street. Hinchman v.

Detroit, 9 Mich., 103.

72 Gardiner v. Johnston, 16 R. I.,
 94; 12 Atl. Rep., 888.

73 Buckley v. Tacoma, 9 Wash.,269; 37 Pac. Rep., 446.

74 As opening and widening a street. In re Powelton Ave., 11 Phila. (Pa.), 447.

75 Boorman v. Santa Barbara, 65 Cal., 313; 4 Pac. Rep., 31.

nance provides for the widening of an alley running north and south through a block, and the opening of a new alley running east and west through the same block, and also the condemnation of two triangular pieces of land at the intersection of these alleys for the purpose of improving the ingress and egress to and from the alleys, two distinct improvements are contemplated and they cannot be united in one proceeding.76 But under the usual charter power, a single ordinance may provide for the improvement of a single street, or a part thereof, or for several streets.⁷⁷ So, under some charters, a resolution to improve a street, may include a declaration of intention to both grade and macadamize. 78 So an ordinance providing for the laying of water pipes which requires the laying to begin on one street, and, after being laid in that for some distance, to turn by right angle into another street, is not void in that it authorizes in one proceeding two separate and distinct improvements.⁷⁹ One ordinance may authorize an improvement consisting of several parts. Thus it has been decided in Illinois that, inasmuch as grading, draining and sodding of a street combine to produce the improved street, all this work may be projected in one ordinance.80 And in the same state it has been held that where streets and parts of streets are similarly situated, and are to be paved in the same manner and with the same material, they may be treated as a single improvement, and hence, such improvement may be authorized by one ordinance.81 So an ordi-

76 Weckler v. Chicago, 61 111.,142.

77 Savannah v. Weed, 96 Ga., 670; 23 S. E. Rep., 900; Adams County v. Quincy, 130 Ill., 566; 22 N. E. Rep., 624; 6 L. R. A., 155; Wilbur v. Springeld, 123 Ill., 395; 14 N. E. Rep., 871; State v. District Court, 33 Minn., 295; 23 N. W. Rep., 222; State v. District Court, 29 Minn., 62; 11 N. W. Rep., 133; In re Walter, 75 N. Y., 354.

⁷⁸ Emery v. San Francisco Gas Co., 28 Cal., 345.

79 Ricketts v. Hyde Park, 85 Ill., 110.

80 Murphy v. Peoria, 119 III., 509;9 N. E. Rep., 895.

s1 Springfield v. Green, 120 Ill.,269; 11 N. E. Rep., 261.

In Iowa the resolution ordering the improvement embraced parts of several streets, one more expensive than another. It was sustained under the code which provided that if the special tax is such as the city is authorized to make, any irregularity in the proceeding by any officer of the city will not defeat a recovery of the abutter's proportion. Burlington v. Quick, 47 Iowa, 222.

A street in one subdivision, practically a continuance of a street in another subdivision may be authorized to be improved by one ordinance. Cincinnati v. Corry, 7 Ohio Dec., 415; 2 Wkly. Law Bul. (Ohio), 337.

nance providing for the construction of a sidewalk on both sides of the same street is not invalid as embracing two separate and distinct improvements. In such case, the construction of the sidewalk on one side of the street is of more or less benefit to the property on both sides of the street.82 In Indiana, a statute conferring authority in one section to order the widening of a street and in another grading and graveling, was construed as contemplating distinct improvements, and therefore one ordinance providing for widening and grading was held unauthorized.83 A single ordinance may provide for the laying of sewers in several streets, where the streets are so situated that the several sewers constitute one system.84 So an ordinance authorizing the construction of a main sewer, with branches, does not call for more than one improvement.85 In an early New York case, it is said that, usually the combination in one proceeding of improvements and assessments so dissimilar in their nature as the grading of a street, the building of a bridge as a part thereof, and the construction of a sewer, would be vicious in principle; but where the sewer is a part of the bridge, serviceable only from relieving it from the effect of water collecting upon the street, there is no objection to such union.86

§ 538. Procedure in passage of ordinance. The procedure in the passage of ordinances is treated elsewhere.⁸⁷ These rules are applicable to the enactment of improvement ordinances. To be valid, the improvement ordinance must be in form sufficient, passed at the time⁸⁸ and in the manner prescribed,⁸⁹

82 Watson v. Chicago, 115 Ill., 78, 83; 3 N. E. Rep., 430, where it was said: "To constitute one improvement, it is not necessary that there should be physical connection between different portions of it. The improvement here was upon one and the same street, and being upon its two sides only, by the building of a sidewalk, and not an improvement of the street in its entire width, did not constitute two improvements."

83 Mendenhall v. Clugish, 84 Ind., 94.

84 Beach v. People, 157 Ill., 659;41 N. E. Rep., 1117.

85 Payne v. South Springfield,161 Ill., 285; 44 N. E. Rep., 105.

86 People v. Yonkers, 39 Barb. (N. Y.), 266.

87 Chapters III and IV.

88 Fehler v. Gosnell, 99 Ky., 380;
35 S. W. Rep., 1125; Wright v.
Forrestal, 65 Wis., 341; 27 N. W.
Rep., 52.

TIME. A general ordinance provided that the council may "at any time hereafter," direct, by resolution, street guttering. It took effect August 17th. On August 9th and 14th, resolutions were adopted authorizing a street to be guttered. The resolutions were sustained, the

receive the vote designated (sometimes to be taken by

word "hereafter" being construed to refer to the time of the passage of the general ordinance, and not to the date it took effect. Kendig v. Knight, 60 Iowa, 29; 14 N. W. Rep., 78.

Time allowed for filing claims. Where no claims are presented, an ordinance passed prior to the expiration of the time, is not rendered void. Toledo v. Lake Shore & M. S. Ry. Co., 2 Ohio Cir. Dec., 450.

Time of introduction and passage. Sec. 146 supra.

Where steps are taken as required by charter, the council may advertise for bids and contract for paving a street before the formal passage of an ordinance ordering the work to be done. Springfield v. Weaver, 137 Mo., 650; 37 S. W. Rep., 509; 39 S. W. Rep., 276, overruling Keane v. Cushing, 15 Mo. App., 96.

Contract made before the enactment of the necessary ordinance, held void. Paxton v. Bogardus, 201 Ill., 628; 66 N. E. Rep., 853.

Passed at special meeting. See section 110 supra. Smith v. Tobener, 32 Mo. App., 601; Dollar Sav. Bank v. Ridge, 62 Mo. App., 324; Aurora Water Co. v. Aurora, 129 Mo., 540; 31 S. W. Rep., 946.

so Trenton v. Coyle, 107 Mo., 193; 17 S. W. Rep., 643; Saxton v. St. Joseph, 60 Mo., 153; Stewart v. Clinton, 79 Mo., 603; Werth v. Springfield, 78 Mo., 107; State ex rel. v. Barlow, 48 Mo., 17; State ex rel. v. St. Louis, 56 Mo., 277; Perkinson v. Partridge, 3 Mo. App., 60.

REFERENCE to and report by committee. § 148 supra.

Failure to refer to committee of council and report, invalidates street improvement proceedings. Worthington v. Covington, 6 Ky. Law Rep., 237; Gilman v. Milwaukee, 61 Wis., 588; 21 N. W. Rep., 640. All steps to be observed. Murphy v. Louisville, 9 Bush. (Ky.), 189.

Reading on different days. Sec. 119 supra.

Improvement ordinance held to be of a permanent nature, within the meaning of a charter requiring reading on three different days. Campbell v. Cincinnati, 49 Ohio St., 463; 31 N. E. Rep., 606; Tyler v. Columbus, 6 Ohio Cir. Ct. Rep., 224.

RECONSIDERATION, held valid in Hough v. Bridgeport, 57 Conn., 290; 18 Atl. Rep., 102. See Sections 121 and 122 supra.

Vote on several at one time. Cincinnati v. Anderson, 52 Ohio St., 600; 43 N. W. Rep., 1040; Bode v. Cincinnati, 9 Ohio Cir. Ct. Rep., 382; 6 Ohio Cir. Dec., 131; Wright v. Forrestal, 65 Wis., 341; 27 N. W. Rep., 52.

Two propositions; separate vote. State v. Armstrong, 54 Minn., 457; 56 N. W. Rep., 97.

MINOR IRREGULARITIES. Parker v. Catholic Bishop of Chicago, 146 Ill., 158; 34 N. E. Rep., 473; Pickford v. Lynn, 98 Mass., 491; Cornell v. New Bedford, 138 Mass., 588; Simpson v. McGonegal, 52 Mo. App., 540; Astor v. New York, 62 N. Y., 567.

90 § 106 supra.

California—Charter San Francisco, Art. VI, ch. 2, § 2; Statutes and Amend. to Codes of Cal. (1899), p. 293.

Indiana—McEneney v. Sullivan, 125 Ind., 407; 25 N. E. Rep., 540; Logansport v. Legg, 20 Ind., 315.

Kentucky—Covington v. Casey, 3

yeas and nays⁹¹ and so recorded),⁹² signed by the presiding officer,^{92½} mayor⁹³ and other officer,⁹⁴ when required, and published, if so prescribed.⁹⁵ The record of the proceedings should be kept properly and show that all mandatory and jurisdictional steps have been taken.⁹⁶

§ 539. Recital of authority to pass. The provisions of the charter authorizing the ordinance need not be recited there-

Bush. (66 Ky.), 698; Kaye v. Hall, 13 B. Mon. (52 Ky.), 455.

Michigan—Tennant v. Crocker, 85 Mich., 328; 48 N. W. Rep., 577.

Pennsylvania—Bradford v. Fox, 171 Pa. St., 343; 33 Atl. Rep., 85.

Washington—Buckley v. Tacoma, 9 Wash., 269; 37 Pac. Rep., 446.

Wisconsin—Dieckmann v. Sheboygan County, 89 Wis., 571; 62 N. W. Rep., 410.

Definite vote required, sec. 106 supra.

⁹¹ YEAS AND NAYS. Sections 117 and 118 supra.

Directory. Wiggin v. New York, 9 Paige (N. Y.), 16; Striker v. Kelly, 7 Hill (N. Y.), 9.

92 Sec. 127 supra.

92½ Sec. 99 supra. Creighton v. Manson, 27 Cal., 613; Thompson v. Hoge, 30 Cal., 179.

93 Sections 100, 101, 149 supra.

Ordinance, to be signed by mayor. Doty v. Lyman, 166 Mass., 318; 44 N. E. Rep., 337; Saxton v. Beach, 50 Mo., 488; Irvin v. Devors, 65 Mo., 625, 627.

Resolution to be signed by mayor. Kinsella v. Auburn, 54 Hun. (N. Y.), 634; 7 N. Y. Supp., 317.

Ordinance need not be signed by mayor. Martindale v. Palmer, 52 Ind., 411.

Resolution need not be approved by mayor. Taylor v. Palmer, 31 Cal., 241; Hendrick v. Crowley, 31 Cal., 471; Beaudry v. Valdez, 32 Cal., 269; McDonald v. Dodge, 97 Cal., 112; 31 Pac. Rep., 909; Clark v. Jennings (Cal. 1893), 32 Pac. Rep., 1049; Hall v. Racine, 81 Wis., 72; 50 N. W. Rep., 1094.

Order for street improvement need not be signed by mayor. State v. Armstrong, 54 Minn., 457; 56 N. W. Rep., 97.

94 CLERK to SIGN resolutions for improvement; held printed signature sufficient. Williams v. Mc-Donald, 58 Cal., 527.

95 Section 155 et seq., supra.

96 RECORDS; manner of keeping; sufficiency; evidence amendment, etc. Section 124 et seq., supra.

Indiana—New Albany v. Endres, 143 Ind., 192; 42 N. E. Rep., 683.

Kentucky—Lexington v. Headley, 5 Bush. (8 Ky.), 508; Nevin v. Roach, 86 Ky., 492; 5 S. W. Rep., 546.

Massachusetts — Leominster v. Conant, 139 Mass., 384; 2 N. E. Rep., 690; Chase v. Springfield, 119 Mass., 556.

New Jersey—Hand v. Elizabeth, 30 N. J. L., 365.

New York—In re Buffalo, 78 N. Y., 362; People v. Whitney's Point. 32 Hun. (N. Y.), 508; In re Schreiber, 53 How Pr. (N. Y.), 359.

Pennsylvania — Darlington v Com., 41 Pa. St., 68.

CONTINGENCY IN TAKING EFFECT. Sec. 36. Supra.

Ordinance for construction of water works, to take effect when proposition accepted by popular in.⁹⁷ In one case the ordinance for a special assessment recited for its authority certain statutes which had been repealed. This part was rejected as surplusage, and the ordinance sustained as having been passed in pursuance of any enabling statute in force.⁹⁸

§ 540. Description of the improvement. The cases differ materially respecting the construction of laws relative to the description of the proposed improvement. But this difference is due mainly to the fact that the laws are different. Where it is to be paid for by special assessment or taxation closer adherence to charter provisions is usually enforced. The proceedings should clearly indicate the nature, extent, cost and method of apportionment that the property owners may know what they will be called upon to pay and the probable benefits to them. Simple justice demands this. Where notice and hearing are provided all these matters may be considered. withstanding, under most charters as they are construed by the courts in view of the constitutional provision of due process of law, etc., the order, resolution or ordinance directing the improvement should contain specific information.99 Thus by statute in Illinois, where the expense of the improvement is collected, in whole or in part, by special assessments upon abutting property, the ordinance "must specify the nature, character, locality and description" of the proposed improvement; and, according to the decisions of that state, this must be done with reasonable certainty. This provision is mandatory. It is clear, therefore, that an ordinance which does not substantially conform to the requirement of the statute in this respect will confer no power on the corporate authorities to make the assessment. Some charters require the ordinance to "specify

vote, held void. Thompson v. Sumner, 9 Wash., 310; 37 Pac, Rep., 450.

97 Sec. 139 supra. Cape Girar-deau v. Houck, 129 Mo., 607; 31 S. W. Rep., 933.

Omission to specify the law under which made is not material. Jones v. Boston, 104 Mass., 461.

98 Delamater v. Chicago, 158 III.,575; 42 N. E. Rep., 444.

90 Bolton v. Gilleran, 105 Cal.,244; 38 Pac. Rep., 881; 45 Am. St.

Rep., 33; Joyes v. Shadurn, 11 Ky. Law Rep., 892; 13 S. W. Rep., 361. ¹ Cass v. People, 166 Ill., 126; 46 N. E. Rep., 729; Otis v. Chicago, 161 Ill., 199; 43 N. E. Rep., 715; Delamater v. Chicago, 158 Ill., 575; 42 N. E. Rep., 444; Stanton v. Chicago, 154 Ill., 23; 39 N. E. Rep., 987; Gage v. Chicago, 143 Ill., 157; 32 N. E. Rep., 264; Kimble v. Peoria, 140 Ill., 157; 29 N. E. Rep., 723; Woods v. Chicago, 135 Ill., 582; 26 N. E. Rep., 608; Adams the character of the work, its extent, the material to be used, the manner and general regulations under which it shall be executed, the fund out of which it shall be paid shall be indorsed with the estimate of the cost thereof." 2 comply substantially with such provision, an ordinance providing for the improvement of streets, and as a part thereof for the construction of sidewalks, must prescribe the width of the sidewalks and the material of which they are to be constructed, unless a general ordinance, sufficiently covers these matters, for they cannot be left to the discretion of an officer, as the street commissioner.3 In other words, the extent of the work must be specified in the ordinance, for it is clear that this cannot be delegated to an executive and administrative officer. But where under a particular charter a railroad company is liable for the cost of reconstructing so much of the street as is included between the rails of the company's tracks,4 the ordinance to improve the street need not specify such liability, since it is fixed by the charter and it will be presumed that the city authorities will observe all legal requirements.⁵ As the presumption is that the municipal authorities kept within their powers, the ordinance need not recite in express terms that the

County v. Quincy, 130 III., 566; 22 N. E. Rep., 624; 6 L. R. A., 155; Pearce v. Hyde Park, 126 III., 287; 18 N. E. Rep., 824; Jacksonville Ry. Co. v. Jacksonville, 114 III., 562, 564; 2 N. E. Rep., 478; Sterling v. Galt, 117 III., 11; 7 N. E. Rep., 471; Lake v. Decatur, 91 III., 596, 600; Andrews v. Chicago, 57 III., 239; Lake Shore & M. S. Ry. Co. v. Chicago, 56 III., 454; Foss v. Chicago, 56 III., 354.

These must be described with such definiteness and certainty as to furnish data for the intelligent estimate of the cost of the work. Kankakee v. Potter, 119 Ill., 324; 10 N. E. Rep., 212; Sterling v. Galt, 117 Ill., 11; 7 N. E. Rep., 471; Levy v. Chicago, 113 Ill., 650.

A description of the same exactness as the law will be sufficient. Harney v. Heller, 47 Cal., 15.

Illustrations of sufficient descriptions. Chytraus v. Chicago, 160

Ill., 18; 43 N. E. Rep., 335; Chicago v. Habar, 62 Ill., 283.

INSUFFICIENT DESCRIPTIONS.

Lake Shore & M. S. Ry. Co. v. Chicago, 144 Ill., 391; 33 N. E. Rep., 602; Illinois Cent. R. R. Co. v. Chicago, 144 Ill., 392; 33 N. E. Rep., 602; Andrews v. Chicago, 57 Ill., 239,

- ² Charter St. Louis, Art. VI., Sec. 15 (Amendment Oct. 22, 1901).
- ³ Heman Const. Co. v. Loevy, 64 Mo. App., 430, 434.

Estimate, map and plan to be attached. Reading v. O'Reilly, 169 Pa. St., 366; 32 Atl. Rep., 420.

- ⁴ St. Louis v. St. Louis R. R. Co., 50 Mo. 94.
- ⁵ Farrar v. St. Louis, 80 Mo., 379, 393; Stifel v. McManus, 74 Mo. App., 558; Neenan v. Smith, 60 Mo., 292; Springfield v. Weaver, 137 Mo., 650; 37 S. W. Rep., 509; 39 S. W. Rep., 276.

contemplated improvement is within the corporate boundaries.⁶ § 541. Sufficiency of description in street improvement ordinances. The cases respecting the sufficiency of street improvement ordinances and resolutions are numerous, but for the most part they are constructions of particular legal provisions; therefore, many general rules are not readily deducible from them. The judicial view can be best understood by diligent study of the individual cases, especially of those in the home jurisdiction. However, the illustrative cases referred to herein, in text and notes, may serve as guides to such investigation.

The fact that an ordinance for the laying of a brick pavement provides that the brick shall be firmly settled by a roller of a certain weight, or a paving ram, at the engineer's discretion, does not render uncertain the description of the nature of the improvement. "The specification is that the brick shall be firmly settled, and the means by which it is to be done are pointed out, either by a roller or a pavement ram. There is no uncertainty as to the character of the work, but simply as to the manner in which it shall be accomplished. It might be, and doubtless is, true, that particular parts of the pavement could not be rolled, and yet the same purpose-namely, to bring the surface of the pavement to a proper level and firmly settle the brick—be accomplished by the use of the ram." An ordinance establishing grades of streets is not void for uncertainty if the grades so established can be ascertained without difficulty.8 Thus a paving ordinance which provides that the excavation of the street at the center be a certain number of inches "below

6 Chytraus v. Chicago, 160 Ill., 18; 43 N. E. Rep., 335; Andrews v. People, 158 Ill., 477; 41 N. E. Rep., 1021; Delamater v. Chicago, 158 Ill., 575; 42 N. E. Rep., 444; Beach v. People, 157 Ill., 659; 41 N. E. Rep., 1117; Chicago v. Silverman, 156 Ill., 601; 41 N. E. Rep., 162; Bliss v. Chicago, 156 Ill., 584; 41 N. E. Rep., 160; Ziegler v. People, 156 Ill., 133; 40 N. E. Rep., 607; Young v. People, 155 Ill., 247; 40 N. E. Rep., 604; Browning v. Chicago, 155 Ill., 314; 40 N. E. Rep., 565; West Chicago St. R. R. Co. v. People, 155 Ill., 299; 40 N. E. Rep., 599; Wisner v. People, 156 Ill., 180; 40 N. E. Rep., 574; Meadow-croft v. People, 154 Ill., 416; 40 N. E. Rep., 442; Stanton v. Chicago, 154 Ill., 23; 39 N. E. Rep., 987; Wheeler v. People, 153 Ill., 480; 39 N. E. Rep., 123.

⁷ Trimble v. Chicago, 168 Ill., 567, 569; 48 N. E. Rep., 416.

8 Burr v. Newcastle, 49 Ind., 322.
Establishing grade. Chicago
Terminal R. R. Co. v. Chicago, 184
Ill., 154; 56 N. E. Rep., 410. § 528
supra.

Grade lines; sufficient indication of. Carlinville v. McClure, 156 Ill., 492; 41 N. E. Rep., 169.

the established grade," the excavation at the side lines being similarly described but of greater depth, is sufficient in its specification of the grade. So an ordinance adopting the grade lines by reference to a map on file (the map when produced not being marked filed) is not void for uncertainty, where the map had been adopted by ordinance and was sufficiently identified by proof.¹⁰ In Illinois, a street improvement ordinance which failed to specify the height of the curb provided for was held insufficient in description. 11 Words "not less than" used in a paving ordinance in describing measurements and dimensions, as "not less than seven inches of sand," "a finishing coat not less than one-half inch thick," will not render the ordinance void for uncertainty of description. 12 So a street improvement ordinance is not rendered void for vagueness because of the fact that it is necessary to take together the title and the body of the ordinance referring to its title, to ascertain with certainty what street or parts thereof is to be improved.¹³ In one case the paving ordinance did not provide for manholes and catch-basins, to convey from the pavement the surface water, dirt, etc. But it was held sufficient, since it appeared that a sewer had already been constructed in the street of ample capacity for this purpose.14 The ordinance may want precision and be not as full and complete as it should be, yet it will not be declared void for uncertainty, if it can be ascertained with reasonable accuracy the character and extent of the improvement intended. 15

Other illustrations of the sufficiency of street, alley and sidewalk improvement ordinances under various laws appear in the note.¹⁶

9 Cramer v. Charleston, 176 Ill.,507, 509; 52 N. E. Rep., 73.

¹⁰ State (Vanatta) v. Morristown, 34 N. J. L., 445.

Ordinance may be aided by maps. State (Boice) v. Plainfield, 38 N. J. L., 95.

11 Cruickshank v. Chicago, 181
 111., 415; 54 N. E. Rep., 997; Holden v. Chicago, 172 Ill., 263; 50 N.
 E. Rep., 181.

Examine Mead v. Chicago, 186 Ill., 54; 57 N. E. Rep., 824.

¹² Latham v. Wilmette, 168 Ill., 153, 157; 48 N. E. Rep., 311. To

same effect Shannon v. Hinsdale, 180 Ill., 202; 54 N. E. Rep., 181; distinguishing Mansfield v. People, 164 Ill., 611; 45 N. E. Rep., 976.

¹³ Martindale v. Palmer, 52 Ind., 411, 414.

Title in construction. § 291 supra.

¹⁴ Vane v. Evanston, 150 III., 616;37 N. E. Rep., 901.

¹⁵ Sheehan v. Gleason, 46 Mo., 100.

¹⁶ Street improvement. State v. Painfield, 38 N. J. L., 95.

Grading. State v. New Bruns-

§ 542. Sufficiency of description in sewer construction ordinance. In an Illinois case an ordinance for a sewer which

wick, 30 N. J. L., 395; Kearney v. Andrews, 2 Stock (10 N. J. Eq.), 70.

Filling street. Mann v. Jersey City, 24 N. J. L., 662.

Opening street. Danville v. Mc-Adams, 153 Ill., 216; 38 N. E. Rep., 632; Newman v. Chicago, 153 Ill., 469; 38 N. E. Rep., 1053.

Opening street through a pond and across a river. Washington Ice Co. v. Chicago, 147 Ill., 327; 35 N. E. Rep., 378.

Extension of street. Pearson v. Chicago, 162 Ill., 383; 44 N. E. Rep., 739.

Widening street. Hays v. Vincennes, 82 Ind., 178.

Location of street. State (Wood-ruff) v. Orange, 32 N. J. L., 49.

Locating improvement. Sargent v. Evanston, 154 Ill., 268; 40 N. E. Rep., 440.

Description of street to be paved. Rawson v. Chicago, 185 Ill., 87; 57 N. E. Rep., 35; C. B. & Q. R. R. Co. v. Quincy, 136 Ill., 563; 29 Am. St. Rep., 334; 27 N. E. Rep., 192.

Width of pavement. Harrison Bros. v. Chicago, 163 Ill., 129; 44 N. E. Rep., 395; Woods v. Chicago, 135 Ill., 582; 26 N. E. Rep., 608; Adams County v. Quincy, 130 Ill., 566; 22 N. E. Rep., 624; Topliff v. Chicago, 196 Ill., 215; 63 N. E. Rep., 692.

New assessment ordinance to complete improvement need not give detailed description. Hull v. West Chicago Park Com'rs., 185 Ill., 150; 57 N. E. Rep., 1.

The following ordinances relating to street and alley improvements held valid under the St. Louis charter, prior to amendments of 1901: Adams v. Lindell. 72 Mo., 198; 5 Mo. App., 197, 213; Crone v. Mallinckrodt, 9 Mo. App., 316; Steffen v. Fox, 124 Mo., 630; 28 S. W. Rep., 70; 56 Mo. App., 9; Farrar v. St. Louis, 80 Mo., 379, 382, 383; Skinker v. Heman, 148 Mo., 349; 49 S. W. Rep., 1026; Heman v. Ring, 85 Mo. App., 231; Seaboard Nat. Bank v. Woesten, 147 Mo., 467; 48 S. W. Rep., 939; Barber Asphalt Paving Co. v. Hezel, 155 Mo., 391; 56 S. W. Rep., 449, affirming 76 Mo. App., 135; Stifel v. McManus, 74 Mo. App., 558.

SUFFICIENT DESCRIPTION.

That street will be graded and macadamized from one named-point to another. Emery v. San Francisco Gas Co., 28 Cal., 345.

That the crossing of designated streets be planked and that the angular corners thereof be reconstructed. Deady v. Townsend, 57 Cal., 298.

Ordering a change of grade by lowering it a few inches, leaving courses, distances and width unchanged, and that property owners interested "curb and pave gutters, and concrete the sidewalks * * to the established grade." Durand v. Ansonia, 57 Conn., 70; 17 Atl. Rep., 283.

Width of improvement on intersecting streets. Shannon v. Hinsdale, 180 Ill., 202; 54 N. E. Rep., 181.

INSUFFICIENT DESCRIPTION.

Hull v. Chicago, 156 Ill., 381; 40 N. E. Rep., 937; Merrill v. Abbott, 62 Ind., 549; Smith v. Duncan, 77 Ind., 92; Copcutt v. Yonkers, 83 Hun. (N. Y.), 178; 31 N. Y. Suppl., 659.

failed to specify the nature, character and location of the manholes, etc., was held bad.¹⁷ But in another case in the same state, where the ordinance referred to "necessary man-holes" in such manner as to be intelligible to a civil engineer, it was declared good.18 So an ordinance was held sufficient in description which specified the number of man-holes and catchbasins, their dimensions and constituent material, and provided that they should be located at necessary points on the improvement, without farther specification of location or of the manner of connecting them with the sewer.¹⁹ nance for a sewer which gives the internal diameter, etc., need not specify the thickness of vitrified tile pipe, the material for construction, as the description of the material will be understood to call for the ordinary and usual vitrified tile pipe of a standard thickness recognized by manufacturers as necessary for a pipe of the internal diameter of the sewer.²⁰ In one case the ordinance provided that a sewer through an alley in a given block be reconstructed and deepened to as great a depth as its connection with another sewer named would admit, the grade of bottom to be as thereafter established by the city surveyor, and after fixing its locality, provided that the character of the work should be the same as the then present sewer, and that the material in the old sewer should be used in the new

Rule "falsa demonstratio non nocet," applied. State (Woodruff) v. Orange, 32 N. J. L., 49.

day, 60 Iowa, 391; 14 N. W. Rep., 775; Frankfort v. Murray, 99 Ky., 422; 36 S. W. Rep., 180; Browne v. Boston, 166 Mass., 229; 44 N. E. Rep., 127.

17 Ogden v. Lake View, 121 Ill., 422; 13 N. E. Rep., 159.

18 Springfield v. Mathus, 124 Ill., 88; 16 N. E. Rep., 92. Location of need not be specified. Springfield v. Sale, 127 Ill., 359; 20 N. E. Rep.,

19 Walker v. Chicago, 202 Ill., 531; 67 N. E. Rep., 369.

A provision for house connection slants every 25 feet, held valid, even though the lots are wider

than 25 feet, where it appears that the property is assessed by its correct description. Walker v. Chi-SIDEWALKS. Chariton v. Halli- cago, 202 Ill., 531; 67 N. E. Rep.,

> Manholes, location. Cochran v. Park Ridge, 138 Ill., 295; 27 N. E. Rep., 939; Barber v. Chicago, 152 Ill., 37; 38 N. E. Rep., 253; St. Joseph v. Owen, 110 Mo., 445: 19 S. W. Rep., 713.

> Catch basins, location. Rich v. Chicago, 152 Ill., 18; 38 N. E. Rep., 255; Hinsdale v. Shannon, 182 Ill., 312; 55 N. E. Rep., 327.

> Connection. Pearce v. Park, 126 Ill., 287; 18 N. E. Rep.,

> 20 Hynes v. Chicago, 175 Ill., 56; 51 N. E. Rep., 705.

as far as possible. It was held void.²¹ Other illustrations wi appear from the cases in the notes.²²

§ 543. Same—Joint district sewer. A sewer created by o dinance uniting more than one district and providing a mai outlet or intercepting sewer for the joint benefit of such districts, to be paid for by special taxes assessed upon all property in a joint sewer district, was held in Missouri, to be a joint district sewer, within the meaning of the amended charter of St. Louis, which defines a joint district sewer to be a sewer constructed or acquired under the authority of ordinance uniting one or more districts or unorganized territory, for the purpose of providing main outlet or intercepting sewers for the joint benefit of such districts or territory, to be paid for b

²¹ Kankakee v. Potter, 119 Ill.,
 324; 10 N. E. Rep., 212; Hyde Park v. Spencer, 118 Ill., 446; 8 N. E. Rep., 846.

²² Duane v. Chicago, 198 Ill., 471;
 64 N. E. Rep., 1033; Brickerdike v. Chicago, 185 Ill., 280; 56 N. E. Rep., 1096.

Material. St. Joseph v. Landis, 54 Mo. App., 315.

Size of sewer; failure to specify, held not to destroy jurisdiction, under Indiana law. Rickcords v. Hammond, 67 Fed. Rep., 380.

Sewer, depth to be specified. Alton v. Middleton's Heirs, 158 Ill., 442; 41 N. E. Rep., 926; St. Louis v. Oeters, 36 Mo., 456.

Description of curves. Hyde Park v. Borden, 94 Ill., 26.

Sewer, location. Stanton v. Chicago, 154 Ill., 23; 39 N. E. Rep., 987; Bennett v. New Bedford, 110 Mass., 433.

Location and length. Pearce v. Hyde Park, 126 Ill., 287; 18 N. E. Rep., 824.

Extending sewer. Com. v. Abbott, 160 Mass., 282; 35 N. E. Rep., 782.

Provision that sewage be discharged into a river does not render assessment void. Walker v. Aurora, 140 III., 402; 29 N. E. Reg 741.

Sewer district. State ex rel. St. Louis, 56 Mo., 277.

Description of fire hydrant crosses, tees and supply-pipes a "City of Chicago standard," hel insufficient, in absence of proo Washburn v. Chicago, 202 III., 210 66 N. E. Rep., 1033.

Ordinance need not provide for obtaining outlet on private projecty. Payne v. Springfield, 161 Ill 285; 44 N. E. Rep., 105.

Outlet for sewer indispensable South Highland Land & Imp. Co v. Kansas City, 172 Mo., 523; 72 & W. Rep., 944.

Single ring of sewer brick lai edgewise, held sufficient. Peters v Chicago, 192 Ill., 437; 61 N. F Rep., 438.

Providing for connection of sew er not constructed, held did not in validate. Ryder Estate v. Altor 175 Ill., 94; 51 N. E. Rep., 821.

Culvert, dimensions of need no be prescribed. Young v. Kansa City, 27 Mo. App., 101.

Drain; location. Steele v. Rive Forest, 141 Ill., 302; 30 N. E. Rep 1034.

Box drain. Hyde Park v. Cal

special taxes assessed against all property in said joint sewer district. And such sewer is none the less a joint district sewer because the purpose of its construction is to supplement an inadequate sewer, which, under the charter prior to its amendment, was a public sewer constructed out of public revenues.²³

§ 544. Specification of material. Under a charter requiring the ordinance to specify the "material to be used" in the improvement, a recital to be "paved with Trinidad sheet asphaltum, according to specifications in office of city engineer," in a street paving ordinance, was held sufficient.²⁴ An ordinance requiring the pavement to be what is known as the "Bloomington brick pavement," and the foundation thereof to be laid of cinders, sand, gravel or "other material equally suitable," at least six inches deep, etc., was sustained against the contention that it was uncertain in description of the material to be used for the brick to rest upon. The words "or other material" were treated as surplusage.²⁵

ton, 132 III., 100; 23 N. E. Rep., 590.

²³ Prior v. Buehler & Cooney Construction Co., 170 Mo., 439, 448; 71 S. W. Rep., 205, per Marshall, J.

Joint district sewer under Kansas City charter; authorized the grouping of 105 sewer districts, embracing one-fourth the area of the city into a joint district sewer to be paid for by special taxation. The terms "public," "joint district" and "private" sewer as employed in charter defined and explained. South Highland Land & Imp. Co. v. Kansas City, 172 Mo., 523: 72 S. W. Rep., 944.

24 Barber Asphalt Pav. Co. v.
 Ullman, 137 Mo., 543, 571; 38 S. W.
 Rep., 458, citing Sheehan v. Gleeson, 46 Mo., 100; Moran v. Lindell,
 52 Mo., 229; Carlin v. Cavender, 56 Mo., 286.

Description of material for pavement. Becker v. Washington, 94 Mo., 375; 7 S. W. Rep., 291; Morley v. Weakley, 86 Mo., 451; Verdin v.

St. Louis, 131 Mo., 26; 27 S. W. Rep., 447.

Brick to be used. Chicago v. Singer, 202 Ill., 75; 66 N. E. Rep., 874.

"Wooden block." Rogers v. St. Paul, 22 Minn., 494.

"Stone." Shannon v. Hinsdale, 180 Ill., 202; 54 N. E. Rep., 181.

"Asphalt." Redersheimer v. Flower, 52 La. Ann., 2089; 28 So. Rep., 299.

²⁵ Jacksonville Ry. Co. v. Jacksonville, 114 Ill., 562, 566; 2 N. E. Rep., 478.

Change of material, held not fatal. Barber Asphalt P. Co. v. Gaar, 24 Ky. Law Rep., 2227; 73 S. W. Rep., 1106.

Under an ordinance requiring the order published to "specify briefly but plainly, the kind of improvement ordered," the material need not be described. Main v. Ft. Smith, 49 Ark., 480; 5 S. W. Rep., 801.

Ordinance need not name material. Bacon v. Savannah, 86 Ga., 301; 12 S. E. Rep., 580.

§ 545. **Description by reference** to documents, maps, plans, specifications, etc., on file, or in official custody, has received judicial indorsement. Such reference, however, should be confined to mere details. The ordinance or resolution itself should contain a substantial description of everything relating to the proposed improvement required by charter.²⁶ In Illinois it has been decided that the nature, character and locality of the improvement may be stated by reference to a former ordinance which fully states these matters.²⁷

§ 546. Matters of detail need not be specified in the improvement ordinance,²⁸ especially where these are provided for by general ordinance.²⁹ "It is not to be expected that an ordinance of this kind," remarked the Supreme Court of Illinois,

Sidewalk, material to be prescribed. Lowell v. Wheelock, 11 Cush. (65 Mass.), 391.

²⁶ California—Stockton v. Skinner, 53 Cal., 85.

Illinois-Brewster v. Peru, 180 Ill., 124; 54 N. E. Rep., 233; Alton v. Middleton's Heirs, 158 Ill., 442; 41 N. E. Rep., 926; Cunningham v. Peoria, 157 Ill., 499; 41 N. E. Rep., 1014; Carlinville v. McClure, 156 Ill., 492; 41 N. E. Rep., 169; Callon v. Jacksonville, 147 Ill., 113; 35 N. E. Rep., 223; Steele v. River Forest. 141 Ill., 302; 30 N. E. Rep., 1034; Pearce v. Hyde Park, 126 III., 287; 18 N. E. Rep., 824; Sterling v. Galt, 117 Ill., 11; 7 N. E. Rep,. 471; Jacksonville R. Co. v. Jacksonville, 114 Ill., 560; 2 N. E. Rep., 478; Lake v. Decatur, 91 Ill., 596; Lake Shore & M. S. Ry, Co. v. Chicago, 56 Ill., 454; Foss v. Chicago, 56 Ill., 354.

Kentucky—Barber Asphalt P. Co. v. Gaar, 24 Ky. Law Rep., 2227; 73 S. W. Rep., 1106.

Maryland—Burk v. Baltimore, 77 Md., 469; 26 Atl. Rep., 868.

Massachusetts—Stone v. Cambridge, 6 Cush. (60 Mass.), 270.

Michigan—Boehme v. Monroe, 106 Mich., 401; 64 N. W. Rep., 204. Missouri—Barber Asphalt Pav. Co. v. Ullman, 137 Mo., 543, 571; 38 S. W. Rep., 458; Becker v. Washington, 94 Mo., 375; 7 S. W. Rep., 291.

²⁷ McManus v. People *ex rel*, 183 Ill., 391, 393; 55 N. E. Rep., 886; West Chicago Park Com'rs v. Farber, 171 Ill., 146; 49 N. E. Rep., 429; Ogden v. Lake View, 121 Ill., 422; 13 N. E. Rep., 159; Shannon v. Hinsdale, 180 Ill., 202; 54 N. E. Rep., 181.

Material for sidewalk may be described by reference to certain section of a general ordinance. Gallagher v. Smith, 55 Mo. App., 116.

By reference to other sewers, etc., as to material and manner of construction. Pearce v. Hyde Park, 126 Ill., 287; 18 N. E. Rep., 824.

Reference to public building, to locate improvement. Ewart v. Western Springs, 180 Ill., 318; 54 N. E. Rep., 478.

28 Haughawout v. Hubbard, 131
Cal., 675; 63 Pac. Rep., 1078; St.
Joseph to use Gibson v. Owen, 110
Mo., 445; 19 S. W. Rep., 713; Becker v. Washington, 94 Mo., 375; 7 S.
W. Rep., 291.

²⁹ St. Joseph to use, etc., v. Landis, 54 Mo. App., 315.

"should set forth the details and all the particulars of the work. Indeed, this is not contemplated and the statute requires nothing of the kind. A substantial compliance with its provisions is all that is required." ³⁰

- § 547. Ordinance must provide method of payment. As the ordinance is the foundation upon which all subsequent proceedings are based, it has been determined in Illinois that the method of paying for the improvement must be provided therein; whether by special assessment, special taxation or general taxation, or out of the municipal revenue. The mode so prescribed is exclusive.³¹
- § 548. Sufficiency of ordinance relating to payments in installments. Many charters provide for the payment of the cost of certain improvements by special assessment or taxation in installments. The usual requirement is that the ordinance directing the improvement shall prescribe the number of payments, within the restrictions of the charter.³² The Illinois statute provides that special assessments may be divided into not more than seven installments, the first to include all fractional amounts, leaving the others equal in amount and multiples of \$100. In that state an ordinance which divided the assessments into seven installments, the first including 20 per cent of the assessment, together with all fractional amounts,

³⁰ Kankakee v. Potter, 119 III., 324; 10 N. E. Rep., 212, approved and quoted in Delamater v. Chicago, 158 III., 575, 578; 42 N. E. Rep., 444.

"It would be difficult for ordinances to specify every particular of a work; but they must be more or less general, and must take many things for granted in the history, geography and topography of the place, and in the arts called into requisition by the improvements ordered. * * * An ordinance may lack desirable precision, and still may so provide for the manner in which an improvement shall be made, and be such a compliance with the law, although a loose one, that the courts would not be authorized to invalidate the action of the ciy officers under it. It is not every irregularity or omission that goes to the substance of a proceeding," per Bliss, J., in Sheehan v. Gleeson, 46 Mo., 100, 104.

General direction as to plan of work, held sufficient. Taber v. Grafmiller, 109 Ind., 206; 9 N. E. Rep., 721; Connersville v. Merrill, 14 Ind. App., 303; 42 N. E. Rep., 1112.

31 Dolese v. McDougall, 78 III. App., 629, 643; Hyde Park v. Thatcher, 13 III. App., 613, 616.

³² St. Louis Charter, Art. VI., Sec. 25 (Amendment, October, 1901); Annotated Amended Charter of St. Louis, p. 359.

Drainage assessments. Gray v. Cicero, 177 Ill., 459; 53 N. E. Rep., 91.

leaving the others equal in amount and multiples of \$100, was sustained: the court ruling that the statute did not limit the first installment to one-seventh of the whole assessment plus the fractional amount.33 So the failure of the ordinance to make the first installment include all fractional amounts does not render it void.34 So the fact that the ordinance provides that the first installment of 20 per centum shall be paid upon the confirmation of the assessment and 20 per centum of the total each year thereafter does not render it void for uncertainty as to the time of payment of the deferred installments.35 An ordinance which provided that "the assessments shall be divided into and collected by installments," in accordance with the statute (specifying it), "and that the amount of the first of said installments shall be 20 per cent of the total of said assessment." was pronounced sufficient. The statute provided for the number and time of payment of each installment. ordinance, taken with the statute, is certain and specific." 36

§ 549. Sufficiency respecting basis of apportionment of tax. An ordinance providing that a certain street shall be paved a designated distance on each side of the center between specified points constituting the termini, and that the improvement be paid for by special taxation upon contiguous property, except at street crossings and opposite property owned by the city, was held in Illinois to sufficiently show that the tax is to be apportioned on the basis of frontage.³⁷

§ 550. Improvement ordinance must be reasonable. The rule elsewhere announced and explained that all ordinances must be reasonable, ³⁸ is often applied in testing the validity of im-

33 Latham v. Wilmette, 168 Ill.,153; 48 N. E. Rep., 311.

34 Delamater v. Chicago, 158 Ill.,575; 42 N. E. Rep., 444.

35 Davis v. Litchfield, 155 Ill., 384; 40 N. E. Rep., 354.

³⁶ Andrews v. People ex rel, 164 III., 581, 584; 45 N. E. Rep., 965.

Division of assessment into installments not in accordance with the requirements of the law, held no ground for refusing judgment of sale if the objector is not thereby prejudiced. Walker v. Chicago, 202 Ill., 531; 67 N. E. Rep., 369.

Farther respecting the ordinance providing for payment by installments under the Illinois statute, see Hinsdale v. Shannon, 182 Ill., 312; 55 N. E. Rep., 327; Danforth v. Hinsdale, 177 Ill., 579; 52 N. E. Rep., 877.

37 Cramer v. Charleston, 176 Ill.,507; 52 N. E. Rep., 73.

Method of apportionment of special tax. Gleason v. Barnett, 20 Ky. Law Rep., 1694; 50 S. W. Rep., 67.

Examine Ryder Estate v. Alton, 175 Ill., 94; 51 N. E. Rep., 821.

38 Chapter VI.

provement ordinances.39 Considering all the circumstances, courts having the authority to determine whether a particular power has been reasonably exercised, may declare improvement ordinances void for unreasonableness, notwithstanding the broad discretion usually conceded to be vested in the municipal authorities. This judicial power is most frequently invoked in proceedings for improvements by special assessment or taxation in cases where, in the opinion of the court, unjust discrimination has been exercised; or positive legal provisions have been violated, as where the method of laving the tax as prescribed is not observed; or where improvements are ordered without necessity or reason whatever, as in a sparsely settled and uninhabited section, or directing the tearing up of a good sidewalk or pavement and replacing it with an expensive one, according to the caprice or whim of municipal officers or to favor some contractor; or exercising the power in such arbitrary and unreasonable manner as to constitute extortion, confiscation or the taking of private property without just compensation or due process of law.40 "A local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name." 41

The reasonableness of an ordinance providing for a system of sewerage is to be determined on a consideration of the situation and condition of the entire territory to be reached by the system, and not merely that part of the property of persons objecting.⁴² An ordinance intending to change the grade of a street so as to carry the way over an intesecting railroad by means of a bridge and approaches, contained a clause vacating a part of the street on which the approach is to rest, and, therefore, it thereby defeats its main object and is unreasonable. Vacating the part of the street upon which the approach to the

³⁹ Morse v. Westport, 136 Mo., 276; 37 S. W. Rep., 932; Field v. Barber Asphalt Pav. Co., 117 Fed. Rep., 925.

⁴⁰ Hawes v. Chicago, 158 Ill., 653, 657; 42 N. E. Rep., 373; Corrigan v. Gage, 68 Mo., 541; Wistar v. Philadelphia, 111 Pa. St., 604;

⁴ Atl. Rep., 511; Wistar v. Philadelphia, 80 Pa. St., 505; Norwood v. Baker, 172 U. S., 269; 74 Fed. Rep., 997.

⁴¹ Per Redfield, J., in Allen v. Drew, 44 Vt., 174, 188.

⁴² Washburn v. Chicago, 198 Ill.,506; 64 N. E. Rep., 1064.

bridge is to rest surrenders all the public rights therein and deprives the public of the right to use this approach, and thus destroys the public utility of the entire structure.⁴³ A provision in a paving ordinance requiring bidders to submit specimen brick which must withstand specified "absorption" and "abrasion" tests by the board of local improvements, and providing for rejection of all specimens not sustaining the test, does not render the ordinance void. The requirement is not an unreasonable restraint upon competitive bidding.⁴⁴

§ 551. Certainty — Validity. The improvement ordinance must be precise, definite and certain. It must be full and complete. Uncertainty in essential parts will render such parts void. But a recital in the ordinance that the proceedings are to be as provided in a particular law, so far as applicable, has been held in Maryland not to render the ordinance uncertain or inconsistent.

It is within the province of the court to determine the validity of the improvement ordinance.⁴⁹ The legal presumption will be indulged that the ordinance is valid,⁵⁰ but this may be rebutted.⁵¹ Void parts will not affect valid parts, provided the latter are not dependent upon and are separable from the latter. This general rule, defined and illustrated in a former chapter,⁵² has often been applied in the construction of improvement ordinances.⁵³ In contesting the validity of the ordinance fraud may be shown, but where power to enact the ordinance is undoubted, the single fact that many improvement ordinance

48 Read v. Camden, 54 N. J. L., 347, 374; 24 Atl. Rep., 549, reversing 53 N. J. L., 322; 21 Atl. Rep., 565.

44 Chicago v. Singer, 202 Ill., 75; 66 N. E. Rep., 874.

45 General rule, Sec. 20, supra.

46 Title Guarantee, etc. Co. v. Chicago, 162 III., 505; 44 N. E. Rep., 832.

⁴⁷ Davidson v. Chicago, 178 Ill., 582; 53 N. E. Rep., 367; Lusk v. Chicago, 176 Ill., 207; 52 N. E. Rep., 54; Hull v. Chicago, 156 Ill., 381; 40 N. E. Rep., 937.

48 Alberger v. Baltimore, 64 Md., 1: 20 Atl. Rep., 988.

Carriageway and sidewalk, des-

ignating. Burghard v. Fitch, 24 Ky. Law Rep., 1983; 72 S. W. Rep., 778

49 Sec. 275 et seq., supra.

⁵⁰ Rutherford v. Hamilton, 97 Mo., 543; 11 S. W. Rep., 249; St. Louis v. Gleason, 15 Mo. App., 25. ⁵¹ Fruin-Bambrick Const. Co. v. Geist, 37 Mo. App., 509, 514.

Improvement ordinances not passed in public interest, held void. § 39 supra and cases.

52 Sections 295 and 296. supra.

53 Shannon v. Hinsdale, 180 Ill.,
202; 54 N. E. Rep., 181; Chytraus
v. Chicago, 160 Ill., 18; 43 N. E.
Rep., 335; Johnson v. People, 202
Ill., 306; 66 N. E. Rep., 1081.

nances are enacted about the same time, in view of an impending change in the charter, does not tend to prove fraud.⁵⁴ While the rule is rigidly enforced that, corporate authorities cannot surrender or barter away public powers,⁵⁵ the fact that an ordinance for an outfall sewer provides that the use and benefit of such sewer shall be available to all property owners, obtaining permission to make connection therewith, is not a surrender of the corporation's police powers, for the power remains to regulate the manner of making such connections and to abate any nuisance that might be created thereby.⁵⁶

§ 552. Agreements of citizens and property owners to pay the expense or a part thereof, of improvements, when they were

54 Morse v. Westport, 136 Mo.,276; 37 S. W. Rep., 932.

Legislative motives; how far courts will inquire into, see secs. 161 and 162, *supra*.

Statement of members of council will not affect validity. Chester v. Eyre, 181 Pa. St., 642; 37 Atl. Rep., 837. See sec. 292, supra.

The ordinance must be enacted in good faith, § 19, supra.

55 Sec. 84, supra.

⁵⁶ Gray v. Cicero, 177 Ill., 459;
 53 N. E. Rep., 91.

VALIDITY-ILLUSTRATIONS.

Ordinance consisting of separate papers. Keating v. Skiles, 72 Mo., 97.

Under the St. Louis charter, the ordinance need not contain a provision for advertisement for bids for the work, as this is sufficiently prescribed in the charter. Bambrick v. Campbell, 37 Mo. App., 460, 465.

Proceedings under an ordinance between date of passage and date it takes effect are void. Heman Const. Co. v. Loevy, 64 Mo. App., 430, 437; Keane v. Cushing, 15 Mo. App., 96; but the last case is overruled in Springfield v. Weaver, 137 Mo., 650, 668; 37 S. W. Rep., 509; 39 S. W. Rep., 276, which holds that advertising for bids may be made and the contract let for the

work, prior to the formal passage of the ordinance.

The work may be subdivided and sublet in parts to different persons. but whenever the construction of a street is provided for by ordinance, the entire work must be completed before adjoining property can be taxed for any of its cost. Heman Const. Co. v. Loevy, 64 Mo. App., 430, 437. "The reason is that the property owners might be willing to bear the expense of a completed street, and unwilling to pay for its partial improvement. In the one case the benefits conferred on the property might justify the outlay, whereas in the other the improvement might be a decided detriment." Heman Const. Co. v. Loevy, 64 Mo. App., 430, 437. The decisions were made prior to charter amendments of 1901.

An ordinance which provides that a city shall do the work and furnish the materials for making a sewer connection up to within three feet of the building to be connected is yold as an unreasonable invasion of the rights of property, although such work is done under the supervision of the city. Slaughter v. O'Berry, 126 N. C., 181; 35 S. E. Rep., 241; 48 L. R. A., 442.

under no legal obligation to do so, have been sanctioned by the courts, and held not to be opposed to public policy.⁵⁷ Thus a promise made by citizens to pay a part of the expense of opening a street, which, under the law, was to be imposed upon the property owners in proportion to benefits, etc., was judicially declared, in New Jersey, not against good public policy, and hence, an ordinance passed to open the street in pursuance of such promise was decided not to be void on this ground.⁵⁸

§ 553. Ordinances restricting competition — Union labor. Charters generally require contracts for public work, particularly in the construction and reconstruction of streets, sewers and drains, which is to be paid for by the property owners, to be let to the lowest responsible bidder. Public lettings of public work are exacted on the ground of public policy, to avoid favoritism, extravagance, improvidence and corruption. As aptly declared in a New York case, provisions of this character "should be so administered and construed as fairly and reasonably to accomplish this purpose." All competitors are entitled to an equal basis. Laws of this nature are usually held to be mandatory.

57 Ford v. North Des Moines, 80
Iowa, 626; 45 N. W. Rep., 1031;
Parks v. Boston, 8 Pick. (25
Mass.), 218; 19 Am. Dec., 322;
Crockett v. Boston, 5 Cush. (59
Mass.), 182.

58 State v. Orange, 54 N. J. L., 111; 22 Atl. Rep., 1004; 14 L. R. A., 62. See cases in opinion pro and con fully discussing question, and note to 14 L. R. A., 62, 63, 64 and cases.

59 Electric Light, etc. Co. v. San Bernardino, 100 Cal., 348; 34 Pac. Rep., 819; Dement v. Rokker, 126 Ill., 174; 19 N. E. Rep., 33; Seaboard Nat. Bank v. Woesten, 147 Mo., 467; 48 S. W. Rep., 939; Springfield v. Weaver, 137 Mo., 650; 37 S. W. Rep., 509; 39 S. W. Rep., 276; Gibson v. Owens, 115 Mo., 258; 21 S. W. Rep., 1107; Frame v. Felix, 167 Pa. St., 47; 31 Atl. Rep., 375.

60 Per Earl, J., in People v. Glea-

son, 121 N. Y., 631, 634; 25 N. E. Rep., 4, reversing 4 N. Y., Suppl., 383; Dickinson v. Poughkeepsie, 75 N. Y., 65; McDonald v. New York, 68 N. Y., 23; Brady v. New York, 20 N. Y., 312; Lyddy v. Long Island City, 104 N. Y., 218; 10 N. E. Rep., 155; Board of Richmond County v. Ellis, 59 N. Y., 620; Nelson v. New York, 5 N. Y. Suppl., 688.

61 McQuiddy v. Brannock, 70 Mo. App., 535; Clapton v. Taylor, 49 Mo. App., 117; Keane v. Klausman, 21 Mo. App., 485; Brambrick v. Campbell, 37 Mo. App., 460.

62 City Imp Co. v. Broderick, 125 Cal., 139; 57 Pac. Rep., 776; Baltimore v. Keyser, 72 Md., 106; 19 Atl. Rep., 706; Whitney v. Hudson, 69 Mich., 189; 37 N. W. Rep., 184; Worthington v. Boston, 152 U. S., 695.

DISCRETION in letting contracts. *Illinois*—Dement v. Rokker, 126

In a recent Tennessee case an ordinance providing that all city printing should bear a union label was held void, because (1) it deprives those not using the label from pursuing their avocation so far as such public printing is concerned, and hence contravenes the fourteenth amendment of the United States constitution; (2) it is against public policy; and (3) it restricts competition in violation of the charter. 63 A late Georgia case seems to announce the broad doctrine that all such contracts are void when not executed. In that case it was decided that a municipal corporation, though not required by its charter to let contracts for work to the lowest bidder, and though clothed as to such matters with the broadest discretionary powers, has no authority to adopt an ordinance prescribing that all work of a designated kind shall be given exclusively to persons of a specified class (those authorized to use the union label); that such an ordinance is ultra vires and illegal, because it tends to encourage monopoly and defeat competition, and all contracts made in pursuance thereof are void.64 In Illinois, where a board of education restricted the bidding for work on public buildings so as to exclude nonunion labor, and the cost of the work was thereby much increased it was held that such restriction was invalid.65 In the same state printing contracts let under an ordinance which excluded the bidding of nonunion labor. were declared void, but it affirmatively appeared that because

Ill., 174, 189; 19 N. E. Rep., 33; Kelly v. Chicago, 62 Ill., 279, 281.

Massachusetts—Mayo v. Com'rs of Hampden Co., 141 Mass., 74; 6 N. E. Rep., 757.

Missouri—Barber A. P. Co. v. Hezel, 76 Mo. App., 135; Verdin v. St. Louis, 131 Mo., 26, 162; 33 S. W. Rep., 480; 36 S. W. Rep., 52; State ex rel. v. McGrath, 91 Mo., 386, 394; 3 S. W. Rep., 846.

New Jersey—Wilson v. Trenton, 61 N. J. L., 599; 44 L. R. A., 540; 40 Atl. Rep., 575.

Pennsylvania—Com. v. Mitchell, 82 Pa. St., 343; Douglass v. Com., 108 Pa. St., 559; Erie v. Bier, 10 Pa. Supr. Ct., 381.

COMBINATION among bidders vitiates contract. McMullen v. Hoff-

man, 174 U. S., 639; 19 Supr. Ct. Rep., 839; 45 L. R. A., 410; Jennings County v. Verbarg, 63 Ind., 107; People v. Stephens, 71 N. Y., 527, 557.

68 Marshall v. Nashville (Tenn. 1903), 71 S. W. Rep., 815; 65 Alb. L. J., 102, fully reviewing the cases.

64 Atlanta v. Stein, 111 Ga., 789;
36 S. E. Rep., 932;
51 L. R. A.,
335.

65 Adams v. 'Brenan, 177 III.,
194; 52 N. E. Rep., 314; 42 L. R.
A., 718; 69 Am. St. Rep., 222.

Under a Pennsylvania statute requiring the contract to be awarded "to the lowest responsible bidder," a like ruling was made. Elliott v. Pittsburg, 6 Pa. Dist. Rep., 455.

of the restriction the cost of the work had been increased.⁶⁶ The St. Louis Court of Appeals declined to sanction an ordinance of the City of St. Louis which required all dressed rock, stone or granite used in connection with public work to be dressed within the limits of the State of Missouri.⁶⁷ Ordinances exist which, in substance, provide that, no contract requiring the employment of skilled labor on public work in any of the municipal departments shall be made with any person, firm or corporation unless it is expressly agreed in such contract that only union labor shall be employed on such work. In the opinion of the Supreme Court of Illinois all such ordinances are void.⁶⁸

On principle it would seem that, as the primary duty of the public officers is to secure the most advantageous contract possible for accomplishing the work under their direction, any regulation which prevents the attainment of this end is invalid. A law demanding competition in the letting of public work is intended unquestionably to secure unrestricted competition among bidders, and hence, where the effect of an ordinance is to prevent or restrict competition and thus increase the cost of the work it violates manifestly such law and is void, as are all proceedings had thereunder. It may be farther observed that, according to the judicial view so

66 Holden v. Alton, 179 III., 318, 324; 53 N. E. Rep., 556.

67 St. Louis Quarry & C. Co. v. Von Versen, 81 Mo. App., 519. See comments on this case in St. Louis Quarry & Const. Co. v. Frost, 90 Mo. App., 677, 689.

68 Fiske v. People, 188 Ill., 206;58 N. E. Rep., 985;52 L. R. A.,291.

Contracts in which the public are interested which tend to prevent competition are void. Fishburn v. Chicago, 171 Ill., 338; 49 N. E. Rep., 532; 39 L. R. A., 482; 63 Am. St. Rep., 236; People v. Chicago Gas Trust Co., 130 Ill., 268; 22 N. E. Rep., 798; 8 L. R. A., 497; 17 Am. St. Rep., 319; Foss v. Cummings, 149 Ill., 353; 36 N. E. Rep., 553.

69 Mazet v. Pittsburg, 137 P. St.,548; 20 Atl. Rep., 693.

EIGHT-HOUR ORDINANCE. An or-

dinance requiring contractor to restrict the hours of labor of its employees to eight hours per day, held not to be unreasonable. "On the contrary, it is in accord with the law of the state (R. S., Mo., § 8136), with enlightened 1899 sentiment, and the trend of modern legislation everywhere. That it had no influence whatever on the cost of the work is shown by the fact that in this character of work laborers are paid by the hour, and stone cutters and pavers by the St. Louis Quarry square." Const. Co. v. Frost, 90 Mo. App., 677, 690. As to eight-hour feature, see § 495 supra.

PRICE OF COMMON LABOR. Recently, in Indiana, a legislative act which required municipal corporations to pay for common labor employed on public work more than its market value, was declared unfar declared, all such ordinances are void on the constitutional ground of discrimination. 70

§ 554. Ordinances authorizing patented and monopolized articles. Under a charter provision requiring contracts for public work to be let to the lowest responsible bidder, the Supreme Court of Wisconsin held that the city could not contract to lay Nicholson pavement where the right to lay it is patented and owned by a single firm. The court remarked that the contention that there could be no competition in the letting of the contract "seems unanswerable. * * It seems to me, therefore, a conclusion derivable from the very nature of the case, that competition could not be, and was not preserved in the letting of this contract; and that it was, therefore, beyond the scope and in violation of the spirit of the charter." While this view has received judicial support, the tendency of the courts appears to be to adopt the opposite view.

constitutional, because (1) it deprives tax-payers of their privileges and immunities, (2) of their property without due process of law, (3) interferes unreasonably with the right of contract, and (4) is class legislation. Street v. Varney Electrical Supply Co. (Ind., 1903), 61 L. R. A., 154; 66 N. E. Rep., 895, approving People ex rel. v. Coler, 166 N. Y., 1; 52 L. R. A., 814; 59 N. E. Rep., 716; Cleveland v. Clements Const. Co., 67 Ohio St., 197; 59 L. R. A., 775; 65 N. E. Rep., 885, and other like cases, cited in sec. 495, supra, relating to the eight-hour law.

70 DISCRIMINATIONS forbidden, secs. 193, 194, 226, 259, 417, supra. Yick Wo v. Hopkins, 118 U. S., 356; 6 Sup. Ct. Rep., 1064; 30 L. Ed., 220; Gillespie v. People, 188 Ill., 176; 58 N. E. Rep., 1007; 80 Am. St. Rep., 176; 52 L. R. A., 283; Cairo v. Feuchter, 159 Ill., 155; 42 N. E. Rep., 308; Eden v. People, 161 Ill., 296; 43 N. E. Rep., 1108; 32 L. R. A., 659; 52 Am. St. Rep., 365; State v. Loomis, 115 Mo., 307; 22 S. W. Rep., 350; 21 L. R. A., 789; People v. Gillson, 109 N. Y., 389; 17 N. E. Rep., 343; 4 Am. St. Rep., 465; *In re* Jacobs, 98 N. Y., 98; 50 Am. Rep., 636; Appeal of Durach, 62 P. St., 491, 495.

71 Dean v. Charlton, 23 Wis., 590; 99 Am. Dec., 205. In McCormack v. Patchin, 53 Mo., 33, under a like charter provision, a special tax bill for Nicholson pavement was sustained without question. Kilvington v. Superior, 83 222; 53 N. W. Rep., 487 restricts somewhat the rule of Dean v. Charlton, supra. Examine Dean v. Borchsenius, 30 Wis., 236, and Mills v. Charlton, 29 Wis., 400; 9 Am. Rep., 578, being construction of statute relating to specified kind of pavement.

72 Mulrein v. Kalloch, 61 Cal., 522; Nicolson Pav. Co. v. Painter 35 Cal., 699; Barber A. P. Co. v. Gogreve, 41 La. Ann., 251; 5 So. Rep., 848; Burgess v. Jefferson, 21 La. Ann., 143. "The question is close; but there seems, so far, to be a tendency in the courts to adopt the Wisconsin view." Per Judge Dillon, writing in 1890, 1 Dillon, Mun. Corp. (4th Ed.), sec. 467.

73 Hobart v. Detroit, 17 Mich., 246; 97 Am. Dec., 185; Harlem Gas

§ 555. Ordinances providing for maintenance of street for a term of years. The cost of construction or reconstruction is usually charged to the abutting owners or those owning property in the benefit or taxing district, and the expense of keeping the street in repair to the general municipal revenue. Or dinances which impose the cost of repairs upon the property, therefore, are void.⁷⁴ The validity of an ordinance authorizing the letting in one contract the work of construction or reconstruction and maintenance of the street for a definite period of years will depend upon the provisions of the particular char

Light Co. v. New York, 33 N. Y., 309; People ex rel. Trundy v. Van Nort, 65 Barb. (N. Y.), 331; Newark v. Bonnell, 57 N. J. L., 424; 51 Am. St. Rep., 609; 31 Atl., Rep., 408; Silsby Mfg. Co. v. Allentown, 153 Pa. St., 319; 26 Atl. Rep., 646.

Species of street work covered by letters patent may be required. Barber A. P. Co. v. Hunt, 100 Mo., 22, 28; 13 S. W. Rep., 98; 18 Am. St. Rep., 530.

In Verdin v. St. Louis, 131 Mo., 26; 33 S. W. Rep., 480; 36 S. W. Rep., 52, the question is elaborately discussed by Burgess, Barclay and Sherwood, J. J., as to whether the charter of St. Louis prevents from letting a contract for paving with asphalt from the Island of Trinidad, when it appears that one corporation has, by virtue of a contract with the government of the island, a monopoly of furnish-Burgess, J., such material. concludes that, inasmuch as the charter says that all contracts for street improvements shall be let to the lowest responsible bidder, "it means that no such contract can be let for a patented or monopolized article for which there can be no competition or bidding," p. 97 of the opinion. Barclay, J. (p. 102, 103), announces a contrary view, adheres to the ruling in the Hunt case, supra, on the rule of stare decisis. This view is supported by Sherwood, J., and fully discussed at pages 138, 139, 167 et seq., and is the opinion of the court.

See Kansas City Transfer Co. v. Hulling, 22 Mo. App., 654, where it is held that the provision of the Kansas City charter as to letting contracts to the "lowest and best bidder," only applies to work done at the expense of the city, and has no relation to work done at the expense of the adjacent property owners. The court declined "to express an opinion upon the question as to whether the contract * * would have been lawful had the requirement of the charter applied to such work."

74 Kansas City v. Hanson, 8 Kan. App., 290; 55 Pac. Rep., 513; Fehler v. Gosnell, 99 Ky., 380; 35 S. W. Rep., 1125; St. Louis Quarry & Const. Co. v. Frost, 90 Mo. App., 677; Robertson v. Omaha, 55 Neb., 718; 76 N. W. Rep., 442; 44 L. R., 534; People v. Maher, 56 Hun. (N. Y.), 81; 9 N. Y. Suppl., 94; Schenectady v. Union College, 66 Hun. (N. Y.), 179; 21 N. Y. Suppl., 147; Boyd v. Milwaukee, 92 Wis., 456; 66 N. W. Rep., 603.

ter.⁷⁵ Such ordinances have been sustained.⁷⁶ On the other hand, they have been declared void.⁷⁷

§ 556. Validating void improvement ordinances. The general authority to ratify irregular and void acts ⁷⁸ and to validate void ordinances by municipal action and the method of doing so are treated elsewhere. ⁷⁹ It has been decided in Illinois that, where the original ordinance directing a special assessment proves defective and insufficient to support the assessment (as a defective description of the work to be done), if not absolutely void, it may be amended or the defect cured by a supplemental ordinance and a re-assessment. ⁸⁰

§ 557. Same—Curative power of the legislature. The general curative power of the legislature over void municipal ordinances, considered in prior sections, s1 has been extended to void improvement ordinances. Irregularities and defects

75 Brown v. Jenks, 98 Cal., 10; 32 Pac. Rep., 701; Bullitt v. Selvage, 20 Ky. Law Rep., 599; 47 S. W. Rep., 255; Barber A. P. Co. v. Ullman, 137 Mo., 543; 38 S. W. Rep., 458; Verdin v. St. Louis, 131 Mo., 26; 33 S..W. Rep., 480; 36 S. W. Rep., 52; Gibson v. Owens, 115. Mo., 258, 270; 21 S. W. Rep., 1107; Warren v. Barber A. P. Co., 115 Mo., 572; 22 S. W. Rep., 490; Morse v. Westport, 110 Mo., 502, 509; 19 S. W. Rep., 831; Gilmore v. Utica, 131 N. Y., 26; 29 N. E. Rep., 841; Portland v. Portland Bituminous P. & I. Co., 33 Oregon, 307; 44 L. R. A., 527; 52 Pac. Rep., 28,

76 Seaboard Nat. Bank v. Woesten, 147 Mo., 467; 48 S. W. Rep., 939; Barber A. P. Co. v. Hezel, 76 Mo. App., 135, affirmed 155 Mo., 391; 56 S. W. Rep., 449; Barber Asphalt P. Co. v. Gaar, 24 Ky. Law Rep., 2227; 73 S. W. Rep., 1106; Williamsport v. Hughes, 21 Pa. Super. Ct. Rep., 443; State (Wilson) v. Trenton, 61 N. J. L., 599; 44 L. R. A., 540; 40 Atl. Rep., 575.

Guaranty for good work. Covington v. Dressman, 6 Bush. (Ky.), 210; Louisville v. Henderson 5

Bush. (Ky.), 515; Gosnell v. Louisville, 14 Ky. Law Rep., 719; Latham v. Wilmette, 168 Ill., 153; 48 N. E. Rep., 311; Allen v. Davenport, 107 Iowa, 90; 77 N. W. Rep., 532; Osburn v. Lyons, 104 Iowa, 160; 73 N. W. Rep., 650; State (Wilson) v. Trenton, 60 N. J. L., 394; 38 Atl. Rep., 635.

77 Excelsior Paving Co. v. Leach (Cal. 1893), 34 Pac. Rep., 116; Mc-Allister v. Tacoma, 9 Wash., 272; 37 Pac. Rep., 447, 658.

⁷⁸ RATIFYING VOID ACTS, sec. 120 supra.

79 VALIDATING VOID ORDINANCES, sec. 164, supra.

80 Alton v. Foster, 74 III. App., 511.

AMENDMENT of improvement ordinances, sec. 198, supra.

REPEAL of improvement ordinances, sec. 202, supra. Effect of such repeal, sec. 207, supra.

81 CURATIVE POWER OF THE LEGIS-LATURE, Secs 165 to 167, supra.

82 San Francisco v. Certain Real Estate, 42 Cal., 513; State (Boice) v. Plainfield, 38 N. J. L., 95; State v. Newark, 34 N. J. L., 236; State v. Union, 33 N. J. L., 350; Bergen in ordinances and the proceedings for public improvements made by a municipality, which render the assessments for the payment of the work void, may be cured and legalized by a subsequent act of the legislature, where the defect, omission or want of compliance with the law is such as the legislature might have dispensed with by a prior statute.83 If in consequence of a defect which consists in some irregularity in the proceedings, or in some oversight in the law itself, a just and equitable claim has failed to be legally imposed, there is no reason why the legislature should not retrospectively supply the oversight or cure the irregularity.84 Thus where property owners have received the benefits of a street improvement, made under a void ordinance, the legislature has power to legalize what it might previously have ordered.85 And the legislature may under its original power to have authorized the act, ratify an act of a municipal corporation which is ultra Thus in a case where authority conferred upon the commission of public works was limited to contracts for regulating and grading an avenue, and did not include the power to contract for setting curb and gutter stones, and flagging the

v. State, 32 N. J. L., 490; Tift v. Buffalo, 82 N. Y., 204; May v. Holdridge, 23 Wis., 93.

88 Clinton v. Walliker, 98 Iowa, 655; 68 N. W. Rep., 431; Lockhart v. Troy, 48 Ala., 579; Mason v. Spencer, 35 Kan., 512; 11 Pac. Rep., 402; Emporia v. Norton, 13 Kan., 569; O'Hara v. State, 112 N. Y., 146; 19 N. E. Rep., 659.

A special assessment invalid for insufficiency of the petition may be cured by act of the legislature. People v. Wilson, 50 Hun., 606; 3 N. Y. Suppl., 326; Nottage v. Portland, 35 Oregon, 539; 58 Pac. Rep., 883.

Where improvements were made by a board of public works, created by an act of congress, congress had authority and power after the work was completed to pass a curative act and ratify the work that had been done. "It may," the court said, "therefore, cure irregularities and confirm proceedings, which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights." Mattingly v. District of Columbia, 97 U. S., 687.

Where the initiatory steps taken by commissioners for the construction of gravel road were invalid, an act of the legislature passed to legalize the action of the commissioners and declaring valid the assessments and charges for the work was held valid. Johnson v. Board of Comrs. of Wells County, 107 Ind., 15; 8 N. E. Rep., 1.

84 Brevoort v. Detroit, 24 Mich., 322.

85 Donly v. Pittsburg, 147 Pa. St., 348; 30 Am. St. Rep., 738; 23 Atl. Rep., 394; Whitney v. Pittsburgh, 147 Pa. St., 351; 23 Atl. Rep., 395; Mills v. Charleton, 29 Wis., 400; Baltimore v. Ulman, 79 Md., 469; 30 Atl. Rep., 43.

sidewalks, in holding a curative act of the legislature valid the court said: "The power of the legislature to ratify a contract entered into by a municipal corporation for a public purpose, which is *ultra vires*, results from its power to have originally authorized the very contract which was made. Municipal corporations are agencies of the state, through which the sovereign power acts in matters of local concern." 86

But where the legislature, as in California, cannot exercise the power of assessment for the purpose of improving a street within the limits of an incorporated city, and, therefore, could not originally have levied the assessment; it is powerless to validate it by a subsequent act.87 So the legislature cannot by a curative act validate a defective assessment unless the tax is for a purpose for which the legislature had power in the first instance to authorize the municipality to impose.88 one case, a town, believing that its charter conferred the power. entered into a contract for street improvements, the cost to be paid by the abutting owner. The work was done, and upon the refusal of some of the abutting owners to pay the assessments, the court held that the charter did not confer the power to improve its streets at the cost of the abutting owner. The legislature then attempted by a healing act to validate the contract and give the town a lien upon the property of the abutting owner, but the act was held void because there was no preexisting right to require the abutting owner to pay for the improvement, and therefore none could be created by a curative So where the legislature under constitutional inhibition against class legislation, is without power to pass a law referring to a special class, a curative act intended to validate all assessments for improvements made in cities of certain classes. within five years preceding the approval of the act, was held void.90

A curative act of the legislature takes effect only from the time of the passage of the act. Thus an assessment originally

86 Brown v. New York, 63 N. Y., 239.

87 People v. Lynch, 51 Cal., 15; Schumaker v. Toberman, 56 Cal., 508; Fanning v. Schammel, 68 Cal., 428; 9 Pac. Rep., 427.

Spatial v. Roberts, 30 Wis., 178;
 Shattuck v. Smith, 6 N. D., 56; 69
 N. W. Rep., 5. An act of the legis-

lature providing for paying for work done without proper authority, held valid. *In re* Cullen, 53 Hun. (N. Y.), 534; 6 N. Y. Suppl., 625.

89 Bellevue v. Peacock, 89 Ky.,
 495; 12 S. W. Rep., 1042; 25 Am.
 St. Rep., 552.

90 Reading v. Savage, 120 Pa. St.,

void for want of publication of the resolution or ordinance authorizing the work, was held to be validated by a subsequent act of the legislature, but that it became valid only from the time of the passage of the act, and that a sale before the act of the legislature passed, made when no valid assessment existed was void and was not rendered valid by the act.⁹¹

§ 558. Construction of improvement ordinances. Ordinances relating to public improvements to be paid for by special assessment or taxation are to be construed in favor of the property owner. 92 An ordinance reciting that the improvement is to be made in accordance with a named law will be construed to mean the law as amended. 93 An ordinance providing that the culvert is to be constructed of "sewer brick," with a block of masonry at each end, means masonry composed of sewer brick and not other material. 94 A paving

198; 13 Atl. Rep., 919; Meadville v. Dickson, 129 Pa. St., 1; 18 Atl. Rep., 513; Kimball v. Rosendale, 42 Wis., 407. It has been held that where an assessment has been declared void by the supreme court of the state, the legislature cannot legalize it by a subsequent act. As where an assessment against the abutting property owners was held void, for failure to observe a provision of an act which requires that the mayor and city council should first determine that the improvement was "consistent with the public good." Baltimore v. Porter, 18 Md., 284, 300. It was held that an act of the legislature passed after the decision to authorize the city authorities to proceed and collect the assessments was void, it being an assumption of judicial power by the legislature. Baltimore v. Horn, 26 Md., 194, 206. An assessment of water rates upon lots without giving to the owners or occupants an opportunity for a hearing, is repugnant to the constitution and a curative act of the legislature cannot make valid an act that is void because

unconstitutional. In re Trustees of Union College, 129 N. Y., 308; 29 N. E. Rep., 460, reversing 55 Hun. 605; 7 N. Y. Suppl., 866. Where an act provided that no assessment "for any local improvement or other public work shall be vacated for any irregularity save in case of fraud," it was held that the opening or enlarging a street was within the meaning of the provision, and that it applied as well to an assessment for that purpose as to an assessment after a street is actually opened. Astor v. New York, 62 N. Y., 580, to same effect In re Delaware & Hud. Canal Co., 60 Hun. (N. Y.), 204; 14 N. Y. Suppl., 585.

91 Lennon v. N. Y. City, 55 N. Y., 361.

92 Slaughter v. O'Berry, 126 N.
C., 181; 35 S. E. Rep., 241; 48 L.
R. A., 442; Edgerton v. Goldsboro Water Co., 126 N. C., 93; 35 S. E.
Rep., 243.

93 Steele v. River Forest, 141 Ill.,302; 30 N. E. Rep., 1034.

94 Shannon v. Hinsdale, 180 III.,202; 54 N. E. Rep., 181.

ordinance providing that the surface of the concrete base upon which the pavement is to rest shall be parallel with the surface of the finished pavement, means that such base shall be on a level with such surface.95 Mere clerical errors will not invalidate the ordinance. Thus the word "fall," used in a drainage ordinance, will be construed to read "rise," where a clerical mistake is manifest. 96 In one case the specifications called for granite blocks, ranging from seven to eight inches deep; they were written out in full in the contract for the improvement. The ordinance provided for eight inch blocks. In view of the fact that for two years, under similar ordinances, the plans and specifications had always called for blocks ranging from seven to eight inches deep, the ordinance was sustained, the variance not being regarded fatal.97 It has been decided that improvement ordinances may be construed in the light of a custom or usage prevailing at the time of their adoption.98 Settled meaning of words used among engineers and contractors will be adopted.99 Where a literal construction renders the execution of an ordinance impracticable, or leads to manifest contradiction of its apparent purpose, such interpretation will be rejected and a construction given which modifies the literal meaning of the words.¹ Ordinarily strict compliance with improvement ordinances is not required.2 Where the ordinance under which public street improvements are made is general in its application, it would be unreasonable to require literal compliance therewith under every exceptional circumstance, as instances might arise where such a rule would work great hardship or injustice upon a contractor or property owner, or

95 Cunningham v. Peoria, 157 Ill.,499; 41 N. E. Rep., 1014.

96 Steele v. River Forest, 141 Ill.,302; 30 N. E. Rep., 1034.

CONSTRUCTION OF WORDS AND TERMS in ordinances, sec. 294, sunara

False Recital in Preamble will not render ordinance void. Bohle v. Stannard, 7 Mo. App., 51.

TITLE in construction, sec. 291, supra.

97 Cole v. Skrainka, 105 Mo., 303;16 S. W. Rep., 491; 37 Mo. App.,427.

Oole v. Skrainka, 105 Mo., 303;
S. W. Rep., 491; 37 Mo. App.,
Kimball v. Brawner, 47 Mo.,
398.

USAGE AND CUSTOM, Sec. 72, supra.

Rules of construction, sec. 289 et seq. supra.

99 Levy v. Chicago, 113 III., 650.
1 Cole v. Skrainka, 105 Mo., 303;
16 S. W. Rep., 491; 37 Mo. App.,
427; Connor v. C. R. I. & P. R. R.,
59 Mo., 285, 295.

Steffen v. Fox, 124 Mo., 630; 28
S. W. Rep., 70; 56 Mo. App., 9.

both.³ A special ordinance directing the construction of sidewalk ordered it to be constructed in the manner and of th material named in a certain section of a general ordinanc relating to sidewalks. Here it was held that such section o the general ordinance was thereby made a part of a special ordinance.⁴

§ 559. Parol evidence of terms employed in improvemen ordinances has been held admissible. It may be shown that th words and terms used have a well known and settled meaning in the city among engineers and street contractors. Thus th word "filled," employed in a street improvement ordinance may be proved to mean to raise the surface of the street be using clay, earth, sand or other suitable material, free from animal or vegetable substances, etc. The circumstances under which a custom or usage may be received to explain the meaning of words and terms used in improvement ordinances and contracts are treated elsewhere.

Steffen v. Fox, 124 Mo., 630; 28S. W. Rep., 70; 56 Mo. App., 9.

4 Gallagher v. Smith, 55 Mo. App., 116. See St. Joseph to use v. Landis, 54 Mo. App., 315; Heman Const. Co. v. Loevy, 64 Mo. App., 430, 434.

Kuester v. Chicago, 187 Ill., 21;
 N. E. Rep., 307; Shannon v.

Hinsdale, 180 Ill., 202; 54 N. E. Rep., 181; Hinsdale v. Shannor 182 Ill., 312; 55 N. E. Rep., 327 Latham v. Wilmette, 168 Ill., 153 48 N. E. Rep., 311; Danville v. Mc Adams, 153 Ill., 216; 38 N. E. Rep. 632.

⁶ Levy v. Chicago, 113 Ill., 650 ⁷ §§ 72 and 73 supra.

CHAPTER XVII.

OF FRANCHISE ORDINANCES.

- \$ 560. Highway defined.
 - 561. Street defined.
 - 562. Sidewalk defined.
 - 563. Alley defined.
 - 564. Distinction Between Rural and Urban Ways—Uses of Streets.
 - 565. "Franchise" as Applied to Grants and Privileges of Municipal Corporations.
 - 566. Same Subject Franchise Defined.
 - 567. Same Subject.
 - 568. Legislative Control of Highways and Streets.
 - 569. Municipal Control of Streets.
 - 570. Street Railroad Tracks, Gas and Water Pipes, Poles and Wires as Nuisances.
 - 571. Use of Street Must be Public.
 - 572. Same-Rights of Abutters.
 - 573. Ordinance Necessary to Grant Right to Use Streets.
 - 574. All Mandatory Requirements Imposed by Law Must Be Duly Observed.
 - 575. The Grantee—Existence of Corporation.
 - 576. Conditions Imposed on Grantee.

- § 577. Paving, Repairing, etc., of Streets, by Railway Companies.
 - 578. Exclusive 'Privileges and Monopolies.
 - 579. Acceptance of Franchise Ordinance.
- 580. Right to Occupy Streets, etc., as Contract.
- 581. Change in Location of Water Mains—Injunction to Prevent.
- 582. Police Regulations Grade Crossings.
- 583. Power to Regulate Rates or Charges.
- 584. Same—Under General Power
 —Estoppel.
- 585. Reasonableness of Water Rates.
- 586. Regulating Price of Gas and Light.
- 587. Regulating Street Car Fares.
- 588. Reasonableness of Street Car Fares.
- 589. Discrimination in Street Car Rates Forbidden.
- 590. Place of Sale of Street Car Tickets—Transfers.
- 591. Duration of Privileges or Franchises to Use Streets, Etc.
- 592. Forfeiture of Franchise.
- § 560. Highway defined. As licenses, privileges or franchises to use the public ways for purposes other than uses open to all, relate only to such ways and places wherein the public have an easement which is protected by the state or municipal corporation in a trust capacity, some general definitions and descriptions of highways, streets, alleys and sidewalks will be appropriate.

All highways are either public or private. A way open to

all the people is public, and, in law, is termed a highway whether called a road, street, avenue or public square.¹ The term highway is the generic name for all kinds of public ways, whether they be carriage ways, bridle ways, foot ways, bridges, turnpike roads, railroads (street or steam), canals, ferries or navigable rivers.² It therefore follows that a public thoroughfare is a highway. And at common law it is not essential to a highway that it be a thoroughfare; it may be a cul-de-sac.³

§ 561. Street defined. A way over land set apart for public travel in a city, town, village or borough is usually designated as a street, whether it be a thoroughfare or not, for a mere cul-de-sac (open at one end only, with no outlet) is a street.⁴ "Street" is a generic term, and includes all urban ways which can be, and are, generally used for the ordinary purposes of travel.⁵ Street, in a legal sense, usually includes all parts of the way—the roadway, the gutters and the sidewalk.⁶ But a law which uses the words "bridges, culverts and cross-walks" will be construed to exclude sidewalks, because of the special limitation.⁷ And the word may be used in such restricted sense so as to include only the roadway.⁸

 1 Elliott, Roads and Streets (2nd Ed.), secs. 1, 5, 7; Woolrych on Ways, p. 3, (4 Law Library); Davis v. Smith, 130 Mass., 113; State v. Proctor, 90 Mo., 334; 2 S. W. Rep., 472.

² Elliott, Roads and Streets (2nd Ed.), sec. 1; Angel on Highways, ch. 1; Sherman and Redfield on Negligence (4th Ed.), 333; 3 Kent's Com., 432; Westfield Borough v. Tioga County, 150 Pa. St., 152; 24 Atl. Rep., 700.

³ Fields v. Colby, 102 Mich., 449; 60 N. W. Rep., 1048; Bartlett v. Bangor, 67 Me., 460; People v. Kingman, 24 N. Y., 559. See Elliott, Roads and Streets (2nd Ed.), sec. 2 and cases.

Wharves whether terminating highways or not, are not highways, but are private property. The title thereto, whether owned by city or not is proprietary, and not a public easement. Horn v. People, 26 Mich., 221.

- ⁴ Sheafe v. People, 87 Ill., 189; 29 Am. Rep., 49.
- ⁵ Elliott on Roads and Streets (2nd Ed.), 23.
- ⁶ Knapp, Stout & Co. v. St. Louis Transfer Co., 126 Mo., 26, 35; 28 S. W. Rep., 627; Denver Board of Public Works v. Hayden, 13 Colo. App., 36; 56 Pac. Rep., 201; Dillon Mun. Corp. (4th Ed.), sec. 280 and note; Elliott, Roads and Streets (2nd Ed.), secs. 17, 20. Street means the whole surface and so much of the depth as is or can be used, not unfairly, for ordinary purposes of a street. 2 Bouv. Law Dict. (Rawle's Ed.), p. 1049.

Detroit v. Putnam, 45 Mich.,263; 7 N. W. Rep., 815.

8 Knapp, Stout & Co. v. St. Louis
Transfer Co., 126 Mo., 26, 35; 28
S. W. Rep., 627.

Water way, held not a street respecting right to assess property for improvement. Reed v. Erie, 79 Pa. St., 346.

§ 562. Sidewalk defined. That part of the way intended for horsemen and vehicles is commonly designated the street; and that part intended for the use of pedestrians is termed the sidewalk.⁹ An ordinance granting permission to construct a railway switch track along a particular "street" was held not to restrict the construction of such switch to the street, as distinguished from the sidewalk.¹⁰

§ 563. Alley defined. A narrow way, less in size than a street, is generally called an alley, but it is obvious that whether the way is or is not to be called an alley depends upon the relation it bears to other ways in the same city, or in the particular part of the city. If the alley is a public one, it is a highway, and, generally, is governed by the rules applicable to streets. The distinction between streets and alleys is sometimes important in the construction of statutory, charter and ordinance provisions relating to their improvement, and the liability of the city growing out of their use. 11 "An alley is not a highway, in the proper sense of the term, but is no more than a way subject to a modified supervision, and liable to be used for drainage and other urban services, under municipal regulations, but intended for the convenience of adjacent property, and not for general travel or passage, like streets."12 The proper uses of alleys are quite as familiar as those of streets, so that the word alley may be said to have acquired a definite meaning. "Assuming that alleys may, under some circumstances, involve public easements in the nature of ways,

Elliott, Roads and Streets (2nd Ed.), sec. 20; Challiss v. Parker,
11 Kan., 384; James v. Portage, 48
Wis., 677, 681.

A sidewalk is a part of the street, and a street is a highway. Frankfort v. Coleman, 19 Ind. App., 368; 49 N. E. Rep., 474; 65 Am. St. Rep., 412.

¹⁰ Knapp, Stout & Co. v. St. Louis Transfer Co., 126 Mo., 26; 28 S. W. Rep., 627.

A sidewalk is a part of the street. State v. Mathis, 21 Ind., 277; State v. Berdetta, 73 Ind., 185, 188.

The term "sidewalk" is a comprehensive one, and in its broadest sense denotes that portion of the public highway which is set apart by dedication, ordinance, or otherwise for the use of pedestrians. Ord v. Nash, 50 Neb., 335, 338; 69 N. W. Rep., 964.

A sidewalk, held to be included within the clause "streets and public grounds," as employed in a municipal charter, rendering the city liable for damages resulting from defective condition. Griffen v. Lewiston (Idaho 1898), 55 Pac. Rep., 545.

¹¹ Elliott, Roads and Streets (2nd Ed.), sec. 23.

12 Paul v. Detroit, 32 Mich., 108,111.

yet the primary purpose, even then, is not to be substituted for streets, but to serve as means of accommodation to a limited neighborhood for chiefly local convenience." The use of the word alley, when not qualified by the term private, as, for example, in a lease, is conventionally understood in its relation to cities and towns, to mean a narrow street in common use.

Distinction between rural and urban ways—Uses of All streets are highways, although all highways are not streets. It is a well recognized legal principle that many uses may be made of streets which cannot be made of suburban roads. In streets the rights of the public are much greater than in roads of rural districts; therefore the method of regulating their construction, improvement, maintenance, repair and use are materially different.¹⁵ A street, aside from its use as a highway for travel in the usual manner, may be used for the accommodation of drains, sewers,16 aqueducts, water and gas pipes, 17 poles and lines of wires for conveying electricity, railroad tracks,18 subways,19 tunnels, and for all other purposes which are reasonably conducive to the general police, sanitary and business interests of the municipal corporation and its inhabitants.²⁰ A street may be used by individuals for the temporary deposit of goods, merchandise and other movables,21

13 Per Campbell, C. J., in Beecher v. People, 38 Mich., 289, 291. See Bagley v. People, 43 Mich., 355; 5 N. W. Rep., 415; Campau v. Board of Public Works, 86 Mich., 372; 49 N. W. Rep., 39.

When alley not included in term "Street," see Face v. Ionia, 90 Mich., 104; 51 N. W. Rep., 184.

¹⁴ Bailey v. Culver, 12 Mo. App., 175, 183.

¹⁵ Elliott, Roads & Streets (2nd Ed.), § 16; Ib. ch. XVIII; Goodnow, Mun. Home Rule, 146, 147.

16 Traphagen v. Jersey City, 29N. J. Eq., 206; Cincinnati v. Penny, 21 Ohio St., 499.

¹⁷ Quincy v. Bull, 106 Ill., 337, 349; 4 Am. & Eng. Corp. Cas., 554. State v. Cincinnati Gas L. Co., 18 Ohio St., 262; Des Moines Gas Co. v. Des Moines, 44 Iowa, 505.

18 Chicago & N. W. Ry. Co. v.

People ex rel. Elgin, 91 Ill., 251; Murphy v. Chicago, 29 Ill., 279; Moses v. Pittsburgh, Ft. W. & C. R. R. Co., 21 Ill., 516, 522.

19 See § 462, supra.

²⁰ CISTERNS may be dug in streets. West v. Bancroft, 32 Vt., 367; Barter v. Com., 3 Pen. & W. (Pa.), 253, 259; Branson v. Phila., 47 Pa. St., 329; Cincinnati v. Penny, 21 Ohio St. 499.

The city may take possession of an abandoned well originally dug in the street by the abutting land owner, and may maintain a public pump therein. No compensation need be paid the original owner. The maintenance of the pump is not a public nuisance. Lostutter v. Aurora, 126 Ind., 436; 26 N. E. Rep., 184.

²¹ Gerdes v. Iron Foundry Co.,124 Mo., 347; 25 S. W. Rep., 557;

or for material and scaffolding for building or repair, and other like purposes, but generally only under permit duly granted, and provided such uses do not unreasonably abridge or incommode its primary use for public travel.²² "All parts of the street, from side to side and end to end, are for public use in appropriate and proper methods, and are not for permanent private use." A sidewalk may be excavated for a basement or cellar, or vault or coal hole,²⁴ or pierced by an aperture for the admission of light, or overhung by a projection, as a sign²⁵ or an awning.²⁶

Another distinction between streets and country highways may be mentioned here incidentally. Generally municipal corporations are held liable in damages growing out of injuries resulting from defective highways, whereas no liability attaches to the state, county or township for injuries on suburban highways or bridges, unless an action is expressly given by statute.²⁷

§ 565. "Franchise" as applied to grants and privileges of municipal corporations. The grant of the right or privilege to use the streets and public ways by the municipal corporation for railroad tracks, poles, wires, gas and water pipes, etc., or a use not open to the public generally, is usually a franchise.²⁸

The word "franchise" has various significations, both in

Watson v. Robberson Ave. Ry. Co., 69 Mo. App., 548.

²² Gerdes v. Iron & Foundry Co.,
 124 Mo., 347; 25 S. W. Rep., 557.

²³ Elliott, Roads & Streets (2nd Ed.), § 20; Schopp v. St. Louis, 117 Mo., 131; 22 S. W. Rep., 898; Lockwood v. Wabash Ry. Co., 122 Mo., 86; 26 S. W. Rep., 689; Eels v. American T. & T. Co., 143 N. Y., 133; 38 N. E. Rep., 202.

²⁴ An abutting owner has a right to construct a vault and coal hole in the sidewalk in front of his premises, provided the sidewalk is left in such a condition as to be reasonably safe for ordinary travel and the rights of the public left undisturbed. Gordon v. Peltzer, 56 Mo. App., 599.

Vault under alley. Gregsten v.

Chicago, 145 Ill., 451; 34 N. E. Rep., 426; 36 Am. St. Rep., 496.

25 See § 461, supra.

²⁶ Hisey v. Mexico, 61 Mo. App., 248. See sec. 461 supra.

²⁷ Reardon v. St. Louis County, 36 Mo., 555; Swineford v. Franklin County, 73 Mo., 279; Hannon v. St. Louis County, 62 Mo., 313; Pundman v. St. Charles County, 110 Mo., 594; 19 S. W. Rep., 733.

28 "The rule must be considered settled, that no person can acquire a right to make a special or exceptional use of a public highway not common to all of the citizens of the state except by grant from the sovereign power." Reg. v. Longton Gas Co., 2 El. & El., 651; Reg. v. Charlesworth, 16 Q: B., 1012.

legal and popular sense. The relation in which the term is employed controls its meaning. Speaking generally, a franchise is a special privilege of a public nature conferred by governmental authority upon individuals as such, or artificial personalities usually called corporations, and which privilege did not belong to individuals generally as a matter of common right.²⁹ It is a generic term embracing all rights granted to corporations by the legislature of the state, or such right as can only be granted by the state in the first instance, which by delegated authority are conferred by the municipal corporation, or other designated public body, acting in such relation as an agency of the state. The right to conduct a business of public utility and use the streets and public ways for this purpose, as, for example, to supply the public with water, light, transportation and other comforts and conveniences in crowded urban centers, is ordinarily required to be conferred by public authority, and this constitutes the giving of a franchise.30 But the privilege of so providing for the municipal corporation and its inhabitants is not, in the strict sense of the term, a "corporate franchise;" that is (as often pointed out), it is not a privilege derived from or obtained by the act of incorporation. Charter rights and privileges of a corporation are such only as are derived by virtue of its organization under legislative enactment. They do not include the right to conduct the business above mentioned.31

²⁹ It is a privilege of a public nature which cannot be exercised without legislative grant. State *ex rel.* v. Weatherby, 45 Mo., 17, 20.

³⁰ FERRY. The right to maintain and operate a ferry and collect tolls is a franchise which can be granted only by the state directly or indirectly. Evans v. Hughes County, 3 S. Dak., 580; 54 N. W. Rep., 603.

⁸¹ Cedar Rapids Water Co. v. Cedar Rapids 117 Iowa, 250; 91 N. W. Rep., 1081.

The franchise of taking tolls is distinct from the "corporate franchise." Per Cooley, C. J., in Grand Rapids Bridge Co. v. Prange, 35 Mich., 400, 405; 24 Am. Rep., 585.

"The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such, are the franchises of the corporation." Per Mr. Justice Matthews in Memphis & Little Rock R. R. Co. v. R. R. Comrs., 112 U. S., 609, 619.

"Corporate franchises in the American states emanate from the government, or the sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are vested in individuals or a body politic." Per Scott, J. in Chicago City Ry. Co. v. People ex rel. 73 Ill., 541, 547.

Same subject—Franchise defined. Under the early English law, Blackstone defines a franchise as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject."32 Speaking for the Supreme Court of the United States, after quoting this definition, Mr. Justice Bradley observed: "Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same. without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise."33

82 2 Bl. Com. 37.

IN AMERICAN LAW, "franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state." Per Mr. Chief Justice Taney in Bank of Augusta v.

Earle, 13 Pet. (38 U.S.), 519, 595.

As applied to American law, Blackstone's definition "is not strictly correct; since our franchises spring from contracts between the sovereign power and private citizens, made upon a valuable consideration, for purposes of public benefit as well as of individual advantage." 4 Thomp. Corp. sec. 5335.

⁸⁸ California v. Central Pac. R.R. Co., 127 U. S., 1, 40, 41.

Same subject. It has been decided in Illinois that, where a railway company is incorporated by the state, with power to construct, maintain and operate a railway in a city, upon the consent of the city, in such manner and upon such conditions as the city may impose, and the city, by ordinance, grants the privilege of constructing and operating the same upon a specified street, the grant by the city is a mere license, and not a franchise. "The license granted by the ordinance is no more a franchise than would be a grant of the right of way by a private citizen to the company to construct its road over his land."34 But when the right to lay and maintain tracks and operate cars thereon is granted and accepted and all conditions imposed incident to the right performed, it ceases to be a mere license and becomes a valid contract.³⁵ Grants of this nature are often spoken of as licenses on the theory that a

Franchise Defined.

Arkansas—State v. Real Estate Bank, 5 Ark., 595; 41 Am. Dec., 109.

Connecticut—Bridgeport v. N. Y. & N. H. R. R. Co., 36 Conn., 255, 266

Illinois—Fietsam v. Hay, 122 III., 293; 13 N. E. Rep., 501; 3 Am. St. Rep., 492; Chićago & Western Ind. R. R. Co. v. Dunbar, 95 Ill., 571; Chicago Board of Trade v. People ex rel. 91 Ill., 80.

Kansas—State ex rel. v. Western irrigating Co., 40 Kan., 96, 99; 19 Pac. Rep., 349.

Massachusetts—Fay, petitioner, 15 Pick. (Mass.), 243.

Minnesota—State ex rel. v. Minnesota Thresher Mfg. Co., 40 Minn., 213, 225; 41 N. W. Rep., 1020.

Nebraska — Abbott v. Omaha Smelting, ètc. Co., 4 Neb., 416, 420. New Hampshire—Pierce v. Emery, 32 N. H., 484, 507.

New York—People ex rel. v. Utica Ins. Co., 15 Johns. (N. Y.), 358, 387.

United States—Railroad Co. v. Georgia, 98 U. S., 359, 365.

4 Thomp. Corp., § 5337; 3 Kent. Com., 458.

³⁴ Chicago City Ry. Co. v. People ex rel. 73 Ill., 541, 548.

Grant as a license discussed. People ex rel. v. Suburban R. R. Co., 178 Ill., 594; 53 N. E. Rep., 349; Quincy v. Bull, 106 Ill., 337. Compare New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S., 18, set out in sec. 233, supra.

"The word franchise is frequently applied (or misapplied) so as to designate a mere license given, for example, by a municipal corporation to a street railway company, or a water supply company, to occupy its public streets for their corporate purpose. * * * But it is essential to the legal idea of a franchise that it should be a special privilege emanating from sovauthority." Thomp. ereign 7 Corp. sec. 8294.

35 Harvey v. Aurora & Geneva Ry. Co., 186 Ill., 283, 293; 57 N. E. Rep., 857; Belleville v. Citizens Ry. Co., 152 Ill., 171; 38 N. E. Rep., 584; Chicago Municipal Gas Light Co. v. Lake, 130 Ill., 42; 22 N. E. Rep., 616. municipal corporation cannot grant a franchise, but can only grant a license, "yet they are franchises in every essential particular as much as though they had been granted directly by the legislature." The municipal corporation in granting such privileges acts as the agent of the state. In this relation it represents the state's sovereign power. The privilege of laying railroad tracks and maintaining and operating cars thereon for hire is undoubtedly a franchise. So the right to use the public streets for the purpose of laying gas pipes therein to supply gas for hire is a franchise. In Wisconsin, an ordinance granting the right to use streets for railway purposes was held to have the force of a statute of the state, and hence, for a violation of the provisions of such ordinance, an action can be maintained to vacate the charter or annul the existence of such corporation.

§ 568. Legislative control of highways and streets. The use of streets is designed for the public at large, as distinguished

36 Thomp. Corp., sec. 5335.

³⁷ United States—Hayes v. Mich. Cent. R. Co., 111 U. S., 228; Transportation Co. v. Chicago, 99 U. S., 635, 641; Sioux City St. Ry. v. Sioux City, 138 U. S., 98, 107.

Alabama—Mobile v. Louisville & N. R. R. Co., 84 Ala., 115, 119; 4 So. Rep., 106.

Iowa—Des Moines G. Co. v. Des Moines, 44 Iowa, 505; 24 Am. Rep., 756.

Missouri—State ex rel. v. East 5th St. Ry. Co., 140 Mo., 539, 550; 41 S. W. Rep., 955.

New York—Kittinger v. Buffalo T. Co., 160 N. Y., 377; 54 N. E. Rep., 1081.

Wisconsin—State ex rel. v. Milwaukee Co. Sup. Ct., 105 Wis., 651, 674; 81 N. W. Rep., 1046.

³⁸ People ex rel. v. Sutter Street R. Co., 117 Cal., 604; 49 Pac. Rep., 736; Denver, etc. R. Co. v. Denver City R. Co., 2 Colo., 673, 682; Milhau v. Sharp, 27 N. Y., 611, 618; People v. Kerr, 37 Barb. (N. Y.), 357, 393; Davis v. New York, 14 N. Y., 506.

A proceeding to determine the

right of a railroad company to use public streets for its tracks does not present a question of franchise. Parlin v. Mills, 11 Ill. App., 396.

39 United States—New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650.

Connecticut—Norwich Gas L. Co. v. Norwich City Gas Co., 25 Conn.,

Kentucky—Newport v. Newport etc. Co., 84 Ky., 166, 176.

Massachusetts—Boston v. Richardson, 13 Allen (Mass.), 146, 160.

New Jersey—State (Montgomery) v. Trenton, 36 N. J. L., 79; Jersey City Gas Co. v. Dwight, 29 N. J. Eq., 242, 248.

Ohio-State v. Cincinnati Gas Co., 18 Ohio St., 262, 291.

Right to lay gas pipes in the public streets, was termed a "local easement," resting only on contract or license. Maybury v. Mutual Gas Light Co., 38 Mich., 154, 156, per Campbell, C. J.

⁴⁰ State *ex rel*. v. Madison Street Ry. Co., 72 Wis., 612; 40 N. W. Rep., 487. from the legal entity known as the city or municipal corporation. The management of highways may be characterized as municipal duties, relating to government affairs. During the early periods of English history the highways were laid out and constructed directly by the government. The government assumed the immediate and sole management of them, and this was recognized as an essential governmental function. 401/2 In this country the control of highways is primarily a state duty.41 They are everywhere maintained for the use of the public at large. "To the commonwealth here, as to the King in England, belongs the franchise of every highway, as a trustee for the public: and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals or public roads laid out by authority of the Quarter Sessions. In England a public road is called a King's highway, and although it is not usually called the commonwealth's highway here, it is so in contemplation of law, for it exists only by force of the commonwealth's authority."42 In view of state control, municipal corporations cannot, without being expressly authorized, confer the authority to use the public streets and ways for the purpose of transporting gas, electricity, water, etc., or for railroad purposes, or indeed for any purpose other than the ordinary use appertaining to such ways and which are open to all individuals.43 General power to regulate and control streets is ordinarily held to be insufficient.44 Unless restricted by the state constitution, the legis-

40½ Beach, Monopolies & Industrial Trusts, § 133, p. 412.

41 Barney v. Keokuk, 94 U. S., 324; People ex rel. v. Supervisors, 112 N. Y., 585; 20 N. E. Rep., 549; Davies v. Saginaw Co., 89 Mich., 295; 50 N. W. Rep., 862.

42 Per Gibson, C. J. in O'Connor v. Pittsburg, 18 Pa. St., 187, 189.

"All land highways are such solely by municipal law, which may establish, regulate and destroy them at all times. All public easements are subject to extinguishment, or control, by legislative authority. * * * There can be no highway which is not made so by common or statute

law, or which is not under public custody; and unless coming within some constitutional protection, there is none that can exist where the law has provided it shall not exist." Per Campbell, J. in Horn v. People, 26 Mich., 221, 223; People v. Ingham, 20 Mich., 95; People v. Jones, 6 Mich., 176.

48 Louisville & Nashville R. Co. v. Mobile, etc. R. R. Co., 124 Ala., 162; 26 So. Rep., 895; Potter v. Collis, 156 N. Y., 16; 50 N. E. Rep., 413; Beekman v. Third Ave. R. Co. 153 N. Y., 144; 47 N. E. Rep., 277; Detroit Citizens' St. Ry. Co. v. Detroit Ry. Co., 171 U. S., 48.

44 Colorado-Denver & S. Ry. Co.

lature may grant the use of the streets and public ways for the purposes above mentioned, whether they have been dedicated by the owner of the fee, established by prescription or acquired in the exercise of the right of eminent domain.⁴⁵

v. Denver City Ry. Co., 2 Colo., 673.

Florida—Florida, C. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla., 306; 22 So. Rep., 692.

Illinois—Chicago v. Evans, 24 Ill., 52.

Kentucky—Covington, etc. Ry. v. Covington, 9 Bush. (Ky.), 127.

New York—Potter v. Collis, 156 N. Y., 16; 50 N. E. Rep., 413.

Oregon—Parkhurst v. Capital City R. Co., 23 Oreg., 471; 32 Pac. Rep., 304; 3 Cook, Corp. (4th Ed.), sec. 913.

General grant of power to regulate streets, does not give power to grant to an individual license, by ordinance, to lay a railroad track across the public streets for his own use. State (Montgomery) v. Trenton, 36 N. J. L., 79; Davis v. New York, 14 N. Y., 506. S. P. Wilson v. Cunningham, 3 Cal., 241.

General power, etc., over streets, held broad enough to permit the city to consent to the use of its streets for street railway purposes by any company having the necessary franchise. Detroit Citizens' Street Ry. Co. v. Detroit, 64 Fed. Rep., 628; 12 C. C. A., 365; 22 U. S. App., 570. But where lands required for streets have not been acquired in fee, but an easement only has been condemned, the municipal corporation has no power to appropriate them to the uses of a street railroad company. To authorize such use a legislative act is indispensable. Perry v. New Orleans, etc. R. R. Co., 55 Ala., 413; 28 Am. Rep., 740.

Poles and Wires. City has no

implied power to permit erection of poles in streets. Brush Elec. L. Co. v. Jones, etc. Co., 5 Ohio Cir. Ct. Rep., 340.

⁴⁵ Alabama—Perry v. New Orleans, etc. R. R. Co., 55 Ala., 413, 418 to 425; 28 Am. Rep., 740.

Georgia—Savannah, etc. R. R. v. Savannah, 45 Ga., 602.

Florida—State v. Jacksonville St. R. R., 29 Fla., 590; 10 So. Rep., 590.

Louisiana—N. O. M. & C. R. Co.
 v. New Orleans, 26 La. Ann., 577.
 New Jersey—Allen v. Jersey
 City, 53 N. J. L., 522; 22 Atl. Rep.,
 257.

Pennsylvania—Danville H. & W. R. Co. v. Com., 73 Pa. St., 29; Philadelphia & T. R. Co.'s Case, 6 Whart. (Pa.), 25; 36 Am. Dec., 202; Green v. Reading, 9 Watts. (Pa.), 382; Henry v. Pittsburgh & A. Bridge Co., 8 Watts & S. (Pa.), 85.

In the absence of constitutional restriction the legislative control is paramount, subject to the property rights and easements of the abufting land owners. Buchan v. Broadwell, 88 Mo., 31, 36; Atl. & Pac. R. R. Co. v. St. Louis, 66 Mo., 228; Perry v. N. O. & C. R. R. Co., 55 Ala., 413, 418-425; 28 Am. Rep., 740; Williams v. Eggleston, 170 U. S., 304; 18 Sup. Ct. Rep., 617; Backus v. Depot Co., 169 U. S., 557; 18 Sup. Ct. Rep., 445.

Legislature may provide for construction of subway for railroad tracks in a city, without city's consent, although the act imposes a heavy debt on the city and to an extent deprives it of control of the § 569. Municipal control of streets. But paramount legislative authority respecting streets and public ways has been, by virtue of constitutions and statutes, delegated to a large extent to municipal corporations. The powers granted to the local corporation to control the streets and their uses, within its limits, are generally very extensive, but the extent must be determined by the state constitution, the charter of the particular public corporation and legislative acts applicable, which operate as a limitation of state control.⁴⁶ Under the constitu-

streets. Prince v. Crocker, 166 Mass., 347; 44 N. E. Rep., 446; 32 L. R. A., 610.

Authority to tunnel streets may be granted by the legislature by implication. Baltimore & P. R. Co. v. Reaney, 42 Md., 117.

State may exercise the power directly or devolve it upon city. Harrison v. N. O. Pac. Ry. Co., 34 La. Ann., 462; 44 Am. Rep., 438; Mercer v. P. Ft. W. & C. R. Co., 36 Pa. St., 99.

Thus the legislature may vacate streets, etc., or authorize the municipal corporation to do so. Appeal of McGee, 114 Pa. St., 470; 8 Atl. Rep., 237.

Where streets cannot be closed, etc. Ashby v. Hall, 119 U. S., 526, affirming Parchen v. Ashby, 5 Mont., 68; 1 Pac. Rep., 204.

Highways are not private property of city and hence legislature may transfer their supervision to another governmental agency provided there is no diversion of the use intended. Simon v. Northrup, 27 Oregon, 487; 40 Pac. Rep., 560; 30 L. R. A., 171.

The legislature may make grants of franchises to use streets. People v. N. Y. & H. R. Co., 45 Barb. (N. Y.), 73; 26 How. Prac., 44.

Legislature may transfer control of streets, highways, etc., to park commissioners. People v. Walsh, 96 Ill., 232; 36 Am. Rep., 135.

The legislature may compel a

city to reduce the grade of a street and may prescribe the details for letting out the contract, etc. People ex rel. v. San Francisco, 36 Cal., 595, 601.

46 Sometimes the right to use streets is conferred by legislative grant, coupled with municipal authority. Murphy v. Chicago, 29 Ill., 279; Lexington & Ohio R. R. v. Applegate, 8 Dana (Ky.), 289; Chapman v. Albany & S. R. R., 10 Barb. (N. Y.), 360; Adams v. Saratoga R. R., 11 Barb. (N. Y.), 414; Williams v. N. Y. Central R. R., 18 Barb. (N. Y.), 222.

VACATING STREETS, power in city. Glasgow v. St. Louis, 87 Mo., 678. Damages may be recovered from city in vacating street, when, Heinrich v. St. Louis, 125 Mo., 424; 28 S. W. Rep., 626; 46 Am. St. Rep., Likewise, where city abolishes sidewalk or unreasonably narrows it, directly affecting rights of property owner. Naschold v. Westport, 71 Mo. App., 508. vacating of a street under Charter powers is wholly a question of expediency for the municipal authorities acting fairly and without fraud. Glasgow v. St. Louis, 107 Mo., 198, 202; 17 S. W. Rep., 743; State v. Clarke, 54 Mo. 17; Springfield R. Co. v. Springfield, 85 Mo., 674; Atkinson v. Wykoff, 58 Mo. App., 86; Knapp-Stout & Co. v. St. Louis, 156 Mo., 343; 55 S. W. Rep., 104, reviews Missouri cases.

tions of some states the power which the state primarily had over all highways, including urban ways, within its boundaries, has been transferred to its municipal corporations,⁴⁷ and in such case the legislature has no power to authorize the construction, operation or transfer of any street railway wholly within any city of the state, without the consent of such city.⁴⁸ The necessity of obtaining local consent to acquire privileges and franchises to use the streets, is quite general. Ordinarily, the power to grant privileges or franchises to use the streets for any purpose other than for travel in the usual manner, and such uses as belong to public ways, is vested in the municipal corporation, or in the duly qualified electors thereof.⁴⁹

⁴⁷ Ghee v. Northern Union Gas Co., 158 N. Y., 510; 53 N. E. Rep., 692.

48 State ex inf. v. Lindell Ry. Co., 151 Mo., 162, 183; 52 S. W. Rep., 248; A. & P. R. R. Co. v. St. Louis, 3 Mo. App., 315; Dubach v. H. & St. J. R. R. Co., 89 Mo., 483; 1 S. W. Rep., 86; Knapp, Stout & Co. v. Transfer Co., 126 Mo., 26; 28 S. W. Rep., 627.

Sometimes full and complete jurisdiction and control over streets and highways is conferred upon the municipal corporation. When such is the case the local authorities may give or withhold franchises, as for a railroad, which necessarily involves the right to prescribe the terms and conditions upon which their assent is given. Northern Central Ry. Co. v. Baltimore, 21 Md., 93.

The right to use the streets may be made subject to reasonable local regulations. State ex rel. Laclede Gas Light Co. v. Murphy, 130 Mo., 10; 31 S. W. Rep., 594; 31 L. R. A., 798; Jersey City v. Jersey City & B. R. Co., 20 N. J. Eq., 360.

Assent to be given without restrictions, where legislative act does not authorize. Pittsburgh's Appeal, 115 Pa. St., 4; 7 Atl. Rep., 778.

49 Laws of Mo. of 1899, pp. 105, 106, require consent of property See The Municipal Code of St. Louis, pp. 351, 352, secs. 58 and 59. Right to construct horse railways in streets, etc., may be granted, also railways operated by State ex rel. v. Corrigan C. Street Ry. Co., 85 Mo., 263; Sherlock v. K. C. B. Ry. Co., 142 Mo., 172; 43 S. W. Rep., 629, or electricity. Granting the right to construct and operate railroad tracks through the streets is conferred by the charter exclusively on the mayor and municipal assembly to be exercised by ordinance. Such right conferred by permit from the mayor is utterly void. Lockwood v. Wabash Ry. Co., 122 Mo., 86; 26 S. W. Rep., 698.

Control and supervision of streets may be delegated to the municipal corporation. Montgomery v. Parker, 114 Ala., 118; 21 So. Rep., 452; 62 Am. St. Rep., 95; McCain v. State, 62 Ala., 138; Brook v. Horton, 68 Cal., 554; 10 Pac. Rep., 204; Polack v. Trustees, etc., 48 Cal., 490.

Gas Pipes; consent of local corporation. Allegheney's Appeal (Pa. 1887), 11 Atl. Rep., 658; Philadelphia Co. v. Freeport, 167 Pa. St., 279; 31 Atl. Rep., 571; Read-

ing v. Consumer's Gas Co., 41 Leg. (Pa.), 428; Philadelphia Steam Supply Co. v. Philadelphia, 41 Leg. Int. (Pa.), 252; Kalamazoo v. Kalamazoo, etc. Co., 124 Mich., 74; 82 N. W. Rep., 811.

Pereria v. Poles and Wires. Wallace, 129 Cal., 397; 62 Pac. Rep., 61; Wyandotte Electric Light Co. v. Wyandotte, 124 Mich., 43; 82 N. W. Rep., 821.

City may authorize use of streets for poles, wires, etc., if they do not materially obstruct the ordinary use of the street for Abutting owner cannot enjoin such use.

McWethy v. Aurora Electric L. & P. Co., 202 Ill., 218; 67 N. E. Rep., 9, affirming 104 Ill. App., 479. A telegraph or telephone company may, in conformity with law and ordinance, plant and maintain its poles on the sidewalk of a street. Julia Building Assn. v. Bell Telephone Co., 13 Mo. App., 477; Schopp v. St. Louis, 117 Mo., 131; 22 S. W. Rep., 898; St. Louis v. Bell Telephone Co., 96 Mo., 623; 10 S. W. Rep., 197. See article on "Rights of Telegraph Companies in Streets and Highways," 21 Alb. L. J., 44-46. The power granted by the charter "to regulate the use" of streets within its limits, extends to the right to regulate the erection of poles and stringing thereon of wires for the supply of electric light by private corporations to consumers. W. U. Tel. Co. v. Guernsey & Scudder Light Co., 46 Mo. App., 120. Under the statutes of the state and the charter and ordinances of the city, the erection of telegraph and telephone poles must be in such a manner as not to incommode the public in the use of such roads and streets. Gay

But whatever rights the city may have over its streets, its v. Mutual Union Telegraph Co., 12 Mo. App., 485. But, inconvenience to the public from the erection of telephone and telegraph poles cannot be reasonably avoided, and furnishes no ground for an injunction. Gay v. Mutual Union Telegraph Co., 12 Mo. App., 485. The right to erect telegraph and telephone poles in the streets of a city does not carry with it the right to erect broken and unsightly poles. Forsythe v. Baltimore & Ohio Tel. Co., 12 Mo. App., 494. The erection of a telegraph pole so as to incommode the public gives an individual no right of action to abate the nuisance unless he has sustained special damage. Gay v. Mutual Union Tel. Co., 12 Mo. App., 485. Telephone companies may set their poles along public streets of cities, subject to regulation by ordinance as to the location and kind of posts, piers, and abutments, and the height of the wires. State ex rel. Bell Telephone Co. v. Flad, 23 Mo. App., 185. And where such companies have complied with all the lawful requirements, the board will be compelled by mandamus to issue a permit for the erection of poles on the streets. State ex rel. Bell Telephone Co. v. Flad, 23 Mo. App., 185. See Hannibal v. M. & K. Tel. Co., 31 Mo. App., 23.

Power to grant for the institution of a telephone system in the city of Rochester, N. Y., is vested in the legislature. The power of the council in the premises is limited to the regulation under the police power of the manner in which the franchise shall be exercised. Barhite v. Home Telephone Co., 50 N. Y. App. Div., 25.

RAILROAD TRACKS. Mobile v. Louisville & N. R. Co., 84 Ala., powers are those of a trustee for the benefit of the cestui que trust (the public), liberally construed for its benefit, strictly construed to its detriment. Whatever may be the quality or quantity of the estate of the city in its streets, that estate is essentially public and not private property, and the city in holding it is considered the agent and trustee of the public and not a private owner for profit or emolument. The interest is exclusively publici juris and is in any respect wholly unlike property of the private corporation which is held for its own benefit and used for its private gain and advantage.⁵¹

§ 570. Street railroad tracks, gas and water pipes, poles and wires as nuisances. The general doctrine relating to obstructions in public streets and ways as nuisances, and municipal power to abate or remove the same, is stated and illustrated elsewhere.⁵² Railroad tracks laid down in the streets, without legal authority, constitute a public nuisance.⁵³ So railroad

115; 4 So. Rep., 106; Perry v. New Orleans etc. R. Co., 55 Ala., 413; 28 Am. Rep., 740; New Orleans v. Steinhardt, 52 La. Ann., 1043; 27 So. Rep., 586.

Location of tracks. Power of Chicago as to Chicago Dock & Canal Co. v. Garrity, 115 Ill., 155; 3 N. E. Rep., 448; Bullen v. Higgins, 115 Ill., 155; 3 N. E. Rep., 456.

The city cannot grant right of way over private property, nor over a proposed street, not yet opened or extended. Wichita & W. R. Co. v. Fechheimer, 36 Kan., 45; 12 Pac. Rep., 362. Where a railroad has by its charter a general power to build its road in streets of a city, it is not estopped from asserting the power to build on a particular street by the fact that it has once solicited and obtained from the city permission to lay and use a track on that street for a limited time, and has actually laid and used it, and then tore up the track and surrendered possession of the street to the city. A. & P. R. R. v. St. Louis, 66 Mo., 228. UNDERGROUND CONDUITS. National Subway Co. v. St. Louis, 169 Mo., 319; 69 S. W. Rep., 290; State ex rel. v. Murphy, 134 Mo., 548; 31 S. W. Rep., 784; 34 S. W. Rep., 51; 56 Am. St. Rep., 515; 34 L. R. A., 369.

⁵¹ People v. Kerr, 27 N. Y., 188, 192, 197-200.

The exercise by a city of its general power given it by the legislature of controlling the streets and of making and enforcing contracts with reference to their occupancy by individuals or corporations, is action by the state within the meaning of the provision of the first section of the 14th constitutional amendment. Iron M. R. Co. v. Memphis (C. C. A.), 96 Fed. Rep., 113.

The power of the city to grant franchises for use of streets is limited to such power as it possesses in its sovereign capacity. It has no proprietary interest in its streets. San Francisco v. Spring Valley Waterworks, 48 Cal., 493.

52 Sec. 459 et seq., supra.

R. Co., 2 Colo., 673; Garnett v.

tracks in a public highway not constructed as authorized and which obstruct it, in the view of the law, are public nuisances.⁵⁴ The rule has also been applied to gas pipes, etc.,⁵⁵ and poles and wires.⁵⁶ The general rule is equally well established that railroad tracks in public streets laid by authority of law, pursuant to grant lawfully made, are not public nuisances.⁵⁷

§ 571. Use of street must be public. The streets and public ways of a municipal corporation are held by it in trust for the public, to be used for the ordinary purposes of travel and such other uses as usually pertain thereto. Therefore, exclusive private uses, whether by license, permit, contract or grant by ordinance, are forbidden. In referring to the authority to grant an individual the right to lay railroad tracks in the

Jacksonville, etc. R. Co., 20 Fla., 889; St. Louis & Meramec R. R. v. Kirkwood, 159 Mo., 239; 60 S. S. Rep., 110. A railroad track constructed under an unlawful ordinance constitutes a public nuisance. Glaessner v. Anheuser-Busch Brew. Assn., 100 Mo., 508; 13 S. W. Rep., 707. Such nuisance may be reached by injunction at the suit of a private individual who shows special damages to himself. Glaessner v. A. B. B. Assn., 100 Mo., 508; 13 S. W. Rep., 707. City may invoke equity to abate a nuisance created by street railway company, arising from failure to comply with conditions of grant of right of way. Springeld v. Robberson Ave. R. R. 69 Mo. App., 514.

⁵⁴ Com. v. Vermont & Mass. R. Corp., 4 Gray (Mass.), 22; Com. v. N. & L. R. Corp., 2 Gray (Mass.), 54.

55 Reg. v. Longton Gas. Co., 29 L.
 J. Mag. Cas., 118.

⁵⁶ Carthage v. Carthage Light Co., 97 Mo. App., 20.

⁵⁷ Florida—Geiger v. Filor, 8 Fla., 325.

Illinois—Murphy v. Chicago, 29 Ill., 279; 81 Am. Dec., 307.

Indiana—New Albany & S. R. Co. v. O'Daily, 12 Ind., 551; State v.

Louisville, N. A. & C. R. Co., 86 Ind., 114.

Michigan—Grand Rapids & I. R. Co. v. Heisel, 38 Mich., 62; 31 Am. Rep., 306.

New York—Davis v. New York, 14 N. Y., 506; 67 Am. Dec., 186.

Pennsylvania—Easton S. E. & W. E. Pass. R. Co. v. Easton, 133 Pa. St., 505; 19 Atl. Rep., 486.

North Carolina—Ridley v. Seaboard & R. R. Co., 118 N. C., 996; 24 S. E. Rep., 730; 32 L. R. A., 708. 58 Glasgow v. St. Louis, 87 Mo., 678; 15 Mo. App., 112.

⁵⁹ Chicago Dock Co. v. Garrity,
 115 Ill., 155; 3 N. E. Rep., 448.

PRIVATE USES - ILLUSTRATIONS. Streets and alleys cannot be dedicated to private uses. Bailey v. Culver, 12 Mo. App., 175. Act of Missouri of Mch. 18, 1891, authorizes St. Louis to consent by ordinance to the construction of a union depot upon portions of its Union Depot Co. v. St. streets. Louis, 8 Mo. App., 412. A city cannot create a nuisance in its streets or devote them or any part thereof to a purpose inconsistent with the rights of the public or abutting property owners. Lockwood v. Wabash Ry. Co., 122 Mo., 86; 26 S. W. Rep., 698. An ordinance granting streets and operate cars thereon, it has been well observed in a New Jersey case that everything which is fairly within the idea

to a steam railway the right to construct its railroad tracks in a public alley twenty feet wide, which puts no limitation upon the continuous and continual use of the alley by the railroad's train or cars is void. And so, also, is an ordinance that states the track must not be used for loading and unloading cars more than twelve hours consecutively. Corby v. C. R. I. & P. Ry. Co., 150 Mo., 457, 465-470; 52 S. W. Rep., 282, Power to regulate use of streets extends to public use only, and does not authorize an ordinance permitting a private corporation to build a railroad track and run trains on the streets for private business. Glaessner v. Anheuser-Busch B. Assn., 100 Mo., 508; 13 S. W. Rep., 707; Brown v. C. G. W. Ry., 137 Mo., 529; 38 S. W. Rep., 1099; St. Cummings v. Louis, 90 2 S. W. Rep., 130; Mo., 259; State ex rel. v. East 5th St. Ry., 140 Mo., 539; 41 S. W. Rep., 955; State v. Trenton, 36 N. J. L., 79; State v. Jersey City, 52 N. J. L., 65; 18 Atl. Rep., 586, 696. Power to grant right to railroad to lay its tracks in the streets is not absolute. The right cannot be conferred if the operation of the road will destroy the use of the street or a part thereof, as a public thoroughfare. Brown v. C. G. W. Ry, Co., 137 Mo., 529; 38 S. W. Rep., 1099; Lockwood v. Wabash R. R., 122 Mo., 86; 26 S. W. Rep., 698; Dubach v, H. & St. J. R. R., 89 Mo., 483; 1 S. W. Rep., 86; Schulenburg & B. Lumber Co. v. St. L. K. & N. W. R. R. Co., 129 Mo., 455; 31 S. W. Rep., 796; St. Louis T. Ry. C. v. St. L. M. B. Ry. Co., 111 Mo., 666; 20 S. W. Rep., 319; K.

C. St. J. & C. B. Ry. C., v. St. J. T. Ry. Co., 97 Mo., 457; 10 S. W. Rep., 826; Grand Ave. Ry. C., v. People's Ry. Co., 132 Mo., 34: 33 S. W. Rep., 472; Belcher S. R. Co. v. St. L. Grain Elevator Co., 82 Mo., 121; Sherlock v. K. C. B. Ry. C., 142 Mo., 172; 43 S. W. Rep., 629. Or will destroy, or unreasonably interfere with, the right of an abutting owner to access to and from his property. Knapp, Stout & Co. v. St. L. T. Ry. Co., 126 Mo., 26; 28 S. W. Rep., 627; Lockwood v. Wabash Ry. Co., 122 Mo., 86; 26 S. W. Rep., 698; Stephenson v. Mo. Pac. Ry. Co., 68 Mo. App., 642. Where right is given to construct a road in private alley, and the privilege has been accepted, a presumption arises that the power was properly exercised. Brown v. C. G. W. Ry. Co., 137 Mo., 529; 38 S. W. Rep., 1099. St. Louis cannot lease for twenty years to the owners of property abutting thereon the use of a street dedicated and opened to public use under the act of 1845. Glasgow v. St. Louis, 15 Mo. App., 112, 87 Mo., 678; Lackland v. N. Mo. R. R. Co., 31 Mo., 180, 187. Private individuals cannot be granted right to construct a wharf over a public street and thus defeat the public right of way. Wood v. San Francisco, 4 Cal., 190.

If the charter forbids the granting of streets for any purpose, except by act of the legislature the municipal authorities cannot authorize the erection of a market to use even temporarily, where the effect is to impair in any way the free use of the street for public travel. Savannah v. Wilson, 49 Ga., 476. So the right "to regu-

of regulating streets, with a view to their use as streets, may be done by municipal legislation. In measuring the extent of the power, the object and purpose for which it was given must always be regarded as the test. "Streets and highways are intended for the common and equal use of all citizens, to which end they must be regulated. An appropriation of them to private individual uses, from which the public derive no convenience, benefit or accommodation, is not a regulation, but a perversion of them from their lawful purposes, and cannot be regarded as an execution of the trust imposed in the city authorities"

late," does not authorize the leasing of spaces on street in front of business houses for produce dealers. Schopp v. St. Louis, 117 Mo., 131; 22 S. W. Rep., 898. Or the establishment of private scales. Berry-Horn Coal Co. v. Scruggs-McClure Coal Co., 62 Mo. App., 93, 96.

PUBLIC USE-ILLUSTRATIONS. A railway switch on a public street for the use of a stock yard company, created for "the convenience of drovers, dealers and the public at large," is a public and not a private use. Knapp, Stout & Co. v. St. L. T. Ry. Co., 126 Mo., 26; 28 S. W. Rep., 627; Belcher Sugar R. Co. v. St. L. Grain Elevator Co., 101 Mo., 192; 13 S. W. Rep., 822. So, a switch in a public alley, connected with the main line and operated therewith, is for public use, although it be provided that the cars run on such switch are to be used exclusively for the benefit of the adjoining property owners. Brown v. C. G. W. Ry., 137 Mo., 529; 38 S. W. Rep., 1099. Nor is the use to be held private although the switch is confined to the carriage of property. Brown v. C. G. W. Ry., 137 Mo., 529; 38 S. W. Rep., The constitution of 1875, 1099. art. 12, sec. 14, declares all railroads public highways, and all railroad companies common carriers.

60 "Is one of those objects or purposes subserved by permitting one individual to enjoy a use of the highways which is denied to all others? I think not. If such power is conceded, its exercise is limited only by the discretion of the common council who must be the sole judges of the extent to which obstructions may be placed in the streets. If they can license one to build a railroad across the highway for his own exclusive benefit, of which the public can have no use or advantage or convenience, it is difficult to perceive why they can not empower another to place therein a structure which will more effectually impede the public passage, and maintain it there during their pleasure. How considerable must be obstruction to the way become before the judgment of the common council can be controverted, and the judicial arm interposed? A grant to every one on the street of a like nature with that now resisted, would render the highway well nigh impas-The right to license one necessarily implies authority to license all, and thus municipal corporations under the general power to regulate streets become the source from which franchises to favored individuals, in the public their existence." ways derive

Same—Rights of abutters. Streets in which private rights and public interest have vested cannot be diverted to a permanent private use. Every part of a street is for public The abutting owner acquires his property and makes improvements or pays for improvements made by the public by special assessment or taxation on the faith that the way will be maintained as a street. The power of the legislature or the municipal corporation as to such ways is limited to authority over them as streets. In no case can they be deprived of this character to the special injury of abutters without just compensation. In some states the fee of the street is vested in the municipal corporation in trust for the public, and in such case, in the absence of constitutional restrictions, it has been held that the legislature may grant franchises to street railways without the city's consent and without allowing compensa-In other states it is the settled doctrine that the owner of premises abutting on a public street is presumably the owner of the fee to the center thereof, subject to the easement to which the land is devoted. 62 Where the fee is vested in the abutters and where the public have only an easement in the

State (Montgomery) v. Trenton, 36 N. J. L., 79, 83, 84, per Van Syckel, J.

Street railway companies cannot turn over part of its line to be used by private individual for his exclusive business. Fanning v. Osborne, 102 N. Y., 441; 7 N. E. Rep., 307; Barker v. Hartman Steel Co., 129 Pa. St., 551; 18 Atl. Rep., 553.

Use of private railroad in street, constructed by ordinance authority may be enjoined by abutting property owner. Gustafson v. Hamm, 56 Minn., 334; 57 N. W. Rep., 1054.

61 Hine v. Keokuk & D. R. R., 42 Iowa, 636; Clinton v. Cedar Rapids Ry. Co., 24 Ia., 455; Mercer v. Pittsburg, etc., Ry. Co., 36 Pa. St., 99; People v. Kerr, 27 N. Y., 188; Savannah, etc., Co. v. Savannah, 45 Ga., 602. See Dubach v. H. & St. J. R. Co., 89 Mo., 438; 1 S. W. Rep., 86; 2 Dillon on Mun. Corp. secs. 702, 704, 726.

62 Thomas v. Hunt, 134 Mo., 392; 35 S. W. Rep., 581; Pemberton v. Doley, 43 Mo. App., 176; Grant v. Moone, 128 Mo., 43; 30 S. W. Rep., 328; Snoddy v. Bolen, 122 Mo., 479; 25 S. W. Rep., 935; Union Elevator Co. v. K. C. S. B. Ry. Co., 135 Mo., 353; 36 S. W. Rep., 1071; Baker v. St. Louis, 7 Mo. App., 429; 75 Mo., 671; Lackland v. N. M. R. R. Co., 31 Mo., 180; Hannibal Bridge Co. v. Schaubacher, 57 Mo., 582; Glasby v. Morris, 18 N. J. Eq., 72; State v. Taylor, 107 Tenn., 455, 463; 64 S. W. Rep., 766; Hamilton Co. v. Rape, 101 Tenn., 222, 225; 47 S. W. Rep., 416; Iron Mountain R. R. v. Bingham, 87 Tenn., 522, 530; 11 S. W. Rep., 705; Smith v. East End St. R. R., 87 Tenn., 626, 630; 11 S. W. Rep., 709. And such ownership attaches although the dedication was by way of statutory plat. Rutherford v. Taylor, 38 Mo., 315; Price v. Thompson, 48 Mo., 361; Thurston v. St. Joseph, 51 Mo., 510:

street as against such abutters, some decisions hold that the use of the street for the purposes of a steam railroad is an additional burden or new servitude, and under the state constitution compensation must be paid to the proprietors of the Lot owner's right to the use of a street is a property right and he may recover damages if his use of the street is unreasonably prevented by a railroad, where his damages are peculiar and different in kind from the public generally. Stephenson v. Mo. Pac. Ry. Co., 68 Mo. App., 642; Tate v. M. K. & T. Ry. Co., 64 Mo., 149. Where a railroad track is illegally constructed and property owner is injured thereby, injunction will lie. Knapp, Stout & Co. v. St. L. T. Ry. Co., 126 Mo., 26; 28 S. W. Rep., 627; Lockwood v. Wabash Ry. Co., 122 Mo., 86; 26 S. W. Rep., 698; Schopp v. St. Louis, 117 Mo., 131; 22 S. W. Rep., 898. See Hovelman v. K. C. H. R. R. Co., 79 Mo., 632. The fact that such complainant has used the track will not destroy this right. Knapp, Stout & Co. v. St. L. T. Ry. Co., 126 Mo., 26; 28 S. W. Rep., 627. Franchise to lay railroad track in streets is right to lay on the grade of the streets. If not so laid company is liable to property owners in damages. Cross v. St. L. K. & N. W. Ry., 77 Mo., 318; Swenson v. Lexington, 69 Mo., 157; Stephenson v. Mo. Pac. Ry. Co., 68 Mo. App., 642; Tate v. M. K. & T. Ry. Co., 64 Mo., 149; Placke v. U. D. Ry. Co., 140 Mo., 634; 41 S. W. Rep., 915. And the owner has a right to the use of the land for all purposes not inconsistent with the grant. Thomas v. Hunt, 134 Mo., 392; 35 S. W. Rep., 581; Gamble v. Pettijohn, 116 Mo., 375; 22 S. W. Rep., 783. An abutting owner has a property right in an alley in the rear of his lot. Christian v. St. Louis, 127 Mo., 109; 29 S. W. Rep., 996.

And he also has a right to the free

admission of light and pure air, and to ingress and egress, which form a part of the estate, and are deemed as much property as the lot itself. Gaus & Sons Mfg. Co. v. St. L., K. & N. Ry. Co., 113 Mo., 308; 20 S. W. Rep., 658. The owner of property abutting on the street has rights to the highway peculiar to himself, and which are not possessed by the public generally, and for a violation of which he may maintain an action. notwithstanding the wrong done also affects the public. Thomas v. Hunt, 134 Mo., 392; 35 S. W. Rep., 581; Schopp v. St. Louis, 117 Mo., 131; 22 S. W. Rep., 898.

But in order to recover damages for an obstruction to the highway he must show that the damages suffered are peculiar to him, being such as are different in kind, and not merely in degree, from those sustained by other members of the community. Rude v. St. Louis, 93 Mo., 408; 6 S. W. Rep., 257; Gates v. Kansas City B. & T. Ry. Co., 111 Mo., 28; 19 S. W. Rep., Or, he must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected. Gates v. K. C. B. & T. Ry. Co., 111 Mo., 28; 19 S. W. Rep., 957. Damages may be awarded to a property owner for an obstruction in the street, where, while the property does not abut on the street, it communicates with it by a private way. Rude v. St. Louis, 93 Mo., 408; 6 S. W. Rep., Property owners can maintain ejectment for the permanent obstruction of the surface of the street adjoining their property. Thomas v. Hunt, 134 Mo., 392; 35

soil for such use.⁶³ But in some states it seems to be settled law that an electric street railway, laid to grade, is not an additional servitude and does not infringe upon the property rights of those whose lots abut on the street and over which the electric road is operated.⁶⁴

S. W. Rep., 581. Damages for erection of bridge, see Wolters v. St. Louis, 132 Mo., 1; 33 S. W. Rep., 441; Slattery v. St. Louis, 120 Mo., 183; 25 S. W. Rep., 521.

Where an obstruction in a street or highway is both a public and private nuisance, the private person who suffers a special injury may have relief by injunction. Knapp, Stout & Co., v. Transfer Ry. Co., 126 Mo., 26; 28 627: W. Rep., Schulenburg Lumber Co. v. В. St. L., K. & N. W. Ry. Co., 129 Mo., 455; 31 S. W. Rep., 796; Watson v. Robberson Ave. Ry., 69 Mo. App., The city is responsible in damages to an abutting owner for decrease in value of his property caused by the enactment of an ordinance vacating a public street. Heinrich v. St. Louis, 125 Mo., 424; 28 S. W. Rep., 626. Nor is it any defense to such action that the owner has access to his own property by another street. Heinrich v. St. Louis, 125 Mo., 424; 28 S. W. But see Werth v. Rep., 626. Springfield, 78 Mo., 107; Moore v. Cape Girardeau, 103 Mo., 470; 15 S. W. Rep., 755.

63 2 Dill. on Corp., 703, 704 cases; also sec. 725; Williams v. Plank Road Co., 21 Mo., 580.

Where streets have been dedicated to the public, as highways, the ultimate fee remaining in the original owner of the soil, the municipal corporation cannot, in the absence of express legislative authority, allow them to be used by a railroad company to lay its tracks on them to the injury of the proprietors of the adjacent

land. Perry v. N. O. & C. R. R. Co., 55 Ala., 413, 418-425.

64 Placke v. Union Depot Ry. Co.,
140 Mo., 634, 638; 41 S. W. Rep.,
915. See Ashland & C. St. R. Co.
v. Falkner, 106 Ky., 332; 43 L. R.
A., 554; 45 S. W. Rep., 235.

NEW USES OF STREETS. Charter power "to regulate the use of streets" is very comprehensive. The word "regulate" is one of broad import. It may be likened to the comprehensive power conferred upon the congress by the federal constitution relating to foreign and interstate commerce. The federal courts have always held this power to be broad and comprehensive. Mr. Justice Brewer in St. Louis v. W. U. Tel. Co., 149 U.S., 465, 469. The right to regulate the use of the streets is not limited to a mere right of way, but it extends to all beneficial uses which the public good and convenience may from time to time require. New uses, as they arise, may be made of the streets, without the consent of the abutting lot owners. All such uses are regarded as included in the original appropriation. Ferrenbach v. Turner, 86 Mo., 416. "As civilization advances new uses may be found expedient." Julia Building Assn. v. Bell Tel. Co., 88 Mo., 258; 13 Mo. App., 477. It extends to the erection of poles and stringing wires for the supply of electric light by private persons or corporations to consumers. W. U. Tel. Co. v. G. & S. E. L. Co., 46 Mo. App., 120. See Palmer v. Larchmont Electric Co., 158 N. Y., 231: 52 N. E. Rep., 1092; 43 L. R. A., § 573. Ordinance necessary to grant right to use streets. As a rule, the right to use streets and public ways for railroad tracks (steam or street), gas and water pipes, subways and underground conduits, poles, wires, etc., or to obstruct public places for any purpose, except temporarily, can only be conferred by the municipal corporation by legislative act.⁶⁵

§ 574. All mandatory requirements imposed by law must be duly observed, otherwise the ordinance granting the privilege or franchise will be void; as, for example, failure to give the prescribed public notice of the time and place of presenting the petition for the privilege of laying railroad tracks in the

672; Carpenter v. Capital Electric Co., 178 Ill., 29; 52 N. E. Rep., 973; 43 L. R. A., 645. Such power may be exercised both as to an adjoining owner and as to a licensee having prior rights of user. U. Tel. Co. v. G. & S. E. L. Co., 46 Mo. App., 120. Adjoining owners cannot claim compensation for damages resulting to their property from such use. It is only when the street is subjected to a new servitude inconsistent with and subversive of its proper use as a street that the abutting property owner can complain. Julia Building Co. v. Bell Telephone Co., 88 Mo., 258. When the public acquires a street in a city, either by condemnation, grant or dedication, it may be applied to all purposes consistent with the proper use of a street. Julia Building Assn. v. Bell Tel. Co., 88 Mo., 258. piling of paving material upon the sidewalk, prior to reconstructing a street, is a use of the street by the city of which an abutting land owner cannot complain. Westliche Post Assn. v. Allen, 26 Mo. App., 181.

65 The privilege or franchise of constructing and operating a street railway in the public street can only be given by ordinance. State v. Newark, 54 N. J. L., 102; 23 Atl. Rep., 284; West Jersey Traction

Co. v. Shivers, 58 N. J. L., 124; 33 Atl. Rep., 55. So the right to lay gas pipes in public streets. People's Gas Light Co. v. Jersey City, 46 N. J. L., 297.

The authority to permit the obstruction of streets and alleys is an exercise of legislative power; hence an ordinance is necessary. Indianapolis v. Miller, 27 Ind., 394.

The right to dig in a public street can only be conferred by ordinance. Hunt v. Lambertville, 45 N. J. L., 279.

No one can without proper permission of city open or disturb the surface of the street in front of the land of another. Glasby v. Morris, 18 N. J. Eq., 72. a law which conferred upon the municipal corporation authority to authorize or forbid the construction by a railroad company of tracks on its streets which did not prescribe the manner of exercising such authority whether by ordinance, resolution or vote duly recorded, it was held in an Iowa case that such authority might be exercised by resolution duly passed or by vote legally taken which appeared in the proper records. Merchants' Union Barb-wire Co. v. Chicago R. I. & P. Ry. Co., 70 Iowa, 105; 28 N. W. Rep., 494; 29 N. W. Rep., 822.

streets,⁶⁶ or omission to publish the ordinance granting the franchise.⁶⁷ So any delegation of power to municipal boards or administrative officers at any step in conferring the privilege or franchise will invalidate the grant.⁶⁸ So a violation of any restriction contained in the state constitution or the organic law of the municipal corporation will render the franchise void. Thus an ordinance granting permission to lay railroad tracks in the streets which ignores the limitation that no street shall be occupied with two railroad tracks, whether they belong to corporations or private persons, for a distance of more than five blocks, is worthless.⁶⁹ Where the law provides for competitive bidding and requires the franchise to be awarded to the lowest bidder, based on the percentage of gross receipts,⁷⁰ or agreement to perform designated service at the lowest rates, such restrictions must be observed.⁷¹ So provi-

66 Harvey v. Aurora & Geneva Ry. Co., 186 Ill., 283; 57 N. E. Rep., 857; Metropolitan City Ry. Co. v. Chicago, 96 Ill., 620.

67 State ex rel. v. Omaha & C. B. Ry. & Bridge Co., 113 Iowa, 30, 34; 84 N. W. Rep., 983.

Notice of application. Benwood v. Wheeling Ry. Co. (W. Va. 1903), 44 S. E. Rep., 271.

68 Illinois—St. Louis, etc. R. R.
v. Belleville, 122 Ill., 376; 12 N. E.
Rep., 680, affirming 20 Ill. App., 580; Chicago & W. I. R. Co. v. Dunbar, 100 Ill., 110; Hickey v. Chicago & W. I. R. Co., 6 Ill App., 172.

Louisiana—Board of Liquidation of City Debt v. New Orleans, 32 La. Ann., 915.

Maine—Veazie v. Mayo, 45 Me., 560.

Missouri—Lockwood v. Wabash R. Co., 122 Mo., 86; 26 S. W. Rep., 698; 43 Am. St. Rep., 547; 24 L. R. A., 516; Union Depot Co. v. St. Louis, 76 Mo., 393.

New Jersey—Trustees Presby. Ch. v. State Board, etc., 55 N. J. L., 436; 27 Atl. Rep., 809.

New York—Central Crosstown R. Co. v. Metropolitan Street Ry. Co., 16 App. Div. (N. Y.), 229.

Ohio—State ex rel. v. Bell, 34 Ohio St., 194.

United States—Citizens' Street Ry. v. Jones, 34 Fed. Rep., 579.

Permits to use street for building material to be regulated by ordinance. McCarthy v. Chicago, 53 Ill., 38. Permit to dig in street, etc. Boyle v. Hazleton, 171 Pa. St., 167; 33 Atl. Rep., 142.

DELEGATION OF POWER FORBIDDEN, secs. 84 to 89, supra.

69 People v. Rich, 54 Cal., 74.

70 Charter San Francisco, art. II., ch. 2, secs. 6 and 7. Statutes and Amendments of Codes of Cal. (1899) pp. 253, 254.

MISSOURI ACT of April 9, 1895, as to sale of franchise or right of way for street railroads, was held to be void for uncertainty in State *ex inf.* v. West Side Street Ry. Co., 146 Mo., 155; 47 S. W. Rep., 959.

71 Covington St. Ry. Co. v. Covington, 72 Ky. (9 Bush), 127; New Orleans, etc. R. Co. v. Watkins, 48 La. Anq., 1550; 21 So. Rep., 199; Beekman v. Third Ave. R. Co., 153 N. Y. 144; 47 N. E. Rep., 277; State ex rel. v. Bell, 34 Ohio St., 194.

A franchise must be sold for

sions requiring a petition of interested property owners, or the consent of abutters, must be observed, as they are mandatory.⁷² So, where as a condition to granting, the consent of the local authorities,⁷³ or a particular department or board of the municipality,⁷⁴ or the duly qualified electors thereof, by vote, at an election legally called,⁷⁵ is required, omission is fatal to the validity of the ordinance.⁷⁶

§ 575. The grantee—Existence of corporation. Under some laws the grant of the right to use the streets for the purposes under consideration may be to individuals or corporations. By

cash under a provision that franchises "must be awarded to the highest bidder." Thompson v. Alameda County Sup'rs, 111 Cal., 553; 44 Pac. Rep., 230.

Consideration for privilege or franchise to use streets. Daly v. Georgia, etc. R. Co., 80 Ga., 793; 7 S. E. Rep., 146; 12 Am. St. Rep., 286; Board of Liquidation, etc. v. New Orleans, 32 La. Ann., 915; Barr v. New Brunswick, 58 N. J. L., 255; 33 Atl. Rep., 477; Stuyvesant v. Pearsall, 15 Barb. (N. Y.), 244.

Contract for private benefit to individuals is against public policy and void. New Haven v. New Haven, etc. R. Co., 62 Conn., 252; 25 Atl. Rep., 316; 18 L. R. A., 256.

North Chicago Street Ry. Co.
v. Cheetham, 58 Ill. App., 318;
Beeson v. Chicago, 75 Fed. Rep., 880.

SUFFICIENCY OF PETITION, with some signatures of agents. Tibbetts v. West & S. T. Street R. Co., 153 Ill., 147; 38 N. E. Rep., 664, affirming 54 Ill. App., 180.

Not Applicable, when. A legislative act forbidding any ordinance authorizing the erection of electric light appliances in the streets, except upon petition of property owners and authorizing property owners to enjoin such use of streets if not so petitioned for, held not to apply to previously granted pri-

vileges. McWethy v. Aurora Electric L. & P. Co., 202 Ill., 218; 67 N. E. Rep., 9, affirming 104 Ill. App., 479.

73 Not properly given in a particular case. Kavanaugh v. Mobile & G. R. Co., 78 Ga., 271; 2 S. E. Rep., 636.

74 Veazie v. Mayo, 45 Me., 560; Lowell v. Simpson, 10 Allen (92 Mass.), 88; Union Depot Co. v. St. Louis, 76 Mo., 393. Consent of board of public works, to be given as entity. West Jersey Traction Co. v. Shivers, 58 N. J. L., 124; 33 Atl. Rep., 55; Tamaqua, etc. Co. v. Inter-County Street Ry. Co., 167 Pa. St., 91; 31 Atl. Rep., 473. See sec. 91, supra, and notes.

75 CONSENT OF ELECTORS gas and electric light franchise. Keokuk v. Fort Wayne Electric Co., 90 Iowa, 67; 57 N. W. Rep., 689, following Hanson v. Hunter, 86 Iowa, 722; 48 N. W. Rep., 1005; 53 N. W. Rep., 84. Nebraska constitution of 1875 requires the consent of a majority of the electors of the municipality, to construct a street railway. Sternberg v. State, 36 Neb., 307; 54 N. W. Rep., 553. Ordinances passed and approved by 152, supra, Sec. electors. notes.

78 Conditions complied with — particular case. Appeal of McGee, 114 Pa. St., 470; 8 Atl. Rep., 237.

statute, in New York, a grant to individuals to lay down tracks is forbidden.⁷⁷ In California, a grant to construct tracks was made to individuals who afterwards organized a corporation which assumed the franchise, but no formal transfer thereof was executed. The franchise was sustained. 78 In West Virginia, a grant by a municipal corporation to an intended company, though at the time the corporation is not chartered, but is chartered subsequently and accepts the grant, was sustained.79 But such grant cannot take effect until the corporation is organized.80 And in Illinois, it has been decided that the ordinance granting the franchise may be presented before the corporation grantee is fully organized, where the organization is completed before the passage and acceptance.81 But in New Jersey, where the first and second reading of the ordinance occurred before the organization of the gas company which was to obtain the grant, the franchise was declared void.82

§ 576. Conditions imposed on grantee. In granting the right to use the streets and public ways for transporting passengers, gas, electricity, etc., reasonable conditions may be imposed upon the grantee in the exercise of such right, 83 espe-

77 Case v. Cayuga County, 88 Hun. (N. Y.), 59; 34 N. Y. Suppl., 595.

78 Santa Rosa, etc. R. R. Co. v. Central Street Ry. Co. (Cal. 1895), 38 Pac. Rep., 986. Compare Homestead Street Ry. v. Pittsburg, etc. Street Ry., 166 Pa. St., 162; 30 Atl. Rep., 950; 27 L. R. A., 383; Atkinson v. Asheville Street Ry., 113 N. C., 581; 18 S. E. Rep., 254.

79 Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va., 739; 35 S. E. Rep., 994. Deed conveying land prior to formal incorporation, held good. Spring Garden Bank v. Hurlings Lumber Co., 32 W. Va., 357; 9 S. E. Rep., 243; 3 L. R. A., 583. 5 Thomp., Corp. § 5802.

So Aspen Water & L. Co. v. Aspen,
Colo. App., 12; 37 Pac. Rep., 728.
Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill., 324; 65 N. E.
Rep., 329, affirming 100 Ill. App.,

57:

The fact the corporation is not organized when the ordinance granting the franchise is passed is an irregularity which may be waived by the parties. Property owners cannot enjoin on this ground. McWethy v. Aurora Electric L. & P. Co., 202 Ill., 218; 67 N. E. Rep., 9, affirming 104 Ill. App., 479.

Application may be made before incorporation if the grant is made after incorporation. Sloane v. People's El. Ry. Co., 7 Ohio Cir. Ct. Rep., 84.

82 Stevens v. Merchantville, 62N. J. L., 167; 40 Atl. Rep., 688.

Contract to furnish light may be with individuals. Citizens Electric Light & Power Co. v. Sands, 95 Mich., 551; 55 N. W. Rep., 452.

83 Western Paving & Supply Co.
v. Citizen's Street R. Co., 128 Ind.,
525; 10 L. R. A., 770; 26 N. E. Rep.,
188; 28 N. E. Rep., 88. Indian-

cially where the discretion of conferring the right is vested exclusively in the municipality or the local authorities.84 Thus a street railway franchise may forbid the carrying of freight;85 an ordinance giving a gas franchise may require compulsory service to all consumers along its line,86 and the supplying of gas on reasonable terms;87 and, if authorized by the charter. an ordinance granting a street railroad franchise may provide for arbitration of controversies between the railway company and its employees.88 It is usual to require bonds for the apolis v. Consumer's Gas Trust Co.. 140 Ind., 107; 27 L. R. A., 514; 39 N. E. Rep., 433; Cambria Iron Co. v. Union Trust Co., 154 Ind., 291; 55 N. E. Rep., 745; 56 N. E. Rep., 665; Union Trust Co. v. Richmond City R. Co., 154 Ind., 48 L. R. A., 41; 55 N. E., 745; 56 N. E. Rep., 665; Noblesville v. Noblesville Gas & Imp. Co., 157 Ind., 162; 60 N. E. Rep., 1032; Citizens' Gas & M. Co. v. Elwood. 114 Ind., 332; 16 N. E. Rep., 624; Detroit v. Ft. Wayne & Belle Isle Ry. Co., 95 Mich., 456; 54 N. W. Rep., 958.

84 Where the right to give or refuse consent to the occupations of streets by municipal corporation is unqualified, the power in granting the right to impose reasonable conditions is necessarily implied. Allegheny City v. Millville, etc., Street Ry. Co., 159 Pa. St., 411; 28 Atl. Rep., 202; Plymouth Tp. v. Chestnut Hill, etc., Ry. Co., 168 Pa. St., 181; 32 Atl. Rep., 19; Minersville Borough v. Schuylkill Electric Ry. Co. (Pa. 1903), 54 Atl. Rep., 1050.

When consent of city required, conditions may be imposed, otherwise not. Philadelphia v. Empire Pass. R. Co., 177 Pa. St., 382; 35 Atl. Rep., 721.

Conditions may be attached to grant, to protect city from pecuniary liability and to secure the health and welfare of its citizens.

If the city should fail in this it will be primarily liable for all injuries resulting from the misuse of its street. Blake v. St. Louis, 40 Mo., 569; Norton v. St. Louis, 97 Mo., 537; 11 S. W. Rep., 242; Walker v. Kansas City, 99 Mo., 647; 12 S. W. Rep., 894.

Right to impose conditions de-McCune v. Norwich City Gas Co., 30 Conn., 521; 79 Am. Dec., 278; Patterson Gas Light Co. v. Brady, 27 N. J. L., 245; 72 Am. Dec., 360.

See article by Salon D. Wilson, Esq., in relation of gas and water companies with their consumers. 27 Am. L. Reg. (U. S.), 277-288. 85 St. Louis & Meramec R. R. Co. v. Kirkwood, 159 Mo., 239; 60 S. W. Rep., 110.

86 Rushville v. Rushville Natural Gas Co., 132 Ind., 575; 15 L. R. A., 321; 28 N. E. Rep., 853.

87 New Orleans Gas Light & B. Co. v. Paulding, 12 Rob. (La.), 378; Baltimore Gas Light Co. v. Colliday, 25 Md., 1; Williams y. Mutual Gas Co., 52 Mich., 499; 18 N. W. Rep., 236; 50 Am. Rep., 266; People v. Manhattan Gas Light Co., 45 Barb. (N. Y.), 136; Shepard v. Milwaukee Gas Light Co., 6 Wis., 539.

88 Wood v. Seattle, 23 Wash., 1; 62 Pac. Rep., 135; holding also that a provision permitting consolidation with existing lines was valid.

faithful performance of the obligations imposed upon the grantee; but in one case, this provision was held not to apply to a gas company already doing business by virtue of a franchise not requiring a bond.⁸⁹

§ 577. Paving, repairing, etc., of streets by railway companies. The requirement is general that, as a condition to the grant of the franchise to maintain tracks and operate cars in the public streets, the grantee or its successor shall pave the streets between the rails of its tracks and for a certain distance outside of its tracks and also between its tracks, where double tracks are laid. Sometimes the whole street from curb to curb is required to be paved and kept in repair by the railroad company. But the extent of this obligation will depend upon the proper construction of the law applicable and the language of the charter of the company and the law or ordinance granting the franchise or privilege. In a case determined by

Rushville v. Rushville Natural
 Gas Co., 132 Ind., 575; 28 N. E.
 Rep., 853; 15 L. R. A., 321.

90 State v. Jacksonville St. R. R.,
29 Fla., 590; 10 So. Rep., 590;
Conway v. Rochester, 157 N. Y.,
33; 51 N. E. Rep., 395.

91 Philadelphia v. Thirteenth, etc., Ry. Co., 169 Pa. St., 269; 33 Atl. Rep., 126; Philadelphia v. Spring Garden, etc., R. Co., 161 Pa. St., 522; 29 Atl. Rep., 286; Leake v. Philadelphia, 150 Pa. St., 643; Philadelphia v. Ridge Ave. Pass. Ry. Co., 143 Pa. St., 444; 22 Atl. Rep., 695.

Every ordinance granting the right to lay tracks and operate cars in the streets shall be on the express condition that the company shall pave and keep in repair the streets from curb to curb, and that the company shall allow any other railroad company to use in common with it the same track or tracks, each paying an equal portion for the construction and repairs of the tracks and appurtenances used by such railways jointly. Charter, San Francisco, art.

II., Ch. 2, sec. 1, par. 28; Amendments to Statutes and Codes of Cal. (1899), pp. 250, 251.

92 The ordinance granting the right to lay tracks and operate cars may exempt the company from paving, where the law does not forbid. Lacey v. Marshalltown, 99 Iowa 367; 68 N. W. Rep., 726.

The requirement as to paving may be modified by the municipality and company. An abutting property owner cannot complain. Barber Asphalt Pav. Co. v. New Orleans, etc., R. R. Co., 49 La. Ann., 1608; 22 So. Rep., 955.

The company cannot be charged with the cost of paving made prior to its occupancy of the street. Gulf City St. Ry. v. Galveston, 69 Tex., 660; 7 S. W. Rep., 520; District of Columbia v. Washington, etc., R. R., 4 Mackey (15 D. C.) 214; Philadelphia v. Empire Pass. Ry., 3 Brewst. (Pa.), 547.

A street railroad company was authorized to lay its tracks in certain streets, one condition being that it should pave the streets in and about the rails. Subsequently,

the Supreme Court of the United States, the ordinance granted the street railway company the right to operate a street railway; one condition being that it should pave the streets between its rails. Subsequently an ordinance was passed requiring the company to also pave the street for one foot outside of This ordinance was declared valid by virtue of the reserved power to amend, etc. The court remarked: "The company took its franchise subject to such legislation as the state might enact. * * * The general assembly deemed it necessary for the public good to require street railways to pay for the paying of one foot outside of the tracks, probably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was not in the power of the city, by any contract with the company, to deprive the legislature of the power of taxing the company." A new corporation formed by the merger of old ones is subject to the condition as to paving imposed on the latter.94 The requirement is general that the paving by the company shall be of the same material as used on other parts

it was duly authorized to extend its tracks, but the law did not expressly impose the condition that it should pave the street; held that as provision in former grant respecting paving did not apply to the extension, the company need not pave streets on extension. New York v. N. Y. & H. R. Co., 19 N. Y. Supp., 67.

A reasonable time must be allowed the company in which to do the paving. Ten days was held too short. People ex rel. v. Coffey, 66 Hun. (73 N. Y. Sup. Ct.), 160; 21 N. Y. Suppl., 34.

If the company fails, the municipality may do the work and collect from the company. Columbus v. Columbus St. R. R. Co., 45 Ohio St., 98; 12 N. E. Rep., 651; Philadelphia v. Thirteenth St. Ry. Co., 3 Pa. Dis. Ct. Rep., 468.

Mandamus will lie to compel the company to pay. State v. Jacksonville St. R. R. Co., 29 Fla., 590; 10 So. Rep., 590.

Mandamus to compel paving as required by ordinance denied, where it appeared the company was out of funds and could not raise them. Benton Harbor v. St. Joseph, etc., St. Ry. Co., 102 Mich., 386; 60 N. W. Rep., 758.

Court will not compel road to operate where it is out of funds. State ex rel. v. Dodge City, etc. Ry. Co., 53 Kan., 329; 36 Pac. Rep., 755; 24 L. R. A., 564 and note.

Failure on the part of the company to pave, as required, was held no ground of forfeiture of its charter in State ex rel. v. Omaha & C. B. Ry. & B. Co., 91 Iowa, 517; 60 N. W. Rep., 121.

Acts involving special facts. Farmers' Loan and Trust Co. v. Ansonia, 61 Conn., 76; 23 Atl. Rep., 705.

93 Sioux City Street Ry. Co. v.
 Sioux City, 138 U. S., 98, 107, affirming 78 Iowa, 367; 43 N. W.
 Rep., 224.

94 Philadelphia v. Ridge Ave.

of the street, and if the street should be repaved with different material the company must adopt the new material.⁹⁵

The obligation to repair has been held to require repaving.⁹⁶ But the weight of authority appears to support the contrary rule.⁹⁷

§ 578. Exclusive privileges and monopolies. As pointed out elsewhere, without express power, exclusive franchises or privi-

Pass. Ry. Co., 143 Pa. St., 444; 22 Atl. Rep., 695.

95 Mandamus will lie to compel the company to comply. Lansing v. Lansing City Elec. Ry. Co., 109 Mich., 123; 66 N. W. Rep., 949.

Paving Material, kind of. Philadelphia v. Hestonville R. R., 177
Pa. St., 371; 35 Atl. Rep., 718;
Philadelphia v. Philadelphia, etc.
Ry. Co., 177 Pa. St., 379; 35 Atl.
Rep., 720; Philadelphia v. Empire
Pass. Ry. Co., 177 Pa. St., 382; 35
Atl. Rep., 721; McKeesport v. McKeesport Pass. Ry., 158 Pa. St.,
447; 27 Atl. Rep., 1006; Norristown
v. Norristown Pass. Ry., 148 Pa.
St., 87; 23 Atl. Rep., 1060; Philadelphia v. Empire, etc. Ry., 3
Brewst. (Pa.), 570.

96 Liability to keep "in good order and repair," includes paving. This was assumed. People ex rel. Detroit v. Fort Street & E. Ry. Co., 41 Mich., 413; 2 N. W. Rep., 188. S. P. Ridge Ave. Ry. Co. v. Philadelphia, 124 Pa. St., 219; 16 Atl. Rep., 741, per Paxson, C. J.; Huggans v. Riley, 125 N. Y., 88; 25 N. E. Rep., 993.

No sound distinction can be made between needful repairs and such improvements as are required for the public good. Middlesex R. R. Co. v. Wakefield, 103 Mass., 261, 266.

97 REPAIR DOES NOT INCLUDE REPAVING. The obligation imposed upon a railroad company to repair a street is not an obligation to construct thereon a new pavement. State ex rel. v. Corrigan Consoli-

dated Ry. Co., 85 Mo., 263; Baltimore v. Scharf, 54 Md., 499, 525; Western Paving & Supply Co. v. Citizens Street Ry. Co., 128 Ind., 525; 26 N. E. Rep., 188; 28 N. E. Rep., 88; In re Repaving Fulton Street, 29 How. Pr. (N. Y.), 429.

In one case, the condition of the franchise was that the company should "keep the surface of said streets and highways within the rails, and for one foot outside thereof, and to the extent of the ties, in good and proper order and repair." The street in issue had never been paved. The council ordered the street to be paved with asphalt, having a concrete foundation. As the company refused to pave, the city did the work and assessed the expense against the company and brought action to recover. No evidence was offered to show that the street was not in good repair or that the pavement was necessary to keep the street in such condition. In denying the right to recover, it was held.

- 1. That the franchise obligation to keep the surface in good repair did not include repaying.
- 2. That the council resolution directing an asphalt pavement to be laid was not presumptive evidence that such pavement was necessary and proper. (Distinguishing Tingue v. Port Chester, 101 N. Y., 294; 4 N. E. Rep., 625; and New York v. Second Ave. R. R. Co., 102 N. Y., 572; 7 N. E. Rep., 905. Compare section 534, supra.).
 - 3. That the city could not con-

leges in the nature of monopolies cannot be granted by a municipal corporation.⁹⁸ Some municipal charters, in express terms, forbid the granting of monopolies and exclusive privileges.⁹⁹ Such restrictions also exist in constitutions and statutes.¹

strue the legislative act granting the franchise to its own advantage. Gilmore v. Utica, 121 N. Y., 561; 24 N. E. Rep., 1009.

4. That as the rights of the company had been fixed by the state act, the city could not impose additional burdens. Binghamton v. Binghamton & Port Dickinson Ry. Co., 61 Hun. 479; 16 N. Y. Supp., 225.

PAVING DEFINED. Burnham v. Chicago, 24 Ill., 496; Warren v. Henly, 31 Iowa, 31.

Macadamizing, held not paving. State v. Ramsey Co. Dist. Ct., 33 Minn., 164; 22 N. W. Rep., 295. Condition to pave with macadam does not include asphalt. Shamokin v. Shamokin St. Ry. Co., 178 Pa. St., 128; 35 Atl. Rep., 862.

REPAIRING. Grading is not. Galveston v. Galveston City Ry. Co., 46 Tex., 435.

Duty to repair includes the removal of deposits from the street caused by extraordinary rains, etc. Pittsburgh & B. Pass. Ry. Co. v. Pittsburgh, 80 Pa. St., 72.

98 Secs. 191 to 192 supra. Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va., 739; 35 S. E. Rep., 994.

Grant to build tracks, etc., in streets without power of revocation reserved to city, denied. Milhau v. Sharp, 17 Barb. (N. Y.), 435; Davis v. New York, 14 N. Y., 506, per Denio, C. J.

The grant of the exclusive right to lay and maintain water pipes in the public highways without express power to do so will not estop the municipal corporation from taking advantage of the invalidity

of such contract, although the water company had, in good faith, performed its part of the contract. The well established rule was invoked that the company was bound to know the extent of the authority of the local corporation. Smith v. Westerly, 19 R. I., 437; 35 Atl. Rep., 526.

As the streets are held in trust for the public, the right to grant the exclusive privilege to one telephone company alone to occupy streets with its poles, wires, etc., was denied in Chicago Tele. Co. v. N. W. Tel. Co., 199 Ill., 324; 65 N. E. Rep., 329 affirming 100 Ill. App., 57.

If the constitution does not forbid, it has been held that, the legislature may grant an exclusive franchise to an electric light company. Grand Rapids, etc. Co. v. Grand Rapids, etc. Co., 33 Fed. Rep., 659; Scranton, etc., Co.'s Appeal, 122 Pa. St., 154; 15 Atl. Rep., 446.

99 "No exclusive franchise or privilege shall be granted for laying pipes, wires, or conduits." Charter, San Francisco, art. II, ch. 2, sec. 5; Stat. and Amend. to Codes of Cal., 1899, p. 252.

Under the San Francisco charter steam railroads are allowed to enter the city on such terms as may be fixed by the board of supervisors, but no exclusive right shall be granted and the use of all such rights shall at all times be subject to regulation by the board. Charter, San Francisco, art. II, ch. 2, sec. 11, par. 28; Stat. and Amend. to Codes of Cal. (1899), 250.

¹ Section 219, p. 354, supra.

Within the powers duly conferred by the state, the municipal corporation oftentimes grant franchises and make contracts which, in effect, confer upon individuals and corporations exclusive privileges in connection with the performance of some public or quasi public service. However, the rule of construction is that such grants are construed against the grantee and in favor of the public; and any ambiguity in the terms of the grant operates in favor of the public.²

§ 579. Acceptance of franchise ordinance. Acceptance of the franchise ordinance by the grantee is usually evidenced in a formal manner by entry upon the municipal records. However, "no formal resolution of acceptance is necessary in any case, if the facts show an actual, practical acceptance by the company." So, "it is universally held that a previous request for an ordinance obviates the necessity of a subsequent acceptance." "We are also of the opinion that an acceptance may be presumed from the fact that the amendment (to the ordinance) was beneficial to the corporation," and from the further fact that it issued bonds, as was contemplated when the ordinance was applied for, and made them fall due at the expiration of the enlarged franchise.

Thrift v. Board of Comrs. etc., 122 N. C., 31; 30 S. E. Rep., 349; Atchison St. Ry. Co. v. Mo. Pac. Ry. Co., 31 Kan., 661; 3 Pac. Rep., 284.

The constitutional restriction as to the grant of any special or exclusive privilege, immunity or franchise was held, in Illinois, to be a limitation of the power of the state legisature and not a restriction of the power of a municipal corporation to designate certain streets and fix the conditions upon which a railroad company organized under a special charter, previously granted, may build and operate its road. Chicago City R. R. Co. v. People, 73 Ill., 541.

² See 1 Eddy on Combinations, sec. 19 et seq. and cases

Exclusive water franchise. Atlantic City Waterworks Co. v. Atlantic City, 39 N. J. Eq., 367, ³ Rule applied to the charter of a corporation. Atlanta v. The Gate City Gas Light Co., 71 Ga., 106, 117.

⁴ Per Mr. Justice Brown in City Ry. Co. v. Citizens' Street Ry. Co., 166 U. S., 557, 568; 17 Sup. Ct. Rep., 653.

It is an old principle of law, as stated by Mr. Cook, that acceptance of the charter is necessary to the actual existence of the private corporation. But there is no rigid rule of law requiring an indication of such acceptance in a formal manner. "Any act which proves an intent on the part of the corporators to proceed under the charter is a sufficient acceptance of it. It has been held frequently that an acceptance may be shown by proof that corporate meetings and elections have been held and other corporate acts entered into. Mere user § 580. Right to occupy streets, etc., as contract. The right conferred by ordinance by municipal corporations upon public or quasi public service companies, to occupy the public streets and ways for legitimate purposes, when accepted by the grantee under the terms prescribed, and after compliance therewith on the part of the grantee, becomes a valid contract between the municipality and the grantee which cannot be repudiated by either party, nor can the obligations thereof be impaired by any act on the part of the public authorities.⁵ This subject is fully treated in prior sections.⁶

§ 581. Change in location of water mains—Injunction to prevent. A contract by ordinance between a city and water company, that the latter will lay water mains and supply the inhabitants with water on certain streets, may, after such mains are laid, be so modified and changed by the city and water company as to require the water company to remove its mains from certain streets, where, in the opinion of the council, public necessity no longer requires their continuance, to other portions of the city where public necessity requires that mains should be laid. The fact that such change may greatly decrease the value of private property will not support injunction at the instance of a property owner to prevent it.

§ 582. Police regulations—Grade crossings. The power of the municipal corporation to make and enforce reasonable

of the right to act as a corporation is sufficient." 1 Cook Corp. sec. 2a, and cases in extensive note.

⁵ Grant of right to lay gas pipes, etc., is property and will be protected. People v. Deehan, 153 N. Y., 528; 47 N. E. Rep., 787.

City cannot repudiate. Lima Gas Co. v. Lima, 4 Ohio Cir. Ct. Rep., 22.

The municipal corporation may require the gas company to perform its part. Pensacola Gas Co. v. Provisional Municipality, 33 Fla., 322; 14 So. Rep., 826.

Where a city has granted a franchise to a union depot company to use and occupy streets and the company has erected permanent and costly buildings thereon, the city cannot object. "When a municipal corporation enters into a contract which it has authority to make, the doctrine of estoppel applies to it with the same force as against individuals." Union Depot Co. v. St. Louis, 76 Mo., 393, 396.

⁶ Ordinances granting franchise as contracts. Impairment of obligation. Sections 238 to 241, *supra*.

Amendment and repeal of franchise and contract ordinances. Sections 197, 200 and 201 supra.

Reservation of right to alter, amend or repeal franchise contracts. Section 242 supra.

⁷ Asher v. Hutchinson Water L. & P. Co. (Kan. 1903) 61 L. R. A., 52; 71 Pac. Rep., 813.

police regulations respecting the uses of streets and public ways and keeping the same free from obstruction and nuisance, in the interest of public safety and convenience, is fully treated elsewhere.⁸ Regulations of this character applicable to the operation of locomotives, trains and streets railways within the corporate limits are fully discussed in prior sections.⁹

Charter power to define and abate nuisances, general authority to adopt necessary police regulations to secure the safety of the inhabitants in the running of trains, and special power to require change of location, grade of roads and crossings, to compel the raising or lowering of tracks to conform to any grade that might be established, and to construct bridges, viaducts or tunnels across the right of way at street crossings. was held in Indiana insufficient to authorize a general ordinance declaring grade crossings a nuisance and directing all railroad companies to elevate their tracks within the city for the purpose of abolishing grade crossings, where it appeared that the condition of some of the crossings did not require such remedy. The court viewed the question as solely one of charter power. and whether the ordinance was within the general police power. The opinion was expressed that, although crossings were authorized by law, if they are so maintained as to become public nuisances the question of fact may be judicially determined in a case properly presented, but that general charter power to define nuisances does not empower the municipal corporation to declare anything a nuisance per se which in fact was not recognized as such by common law.10

8 Section 458 et seq, supra.

Poles and Wires. Reasonable rules and regulations for the erection and maintenance of the poles and wires of electric light companies may be adopted and enforced. The removal of those that are dangerous may be compelled. Wyandotte Electric Light Co. v. Wyandotte, 124 Mich., 43; 82 N. W. Rep., 821; Michigan Telephone Co. v. St. Joseph, 121 Mich., 502; 80 N. W. Rep., 383; 47 L. R. A., 87; Michigan Telephone Co. v. Benton Harbor, 121 Mich., 512; 80 N. W. Rep., 386; 47 L. R. A., 104.

9 Sections 472 and 474 supra.

10 The fact that relator's common council under the ordinance in controversy has by its own fiat declared all of the appellee's railroad crossings to be nuisances does not justify the demand that, by reason of such declaration, appellee must move its surface tracks and construct, instead thereof, a series of elevated ones." State ex rel. Indianapolis v. Indianapolis Union Ry. Co. (Ind. 1903), 66 N. E. Rep., 163; 60 L. R. A., 831.

Duty of railroad company to maintain safe use of highway crossed by railroads. Chicago, Indianapolis & L. Ry. Co. v. Zimmer-

§ 583. Power to regulate rates or charges. In the leading case of Munn v. Illinois,11 the Supreme Court of the United States announced the doctrine that, by virtue of the power inherent in every sovereignty, a government may regulate the conduct of its citizens towards each other, and, when necessary for the public good, the manner in which each shall use his own property. Ferries, common carriers, hackmen, inn keepers, wharfingers, bakers, millers, markets, etc., have been the subject of regulation in England from the earliest period and in this country from the date of the establishment of the colonies. The purpose has been not only to insure efficient public service, but to prevent extortion and monopoly, the monopoly so odious to the common law. 12 Supplying transportation, water, light, etc., to the municipality and its inhabitants by virtue of franchise grants involving the use of public ways impresses the business with a public character and justifies public regulation, especially if the right to supply is exclusive and in the nature of a monopoly.13

The power of regulation appertaining to the state as a sovereignty may be delegated by the state to its municipal corporations, and such agencies may fix the maximum rates or charges of public or quasi public service companies, engaged in the business of supplying water,14 gas or electric light, heat and power, or transportation, to the inhabitants of the local comman, 158 Ind., 189, 193; 63 N. E. Rep., 224, quoting with approval § 1107, Elliott on R. R., as follows: "Each particular crossing presents different conditions, but the general rule * * * is that the company must erect whatever strictures are reasonably necessary to the safety and convenience of the traveler using the crossing."

General police power. State v. Gerhardt, 145 Ind., 439; 33 L. R. A., 313; 44 N. E. Rep., 469.

11 94 U. S., 113.

12 See Beach, Monopolies and Industrial Trusts, sec. 133, p. 413.

13 Spring Valley Waterworks v. Schottler, 110 U.S., 347; Freeport Water Co. v. Freeport, 180 U. S., 587; 21 Sup. Ct. Rep., 493, affirming 186 Ill., 179; 57 N. E. Rep., 862; Danville Water Co. v. Danville, 180 U.S., 619; 21 Sup. Ct. Rep., 505, affirming 186 Ill., 326; 57 N. E. Rep., 1129; 178 Ill., 299; 53 N. E. Rep., 118; Rogers Park Water Co. v. Fergus, 180 U. S., 624; 21 Sup. Ct. Rep., 490, affirming 178 Ill., 571; 53 N. E. Rep., 363; Agua Pura Co. v. Las Vegas (N. Mex. 1900), 60 Pac. Rep., 208; 50 L. R. A., 224; Kennebec Water Dist. v. Waterville, 97 Me., 185; 54 Atl. Rep., 6; American Waterworks Co. v. State, 46 Neb., 194; 64 N. W. Rep., 711; 30 L. R. A., 447.

14 Danville v. Danville Water Co., 178 Ill., 299; 53 N. E. Rep., 118; Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250; 91 N. W. Rep., 1081.

munity. And such power may be conferred to be exercised from time to time as public necessity may require.¹⁵ While the obligations of contracts cannot be impaired or vested rights disturbed by action on the part of the municipal corporation,¹⁶ the reserved power to repeal or alter the ordinance granting the privilege or franchise will justify reasonable change or reduction in rates or charges. In such case there is no impairment of the obligation of contracts, since there can be no vested right to the rates or charges.¹⁷

8 584. Same—Under general power—Estoppel. control over streets and power "to license, tax and regulate" various businesses and occupations, was held in Missouri insufficient to authorize an ordinance regulating telephone charges. 18 Charter power "to provide for supplying the city with water" gives authority to contract with a water company in respect to rates to be charged to consumers. In such case the municipal corporation may, by contract in granting the franchise, limit its powers as to fixing rates. And the rates so fixed cannot be reduced. And where the municipality, by ordinances passed each year, assumes to regulate the sums to be charged by a water company, acquiescence by the company in the reduction made by one of such ordinances, was held not to be acquiescence in the ordinances of the succeeding years. 19 A water company will not be estopped from contesting the constitutionality of an ordinance fixing rates where it collects rates under protests, although for a period of fifteen years.²⁰

§ 585. Reasonableness of water rates. The rates or charges must be reasonable and made in good faith.²¹ Usually the

15 Danville v. Danville Water Co., 180 Ill., 235; 54 N. E. Rep., 224; Rogers Park Water Co. v. Fergus, 178 Ill., 571; 53 N. E. Rep., 363; Knoxville v. Knoxville Water Co., 107 Tenn., 647; 64 S. W. Rep., 1075; Carlyle v. Carlyle Water, L. & P. Co., 52 Ill. App., 577.

¹⁶ Sections 197, 200, 201, 238 to 242.

Contracts or vested rights cannot be impaired. Santa Ana Water Co. v. San Buenaventura, 56 Fed. Rep., 339.

17 Spring Valley Waterworks

v. Schottler, 110 U. S., 347; 4 Sup. Ct. Rep., 48.

18 St. Louis v. Bell Tel. Co., 96
 Mo., 623; 10 S. W. Rep., 197; 2 L.
 R. A., 278; 9 Am. St. Rep., 370.

19 Injunction against enforcement of ordinance reducing water rates granted. Los Angeles City Water Co. v. Los Angeles, 88 Fed. Rep., 720.

²⁰ Los Angeles v. Los Angeles City Water Co., 177 U. S., 558; 20 Sup. Ct. Rep., 736.

²¹ San Diego Water Co. v. San Diego, 118 Cal., 556; 50 Pac. Rep.,

ordinance fixing the rates or charges will be held to be *prima* facie reasonable.²² The ordinance fixing the rates or charges must be definite and certain.²³ Thus in an Iowa case, an ordinance was held void for indefiniteness which stipulated that the water should be furnished at the average rate paid in other cities of the union, having efficient water works operated by private corporations, and which provided for arbitration of such rates if they could not be fixed by agreement.²⁴ The reasonableness of the ordinance is a judicial question.²⁵

633; 38 L. R. A., 460; Des Moines v. Des Moines Waterworks Co., 95 Iowa, 348; 64 N. W. Rep., 269; Goebel v. Grosse Pointe Water-Works, 126 Mich., 307; 85 N. W. Rep., 744.

²² Rule applied to ordinance regulating street car fares, § 588 post.
²³ § 20, supra.

²⁴ Des Moines v. Des Moines Water Works Co., 95 Iowa, 348; 64 N. W. Rep., 269.

25 Knoxville v. Knoxville Water
Co., 189 U. S., 434; 23 Sup. Ct.
Rep., 531, affirming 107 Tenn., 647;
64 S. W. Rep., 1075.

Validity or ordinance restricting power as to future regulation. Creston Waterworks Co. v. Creston, 101 Iowa, 687, 698; 70 N. W. Rep., 739.

Terms used in ordinances. St. Louis Brewing Assn. v. St. Louis, 140 Mo., 419; 37 S. W. Rep., 525; 41 S. W. Rep., 911.

"Bath," "water-closets," "water basins." Allen v. Duluth Gas & W. Co., 46 Minn., 290; 48 N. W. Rep., 1128.

"Room," "domestic purposes." Crosby v. Montgomery, 108 Ala., 498; 18 So. Rep., 723.

"Dwelling." Smith v. Birmingham Waterworks Co., 104 Ala., 315; 16 So. Rep., 123; United States v. American Waterworks Co., 37 Fed. Rep., 747.

Method of determining reason-

ableness of water rates. San Diego Land & Town Co. v. National City, 174 U. S., 739; 19 Sup. Ct. Rep., 804, affirming 74 Fed. Rep., 79; Redlands, L. & C. Domestic Water Co. v. Redlands, 121 Cal., 312; 53 Pac. Rep., 791.

WATER WORKS OWNED AND OPERATED BY CITY. When the power to fix rates is conferred on the board of public works the council cannot fix such rates under the general power to pass such ordinances as may be necessary to protect the water works and enforce the rules and regulations of the board. The board has power to recommend the ordinance fixing the rates and the council the power to adopt or reject. State ex rel. v. Gosnell (Wis. 1903), 93 N. W. Rep., 542; 61 L. R. A., 33.

WATER METERS. An ordinance may require consumers of water to provide at their own expense meters for measuring water. Such ordinance may prescribe that consumers using service pipes of a certain diameter shall furnish such meters, leaving the matter of using a meter by others optional. State ex rel. v. Gosnell 1903), 93 N. W. Rep., 542; 61 L. R. A., 33, distinguishing Red Star S. S. Co. v. Jersey City, 45 N. J. L., 246, and Spring Valley Waterworks v. San Francisco, 82 Cal., 286; 22 Pac. Rep., 910, 1046; 6 L. § 586. Regulating price of gas and light. General power to provide reasonable regulations for the safe supply, distribution and consumption of natural gas, was held in Indiana insufficient to authorize the regulation of the price by ordinance. But in the same state it has been decided that a statute giving the local corporation exclusive power over the streets, highways and alleys, confers authority in granting a franchise to lay gas pipes in the streets, to prescribe the maximum rates to be charged by the company for gas. ²⁷

In Washington, it was ruled that power to regulate and control the use of light was insufficient to authorize a reduction in the price of light.²⁸ Where the charter of a gas company, granted by the state, authorized it to fix the price of gas manufactured by it, it was held in Missouri that such price could not be diminished by subsequent legislative action, state or municipal, for the reason that the charter constituted a contract between the company and the city and the obligations of which could not be impaired. And where an ordinance grants to a gas company the privilege of furnishing gas to the municipality and private consumers for a named period, and provides the maximum price of gas, which ordinance is accepted by the company, the city cannot thereafter reduce such price. The case declares the law to be that the regulation of the price of gas by the state or by municipalities created by it is not the exercise of a police power which cannot be abridged by a contract.29

R. A., 756; 16 Am. St. Rep., 116, and approving Sheffield Waterworks Co. v. Bingham, 25 Ch. Div., 443. See article 27 Am. Law Reg. (N. S.), 277-288 by Salon D. Wilson, Esq., on relation of gas and water companies with consumers. ²⁶ Louisville Natural Gas Co. v. State ex rel. Reynolds, 135 Ind.,

State *ex rel.* Reynolds, 135 Ind., 49; 34 N. E. Rep., 702; 21 L. R. A., 734, overruling Rushville v. Rushville Natural Gas Co., 132 Ind., 575; 28 N. E. Rep., 853; 15 L. R. A., 321.

Power to regulate price of gas denied. *In re* Pryor, 55 Kan., 724; 29 L. R. A., 398; 41 Pac. Rep., 958.

permit a natural gas company to use the streets without any conditions annexed except such as the law attaches, it is not perceived why, as in this case, in making provision for supplying natural gas to all of the inhabitants of the city, it may not protect such inhabitants against extortion by providing that the company shall not charge in excess of certain prices for its service." Per Gillett, J., in Muncie Natural Gas Co. v. Muncie (Ind. 1903), 66 N. E. Rep., 436; 60 L. R. A., 822.

²⁸ Tacoma, etc., Co. v. Tacoma, 14Wash., 700; 44 Pac. Rep., 106.

29 State ex rel, St. Louis v. La-

§ 587. Regulating street car fares. As stated, it cannot be questioned that the legislature has power to regulate the charges of common carriers, 30° and this power may be delegated to the municipal authorities. 31 If the power has been properly delegated by the state to the municipal corporation, its exercise is a matter of municipal discretion. Whether there exists a public demand or need for the enactment, or even whether it is just and reasonable in all its provisions, are not questions for judicial determination, except for the sole purpose of ascertaining whether constitutional rights have been violated. 32

After a full review of the cases, the law is thus concisely stated by Mr. Justice Harlan: "In view of the adjudications, these principles must be regarded as settled:

- 1. A railroad corporation is a person within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
- 2. A state enactment, or regulation made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad, that will not admit of the carrier earning such compensation as under all the circumstances is just to it and the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the Constitution of the United States.

clede Gaslight Co., 102 Mo., 472; 14 S. W. Rep., 974; 15 S. W. Rep., 383; 22 Am. St. Rep., 789.

Implied power to regulate the price of light, § 67, supra.

30 Munn v. Illinois, 94 U. S., 113;
 Chicago, etc., R. R. v. Iowa, 94 U.
 S., 155; Ruggles v. Illinois, 108 U.
 S., 526; Ruggles v. People, 91 Ill.,
 256.

31 Chicago Union Traction Co. v. Chicago, 199 Ill., 484, 523; 65 N. E. Rep., 451. S. P. Rogers Park Water Co. v. Fergus, 178 Ill., 571; 53 N. E. Rep., 563; Danville v. Danville Water Co., 180 Ill., 235; 54 N. E. Rep., 224; Dean v. Chicago General

Ry. Co., 64 Ill. App., 165; Chicago Packing Co. v. Chicago, 88 Ill., 221, 225.

32 Milwaukee Elec. Ry. & Light Co. v. Milwaukee, 87 Fed. Rep., 577.

Rates apply to non-residents of the local corporation. Coy v. Detroit Y. & A. A. Ry., 125 Mich., 616; 85 N. W. Rep., 6.

Right to change—Particular Case — Consolidation — Reserved right, etc. Cleveland City Ry. Co. v. Cleveland, 94 Fed. Rep., 385.

When fare cannot be reduced. Old Colony T. Co. v. Atlanta, 83 Fed. Rep., 39.

- 3. While rates for the transportation of persons or property within the limits of the state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state or by regulation adopted under its authority, that the matter may not become the subject of judicial inquiry." 33
- § 588. Reasonableness of street car fares. Street car rates must be reasonable. If they are fixed unreasonably low, this will amount to confiscation of property without due process of law within the meaning of the fourteenth amendment of the constitution.³⁴ The law will presume street car fares fixed by ordinance to be reasonable until the contrary is shown, and the burden is on the party contending them to be unreasonable.³⁵ A street railroad company desiring to present this question must show the profits and earnings of its entire system and the effect which the enforcement of the ordinance will

Cannot fix fare for cars run outside of city. South Pasadena v. Los Angeles Term. Ry. Co., 109 Cal., 315; 41 Pac. Rep., 1093.

Regulating rates on electric roads running through several cities, villages and townships in Michigan. Coy v. Detroit, Y. & A. A. Ry., 125 Mich., 616; 85 N. W. Rep., 6.

33 Smyth v. Ames, 169 U. S., 466, 526; 18 Sup. Ct. Rep., 418, 426.

34 Corporations are persons within meaning of amendment. Santa Clara Co. v. Southern Pac. R., 118 U. S., 394; 24 Am. & Eng. R. Cas., 523; 6 Sup. Ct. Rep., 1132; Charlotte, C. & A. R. R. v. Gibbes, 142 U. S., 386; 12 Sup. Ct. Rep., 255; Gulf, C. & S. F. R. R. v. Ellis, 165 U. S., 150; 17 Sup. Ct. Rep., 255.

REASONABLENESS OF RATES discussed as relates to 14th amendment, Railroad Commission Cases, 116 U. S., 307; 6 Sup. Ct. Rep., 334; Dow v. Beidelman, 125 U. S., 680; 8 Sup. Ct. Rep., 1028; 34 Am. & Eng. R. Cas., 322; Georgia Ry. & Banking Co. v. Smith, 128 U. S., 174; 9 Sup. Ct. Rep., 47; 35 Am. & Eng. R. Cas., 511; C., M. & St. P. Ry. Co. v. Minnesota, 134 U. S., 418; 10 Sup. Ct. Rep., 462; 42 Am. & Eng. R. Cas., 285; Budd v. New York, 143 U. S., 517; 12 Sup. Ct. Rep., 468; 36 Am. & Eng. Corp. Cas., 31; Reagan v. Farmer's L. & Trust Co., 154 U. S., 362; 14 Sup. Ct. Rep., 1047; 58 Am. & Eng. R. R. Cas., 699; Chicago & G. T. Ry. Co. v. Wellman, 143 U.S., 339; 12 Sup. Ct. Rep., 400; 49 Am. & Eng. R. R. Cas., 1; St. Louis & S. F. Ry. Co. v. Gill, 156 U. S., 649; 15 Sup. Ct. Rep., 484; Covington & Lexington Turnpike Road Co. v. Sanford, 164 U. S., 578; 17 Sup. Ct. Rep., 198.

35 S. P. Cotting v. K. C. Stock Yards, 183 U. S., 79, 97. have upon such system. The basis of calculation is the fair value of the property; the apparent value of the property and franchises as represented by stocks, bonds and obligations is not alone to be considered. A showing that other companies of a similar character charged the same rate for transportation for the same or longer distances is one way of ascertaining the reasonableness of rates of fare.³⁶

§ 589. Discrimination in street car rates forbidden. The rule elsewhere stated and illustrated which forbids discriminations in municipal legislation,³⁷ has been applied to ordinances regulating the rates of street car fare. Thus an ordinance permitting a street railroad company engaged in interstate commerce under franchise granted by the local corporation to make discrimination in rates in favor of residents of the city against residents of another state conflicts with the interstate commerce clause of the federal constitution and is therefore void.³⁸ Ordinances of this character must have an uniform operation. If they give residents of the city the special privilege of obtaining transportation at a less rate than other residents of the state they will be declared unconstitutional.³⁹

§ 590. Place of sale of street car tickets—Transfers. Power "to fix and determine the fare charged," necessarily carries with it all incidents necessary to carry the power into effect, including power to require by ordinance tickets to be kept for sale by each conductor of a street car. "A street railway has no depots. Its stations are the street corners, and its business with the public is conducted on its cars. * * * The question is one of power, and the power of the city over the street railway is full and ample, and the requirement is reasonable, and the company must perform on its part."

36 Chicago Union Traction Co. v. Chicago, 199 Ill., 579; 65 N. E. Rep., 451. See San Diego Land & Town Co. v. National City, 174 U. S., 739, 755; St. Louis & San Francisco Ry. Co. v. Gill, 156 U. S., 649, 665.

⁸⁷ Sections 184, 193, 226; 417, 438

38 State ex rel. v. Omaha & C. B.
 Ry. & Bridge Co., 113 Iowa, 30;
 84 N. W. Rep., 983. S. P. Pacific

Junction v. Dyer, 64 Iowa, 38; 19 N. W. Rep., 862.

39 Lake Shore & M. S. Ry. Co. v. Smith, 173 U. S., 684; 19 Sup. Ct. Rep., 565; Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196; 5 Sup. Ct. Rep., 826; Guy v. Baltimore, 100 U. S., 434.

⁴⁰ Per Maxwell, C. J., in Sternberg v. State, 36 Neb., 307; 54 N. W. Rep., 553, sustaining Lincoln ordinance.

A reservation in the ordinance granting the franchise of the right "to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public," includes the right to pass an ordinance requiring the company, for the accommodation of the public, to keep tickets for sale upon its cars to be good for transportation over its entire route or any portion thereof, "traveling continuously either way," between certain hours, at a rate prescribed. Such ordinance may make each day's neglect to comply therewith an offense punishable by fine and may provide for the collection of such fine in an action at law.⁴¹

§ 591. Duration of privileges or franchises to use streets, etc. Municipal charters or general laws usually limit the time for which franchises or privileges for using the streets by public or quasi public service companies may be granted.42 It has been held that where a limit is contained in the charter or general law a grant of a franchise without limit is void.43 Where a municipal corporation grants to an electric light company an easement in its streets for the maintenance of poles and wires, without specifying the time of user, the grant is good for the corporate lifetime of the grantee,44 provided, however, that such privilege or franchise is not otherwise limited by law. And it has been decided that a street railway company is not incapable of taking a grant of a right to use streets for its railways for a period extending beyond the life of its own corporate franchise, the interest granted being assignable.45 This doctrine has been applied to a grant to a

41 Detroit v. Ft. Wayne & Belle Isle Ry. Co., 95 Mich., 456; 54 N. W. Rep., 958.

Requiring sale of tickets on cars. Rice v. Detroit, Y. & A. A. Ry., 122 Mich., 677; 81 N. W. Rep., 927; 48 L. R. A., 84.

Chicago ordinance of 1897 sustained which fixed the rate of fare at five cents for one continuous passage on any line within the corporate limits. Chicago Union Traction Co. v. Chicago, 199 Ill., 484, 579; 65 N. E. Rep., 451.

42 Twenty-five years. Charter Greater New York; Laws of New

York, 1897, ch. 378, sec. 73.

43 Blaschko v. Wurster, 156 N.
Y., 437; 51 N. E. Rep., 303; Norris
v. Wurster, 23 App. Div. (N. Y.), 124.

44 Wyandotte Electric Light Co. v. Wyandotte, 124 Mich., 43, 47; 82 N. W. Rep., 821. S. P. St. Clair County Turnpike Co. v. Illinois, 96 U. S., 63, 68.

45 Detroit Citizens' St. Ry. Co. v. Detroit, 64 Fed. Rep., 628; 12 C. C. A., 365; 22 U. S., 570, reversing Detroit v. Detroit City Ry., 56 Fed. Rep., 867; 60 Fed. Rep., 161; People v. O'Brien, 111 N. Y., 1; 18 N.

gas company to occupy the streets, etc., with its gas pipes, etc.⁴⁶

§ 592. Forfeiture of franchise. A franchise to run a street railway may be forfeited by non-user.⁴⁷ If the right conferred by the franchise is not acted upon within the time specified, where this is an essential condition, the franchise may be forfeited.⁴⁸ So if the franchise or the rights conferred thereby are abandoned after the construction of the road is begun, the franchise may be forfeited.⁴⁹ Non-user of a street railway franchise is established by proof that there was a sham pretense of user by running but one car a day without intending

E. Rep., 692, reversing 45 Hun. (N. Y.), 519.

"The right to construct and operate tracks on a street may be granted for a longer period than the charter duration of the corporation which takes the grant; and, where there is no express limitation of time specified in the charter or ordinance giving this right, it is granted in perpetuity and exists forever." 4 Cook. Corp. § 913, p. 2237.

46 A city ordinance, granting to a gas company, its successors and assigns the privilege of furnishing gas to the city and to private consumers for a named period, is not void because the time extends beyond the termination of the company's chartered existence, the ordinance providing that it might transfer all of its rights and privileges, property and franchises, given by the ordinance, to any organized gas company of the state which would, within twenty days after the transfer, file its written acceptance of the ordinance and give bond to perform all the agreements required of the original company. State ex rel. St. Louis v. Laclede Gas Light Co., 102 Mo., 472; 14 S. W. Rep., 974; 15 S. W. Rep., 383; 22 Am. St. Rep., 789.

Whether a grant to maintain gas pipes, etc., in streets, etc., is

perpetual is discussed in Levis v. Newton, 75 Fed. Rep., 884.

Street railway franchise in perpetuity cannot be granted by municipality under general powers. Birmingham & P. M. St. Ry. Co. v. Birmingham St. Ry. Co., 79 Ala., 465; 58 Am. Rep., 615.

Perpetual right to maintain stairway in part of alley—Stairway may be abated as nuisance. Pettis v. Johnson, 56 Ind., 139. Duration of franchise discussed. Milhau v. Sharp, 17 Barb. (N. Y.), 435; State v. New York, 10 N. Y. Super. Ct. (3 Duer), 119; Houston v. Houston City Ry. Co., 83 Tex., 548; 19 S. W. Rep., 127; Seattle v. Columbia & P. S. R. Co., 6 Wash., 379; 33 Pac. Rep., 1048.

An irrepealable contract for use of street may be made. Baltimore Trust & Guarantee Co. v. Baltimore, 64 Fed. Rep., 153.

⁴⁷ State *ex rel*. Kansas City v. East 5th St. Ry. Co., 140 Mo., 539; 41 S. W. Rep., 955; 38 L. R. A., 218.

48 Atchison St. R. Co. v. Nave,
38 Kan., 744; 17 Pac. Rep., 587;
36 Am. & Eng. R. R. Cas., 29.

49 Great Central R. Co. v. Gulf,
 etc., R. Co., 63 Tex., 529; 26 Am.
 & Eng. R. R. Cas., 114.

Failure to comply with terms, will work revocation. Plymouth

to accommodate the public and which could not have accomplished this purpose.⁵⁰ Where the right conferred by ordinance to use the streets for railway purposes is granted on the express condition that such rights shall be forfeited if the company does not within a year build a named extension (which condition is reasonable), the municipal corporation enacting the ordinance may remove the tracks of the company from the streets on failure on the part of the company to comply with the condition.⁵¹ The municipal corporation may waive strict performance of the conditions under which such privileges or franchises are granted.⁵² But mere delay on its part in bringing proceedings will not constitute a waiver, especially where it does not lead to any material change in the situation.⁵⁸

Although the municipal corporation may by delegated authority grant a franchise to construct, maintain and operate a street railway, it cannot maintain an action to forfeit such franchise for misuse or abuse. Such jurisdiction belongs exclusively to the state unless delegated to the city. The mere right to grant the franchise does not constitute a delegation of such authority.⁵⁴

Tp. v. Chestnut Hill & N. R. Co., 168 Pa. St., 181; 32 Atl. Rep., 19.

⁵⁰ People *ex rel.* v. Sutter Street Ry. Co., 117 Cal., 604, 613; 49 Pac. Rep., 736.

Minersville Borough v. Schuylkill Elec, Ry. Co. (Pa., 1903), 54Atl. Rep., 1050.

⁵² Chicago City R. R. Co. v. People, 73 Ill., 541.

Right of city to waive a forfeiture of a street railway franchise or to be estopped in respect thereto was discussed but not decided in People ex rel. v. Sutter St. Ry. Co., 117 Cal., 604, 612; 49 Pac. Rep., 736.

⁵³ Minersville Borough v. Schuylkill Ry. Co. (Pa., 1903), 54 Atl. Rep., 1050.

An ordinance provided that a proceeding for a forfeiture should be begun in six months after the forfeiture accrued. The suit was

not begun for 18 months. Held, that the city did not thereby waive its right to forfeiture because it has no right to contract with defendant that non-user by the corporation of its tracks for any length of time should not act as a forfeiture. State ex rel. Kansas City v. East 5th St. Ry. Co., 140 Mo., 539; 41 S. W. Rep., 955; 38 L. R. A., 218.

A Fine may be imposed in declaring a forfeiture of a street railway franchise and such fine will not be disturbed on appeal if not unreasonable. People ex rel. v. Sutter St. Ry. Co., 117 Cal., 604, 613; 49 Pac. Rep., 736.

54 Milwaukee Electric Ry. & Light Co. v. Milwaukee, 95 Wis., 39; 69 N. W. Rep., 794.

ACTION BY CITY TO ENFORCE FOR-FEITURE SUSTAINED. Failure to compl, with the condition to furWhere the condition is that, if the road is not built within a specified time the franchise shall be forfeited, a judgment declaring a forfeiture is required.⁵⁵ But where the condition is that the franchise shall "be terminated" or shall cease within

nish water of a certain quantity and quality is ground of forfeiture and an action to annul the grant will lie on behalf of the municipal corporation. The right of forfeiture is not limited to quo warranto on the part of the state. St. Cloud v. Water, Light & P. Co. (Minn., 1903), 92 N. W. Rep., 1112.

PRIVATE CITIZEN CANNOT MAIN-TAIN ACTION. Right of way to build tracks in certain streets granted, provided that road should be completed within twelve months from date of company's acceptance of grant, and that in event of failure the franchise might be taken away. Held, that this provision was a condition subsequent and that acceptance vested right of way at once subject to be defeated at election of city for breach of conditions, but not at instance of private citizens. Hovelman v. K. C. H. R. R. Co., 79 Mo., 632. See A. & P. R. R. Co. v. St. Louis, 66 Mo., 228. So a like ruling was made where the condition was that the franchise should become null and void if the company should ever remove its machine shops from the city. Knight v. K. C., St. J. & C. B. R. R., 70 Mo., 231.

QUO WARRANTO is proper to forfeit franchise of street railway. The franchise given by city ordinance to construct and operate a street railway comes from the state, which, in granting it, acts through the city as its agent, and such agent cannot abridge the sovereign power of the state to proceed by quo warranto to have such franchises forfeited. State ex rel. v. East Fifth St. Ry. Co.,

140 Mo., 539; 41 S. W. Rep., 955; 38 L. R. A., 218.

Municipal corporation cannot enforce part and repudiate part of a franchise. New Orleans, S. F. & L. R. Co. v. New Orleans (La., 1902), 33 So. Rep., 192.

Surrender of Franchise by the owners thereof may be accepted by the city, if the charter does not forbid. Wood v. Seattle, 23 Wash., 1; 62 Pac. Rep., 135. Any street railroad company unable or indisposed to carry forward its business may notify the mayor of such indisposition and surrender thereby all their chartered rights or franchise in such manner and under such terms and conditions as may be provided by ordinance. Charter, St. Louis, art. X, sec. 3; The Municipal Code of St. Louis, p. 294.

STATE MAY QUESTION validity of corporate existence. Detroit St. Ry. Co. v. Mills, 85 Mich., 634, 637; 48 N. W. Rep., 1007.

Rule applied to national banks. National Bank v. Matthews, 98 U. S., 621; National Bank v. Whitney, 103 U. S., 99.

VESTED RIGHTS. Right granted by city to build a private sewer in streets and alleys with the right of the builder to charge abutting owners for connections therewith was held to be a vested right and not a license revocable at the will of the city. Stevens v. Muskegon, 111 Mich., 72, 77; 69 N. W. Rep., 227. Compare dissenting opinion and cases cited therein.

55 In re Brooklyn Elevated R. R. Co., 125 N. Y., 434; 26 N. E. Rep., 474.

the time named, no judicial declaration is necessary, to constitute a forfeiture.⁵⁶

Newtown Ry. Co., 72 N. Y., 245; Oakland R. R. Co. v. Oakland, B. & F. V. R. R. Co., 45 Cal., 365; Atchison Street Ry. Co. v. Nave, 38 Kan., 744; 17 Pac. Rep., 587; Street Ry. Co. of Grand Rapids v. West Side Street Ry. Co., 48 Mich., 433; 12 N. W. Rep., 643; Ft. Worth Street Ry.

Co. v. Rosedale St. Ry. Co., 68 Tex., 169; 4 S. W. Rep., 534.

When company is prevented by the mayor, through police officers, no rights are lost, though the road is not constructed within the time named. Chicago v. Chicago Western & Ind. R. R. Co., 105 Ill., 73.

The references are to the sections, except as otherwise indicated. Reference numbers preceded by p. and followed by n. refer to page and note matter.

ABATEMENT OF ACTION	
prosecution for violation of ordinance abates on death of de-	
fendant	338
ABATEMENT OF NUISANCE	
(See Nuisance.)	
ABDICATION	
of public powers forbidden	84
"ABSENT"	-
when presiding officer of councils is	59n
ABUTTERS	.011
(See Injunction; Property Owners; Public Improvements;	
Public Improvement Ordinances.)	
failure to remove filth; defenses	355
duty to remove snow and ice from sidewalk, when 42, 4	
consent to grant to use streets by public service companies	
rights of, as to granting right to use streets by public service	
companies	572
when damages in favor of, may be recovered	572
when may question validity of grant to railroadp. 42	29n
injunction by, to prevent use of streets for railroad tracks	572
cannot enjoin use of streets by public service companies, when a	569
injunction by, to restrain erection of poles, wires, etcp. 88	5n
ACCEPTANCE	
of franchise ordinance	579
ACTION	
municipal corporation may institute, defend, etc	45
	42
ACTIONS TO ENFORCE POLICE ORDINANCES.	
(See Defenses; Evidence for the Corporation; Trial.)	
	303
	303
method prescribed by law is exclusive	303
	303
when statutory civil action applies 3	303
how far proceedings are criminal or quasi criminal 3	
proceedings held civil by weight of authority 3	
how proceedings instituted 3	05

(The references are to the sections, except as otherwise indicated.)	
ACTIONS TO ENFORCE POLICE ORDINANCES—Continued.	
	305
	305
	306
	07
	08
	09
penal; effect of repeal on prosecution 2	
ADDRESS	
in public parks, street, etc., as disturbance of the peacep. 770	0n
delivery of, in public places, may be regulated 2	
ADJOURN	
less than quorum may	05
power to adjourn corporate meetings exists	
method of exercising power	
ADJOURNED MEETING	
(See Meetings.)	
corporate business that may be transacted at	12
members to take notice of	
ADMINISTRATIVE ORDINANCE	
defined	8
the two general classes	8
form of	38
ADMINISTRATIVE POWERS	
(See Executive Powers.)	
ADMISSION	
by defendant of violation of ordinance, admissible as evidence 3	<i>1</i> 1
	#T
ADVERTISING MATTER	
forbidden distribution of on streets, sidewalks, etc188, 40	67
ADVERTISING STRUCTURES	
(See Billboards.)	
AFFRAY	
is petty offense; ordinance may forbidp. 785	5n
both statute and ordinance may punish	
AGENT	04
method of employment, ordinance or resolutionp. 9n, 5, 8 appointment of, without legal authority, void4 p. 9	81
to sell bonds	
-	эн 5
may employ legal services in behalf of town in Vermontp. 142	
may be employed to supervise public work	
real estate, may be licensed	
of sewing machines, may be licensed	
engaged in interstate commerce, license tax on	
for laundry, tax on, held valid	
for insurance company, license tax on, valid	

(The references are to the sections, except as otherwise indicated.)
AIDER
doctrine of, applied to defective statement, complaint or information
ALABAMA
corporate authority of towns in, where vestedp. 141n
appeals in prosecutions for violation of ordinancesp. 562r municipal corporation in, not liable for costs in ordinance cases 333 same act may be made a state and municipal offense 500
double punishment authorized 510
ALDERMEN
(See Offices and Officers.)
construed as councilmenp. 448r
ALLEY
(See Public Improvements; Public Improvement Ordinances; Streets.)
defined 563
grade of, fixing prior to improvement 528
AMENDMENT
of municipal record
method of making 133
court may order—mandamus
after lapse of time
to return of service of, notice of New England town meetingp. 150n
of warrants or summonses for violations of ordinances 307
of information, complaint or statement 323
of report of police on violation of ordinancesp. 507r
of information, disallowed on appeal 323
AMENDMENT OF CHARTER
ordinances superseded by, when
AMENDMENT OF ORDINANCES
method of making 195
void ordinance cannot be amended 196
by striking out void parts
constitutional provisions as to state laws do not apply 195
cannot be by resolution
setting out amendment; method
of ordinance on passage
publication of
requirements in making
of franchise and contract ordinances
reservation of right to change
doctrine in New Jersey
rule under Ohio constitution
reasonableness of amendment
of improvement ordinances
city may relieve street railway of duty to pave by 197
of improvement ordinance by board, without change of esti-

(The references are to the sections, except as otherwise indicated.)
AMOTION
power of, may be exercised by municipal corporations 56
AMUSEMENTS
as ball playing, etc., on streets, may be forbidden 458
ANIMALS
(See Cruelty to Animals; Dead Animals; Dogs; Driving and Riding; Slaughter Houses; Slaughtering Animals.)
intended for food, inspection of, authorizedp. 762n
killing of, may be limited to certain places
ordinance declaring all dead, not slain for food nuisances, void 223
driving of, through streets may be regulated 468
driving of, on certain streets forbidden
cruelty to, may be forbidden
teams attached to vehicles, to be hitched
violation of ordinance as evidence of negligence 41
trespass committed byp. 731n
leaving, unfastened, negligencep. 732n
bicycle held to be, in law forbidding on sidewalkp. 732n
taking, from pound; allegation on charge of 321
feeding of, on highway, may be forbiddenp. 731n
permitting to feed on highway; complaintp. 506n
ANIMALS AT LARGE
may be forbidden24, 468
in designated limits
ordinance may prohibit, though subject covered by state
statute 509
dogs may be kept from going
power to kill dogs at large
when is a dog at largep. 733n
ordinance forbidding dogs at large, applied to dogs of residents only
"to permit" horses, etc., to go at large, applied to horses of
non-residents
sheep herded are not at large
dog; summary jurisdiction on charge of
sufficiency of complaint on charge of violating ordinance for-
bidding 321
permitting swine to go on sidewalk; complaint in charge of 321
swine on sidewalk; proof of 342
construction of ordinance requiring cattle to be penned at night 297
may be impounded 468
power to restrain running at large, does not give power to im-
pound and sell 169
running at large; forfeiting; proceedings 172
ANNIVERSARY
appropriations to celebrate, generally forbidden 69
APARTMENT HOUSES
erection of regulations

(The references are to the sections, except as otherwise indicated.)	
APPEAL	
(See Review.)	
right to, in prosecutions for violations of ordinances	360
law must authorize	
time and method of taking	362
trial de novo on	363
judicial notice of ordinance on	385
raising objections, condition of record	
sufficiency of record for review by	370
jury trial on, unreasonable restrictions	
in ordinance cases, security for costs not required in Illinois	
costs on, in New Hampshire	339
judgment may be reduced on	357
APPEAL BOND	
Governor cannot relieve surety on in ordinance case	359
APPEARANCE	
voluntary, on charge of violation of ordinance	305
APPROPRIATIONS	505
as pure donations, forbidden	68
for celebrations, entertainments, etc., void	69
bounties to soldiers, when authorized; validity	70
to obtain or oppose legislation	71
by virtue of usage or custom	73
APPROVAL	
	140
of ordinance by mayor	
time and manner of	
official, of fire escape, is good defense	
	500
ARBITRATION	
disputed controversies may be submitted to	74
between street railway company and employes, may be required	
as condition to grant right to use streets	576
ARCHITECTS	
license of, valid	428
ARKANSAS	
statute and ordinance may denounce the same offense	500
double punishment authorized	
ARRAIGNMENT	995
of defendant on charge of violating ordinance, not required	325
ARREST	
without warrant, when authorized 225,	
for refusal to obey police officer at fire, void	
resisting; sufficiency of allegation of	321
ASSAULT	
validity of ordinance, forbiddingp. 7	71n
both statute and ordinance may punish	

(The references are to the sections, except as otherwise indicated.)
ASSAULT AND BATTERY
ordinance may punish, though subject covered by statute 509
under general power, an ordinance is unauthorized where sub-
ject is regulated by statutep. 784n
summary jurisdiction of
ASSESSMENT (See Special Assessments or Taxation.)
ASSESSMENT DISTRICTS
(See Special Taxing District.)
ASSIGNATION
(See Bawdy House.)
ASSOCIATION
(See Constitutionality of Ordinances.)
forbidden with thieves, pickpockets, etc., complaintp. 506n
ASSUMPSIT action of, to enforce penal ordinances
ATTACHMENT
local court may issue writ ofp. 468n
ATTORNEY, CITY.
(See Trial.)
ATTORNEYS-AT-LAW
legal authority to employ must exist 4 p. 9n
power to employ to be exercised by ordinance
cannot be disbarred by police court
license on, irrespective of amount of practice
AUCTION
lease of property to be made by public, when
ringing bells for, may be forbidden 486
AUCTIONEERS
reasonable regulations may be imposed on
history of licensing and regulating in New Yorkp. 772n ordinance may forbid sales by, after 6 p. mp. 761n
may be licensed
classification of, to license, sustainedp. 631n
amount of license tax onp. 635n
AUCTION SALES
ordinance forbidding in public placesp. 303n
AUTHORITY
to enact ordinances, recital of, not necessary
quired
AUTOMOBILE
not a vehicle as to license tax

(The references are to the sections, except as otherwise indicated.)
AWNING
definedp. 721n
extending over sidewalks, may be regulated 461
when nuisance 461
ordinance directing removal, validity 461
ordinances regulating must be certain
"suitable frame"
ordinance requiring consent of officers to maintain, valid 184
AYES AND NOES
(See Yeas and Nays.)
BAIL BOND
when may be taken
BAKERS
(See Bread; Markets.)
may be licensed
BALL AND BANQUET
appropriation for, void
BALL PLAYING
on streets, etc., may be forbidden
BALTIMORE
milk ordinance of, sustained 484
BANK
license tax on, reasonableness of amountp. 635n
BATH
meaning of, in ordinance as to water ratesp. 907n
BATTERY
(See Assault and Battery.)
BAWDY HOUSES
may be suppressed
are public nuisances per sep. 751n
evidence to establish character ofp. 752n
inmates of, may be punishedp. 752n
power of municipal corporation to make it unlawful to visit.p. 784n
power to suppress is authority to impose fine 168
may be forbidden by ordinance, though condemned by statute. 509
conducting in an "indecent manner," may be punished20, p. 752n
may be confined to certain districts
may be prohibited in certain sections
keeping; summary jurisdiction on charge of 329
being inmate of; complaintp. 506n
keeping assignation house; complaintp. 505n
complaint in charge of keeping
keeping; proof of
proof of ownershipp. 537n
keeping; participants liable for344, p. 540n
married woman, jointly liable with husband344, p. 540n
owner or tenant, who liable forp. 752n

(The references are to the sections, except as otherwise indicated.)
BAY WINDOWS
extending over sidewalk, regulation of 458
may be regulated by ordinance, though covered by statute 509
BELL
on railroad engine, may be required to be rung 474
ringing of, for auction sales, may be forbidden 486
BENEFIT
(See Special Assessment or Taxation.)
BENEFIT DISTRICT
(See Special Taxing District.)
BEER SELLING
(See License; Liquor Selling; Saloons.)
proof of
BICYCLES
definedp. 727n
right of wayp. 727n
riding of, on streets, etc., may be regulated
may forbid riding of, on sidewalks
may require bell and light on
held to be an animal, in law forbidding on sidewalkp. 732n
riding, on bridgep. 538n may be punished
riding of, in public parks, may be forbidden 465
Chicago wheel tax license ordinance, imposing tax for use of
streets, held void
riding on sidewalk; complaintp. 506r
BIDS
(See Competition; Public Improvements; Public Improvement
Ordinances; Public Work.)
BILL
ordinance to be by, when
reading of, on different days, before council 119
BILL BOARDS
erection and maintenance of, may be regulated 463
Buffalo and Rochester ordinances, sustained 463
Topeka, Kan., ordinance regulating, held unreasonablep. 726
BILLIARD HALL
for hire, keeping of, may be regulated 470
may be licensed 428
BILLIARD TABLES
ordinance may regulate, though subject covered by statute 509
BLACKSTONE .
definition of "franchise" 566
comments of Judge Thompson onp. 878i
BLASTING
may be regulated
violation of ordinance regulating as evidence of negligence 40

(The references are to the sections, except as otherwise_indicated.)
BLASTING POWDER
keeping of, may be regulated
BOARDING HOUSES
license of, valid 428
BOARD OF HEALTH
(See Health and Sanitary; Nuisances.)
power to enact sanitary ordinance90, p. 143n
BOARD OF PUBLIC WORKS
(See Public Improvements; Public Improvement Ordinances; Public Work.)
improvement ordinances to be recommended by 529
ordinances fixing grade of streets
may pass franchise ordinances, when90, p. 143n
required to keep records124, p. 198n
BOARD OF POLICE
may regulate use of streetsp. 143n
BOATS-
(See Row Boats; Ferries.)
BOILERS
(See Steam Boilers.)
BOISTEROUS CONDUCT
(See Disturbing the Peace.)
BONA FIDES
(See Good Faith.)
BOND (See Appeal Bond)
(See Appeal Bond.) contract of mayor as to, may be ratified by council
as bail, when may be taken
ordinance requiring of labor agent, held void for lack of charter
powerp. 773n
municipal, to be issued as prescribed,
when to be exercised by ordinance
when by resolution
BOOK MAKING may be limited to certain localities
•
BOOK SELLER is not a second-hand dealerp. 773n
BOOKS
by-law forbidding directors from inspecting, voidp. 301n
BOOTHS
on sidewalks for goods, etc., as nuisance
BOROUGH
(See Municipal Corporation.)
is a public corporation

(The references are to the sections, except as otherwise indicated.)	
BORROW MONEY	
implied powers respecting	74
BOSTON	
, special assessment for street sprinkling, sustained	524
ordinance regulating delivery of discourse, etc., on the com-	
mons, valid	225
ordinance of, giving police board power to regulate itinerant	
•	416
ordinance of, requiring removal of snow from sidewalk, applies	
to tenant	298
BOULEVARDS	
power to establish	
property rights must be observed	
discontinuance of	
subject of local control	
heavy hauling and driving on	32
BOUNDARIES	
(See Corporate Limits; of Wards, see Ward Lines.)	
BOUNTIES	
to soldiers, power to provide for	70
BOWLING ALLEY	
for hire, keeping of, may be restrained and regulated	476
for hire, power to suppress nuisances is sufficient to sustain	450
ordinance forbidding	
	9011
BREACH OF THE PEACE (See Disturbing the Peace.)	
ordinance fixing penalty for, void if conflicts with state law.p. 7	771
ordinance as to, held not to conflict with statute on subject.p. 7	
ordinance denouncing invalid, if subject regulated by	<i>3</i> 011
statutep. 7	/85n
BREAD	
may be required to be sold by weight	485
short weight; power to seize and forfeitp. 2	75n
BREAKWATER	
general power to protect streets, sufficient to authorize con-	
struction ofp. 7	799n
BRICK KILNS	
as nuisances; regulation ofp. 6	i98n
erecting near dwelling; proof ofp. 5	37n
residence definedp. 5	537n
burning brick inp. 5	37n
BRIDGES	
bicycles may be excluded from	465
legislature may compel tax levy forp. 8	306n
BROKEN WARE	
deposit of may be regulated	453

1

(The references are to the sections, except as otherwise indicated.)
BROKER
(See Pawnbroker.)
may be licensed
BROOKS
fouling of waters of, may be prevented 454
(See Bawdy House.)
BUFFALO
ordinance of, regulating billboards, sustained
BUILDINGS
power to establish fire limits 470
regulations for, to be established by ordinance 470
various regulations as to additions, repairs, fire escapes, etc.
pp. 736, 737n
wooden, frame, ironp. 736n
what is erectionp. 737n
wooden, power to removepp. 737, 738n injunction to restrainp. 738n
notice, when requiredp. 738n
permits to erect
regulations as to erection 471
regulations as to use of sidewalks and streets 471
in streets, etc., when nuisancep. 718n
for laundries and wash houses character of, may be prescribed. 491
public, constitute public improvements
unlawfully erecting wooden, without license; defense 355
unsafe; charge of, allegation of inspection
erecting unlawfully; subsequent consent; estoppel 352
walls less thick than required; complaintp. 505n
BUILDING LINE
power to establish
BULKY ARTICLES may be required to be sold by weight or measure 485
BURDEN OF PROOF
in ordinance violations
BURIAL OF DEAD (See Cemeteries.)
BURNING TAN
to the annovance of persons: allegation in charge of 321

(The references are to the sections, except as otherwise indicated.)
BUSINESS
(See Liquor Selling; Saloons; Sunday.)
ordinances forbidding on Sunday 479
on Christmas day, void
ordinances regulating hours of
on Sunday; general power insufficient to forbid, where subject
is covered by state statutep. 784n
BUTCHER
may mean keeper of meat shopp. 763n
license ofp. 764n
may be licensed
reasonableness of amount of license tax onp. 635n
BUTTER
laws forbidding sale of oleomargarine as imitation ofp. 763n
BY-LAW
(See Ordinances.)
defined1, 6
distinguished from ordinance
of New England towns
CABMEN
police control of, sustained 184
CABS
violating stand regulations for, proof of 342
license onp. 642n
CALIFORNIA
municipal corporations in, where corporate authority vested.p. 141n
doctrine in, as to repeals of ordinances and revival 205
ordinance forbidding employment of Chinese labor, void 495
limiting day's work to eight hours, void
rule as to effect of general laws on municipal ordinances 214
ordinance can not punish offense, condemned by state statute 501
appeals from municipal court of San Francisco, allowedp. 562n
CALLED MEETING
(See Special Meetings.)
CANAL COMPANY
is a quasi-public corporation
CANVASSER
house to house, may be licensed 428
CARDS
distribution of, on sidewalks, streets, etc 467
CARPET BEATING MACHINES
use of, may be forbidden near church, school house or residence 491
CARRIER
(See Common Carrier.)
without license; proof ofp. 538r
CARS
(See Street Railways.)

(The references are to the sections, except as otherwise indicated.)
CASTING VOTE
by presiding officer in case of tie
CATCH BASINS
location and description of, in sewer construction ordinances 542 CATTLE
(See Animals; Animals at Large.)
CATTLE DEALERS
may be licensed
CAUSE OF ACTION
ordinances creating
CAUSE TO SUSPECT
allegation as to ground for
CELLAR DOOR
in sidewalk, may be authorized and regulated 458
CEMETERIES
regulation of, fall within the police power
as nuisances
may regulate places for burials 446
may discontinue
may require permits for burial of the dead 446
CERTAINTY
(See Public Improvement Ordinances.)
ordinance must be definite and certain
CERTIORARI
will lie to test validity of ordinances
by tax payerp. 440r denied in Iowap. 440r
right to review by, in prosecutions for violations of ordi-
nances
trial de novo denied; review on record 363
early North Carolina ruling, contra
proceedings by, defined
record
to try title to office
CESSPOOLS
removal of contents of, may be compelled and regulated 453
if result in nuisance, may be abated
CHANCERY
(See Equity; Injunction.)
CHANGE OF CORPORATE LIMITS
(See Corporate Limits.)
CHANGE OF VENUE
allowed 338
CHARGE
(See Price.)

(The references are to the sections, except as otherwise indicated.)	
CHARGES	
(See Rates of Public Service Companies.)	
CHARTER, MUNICIPAL.	
(See Construction.)	
its nature and purpose43,	44
is not a contract	43
how granted	44
legislative and constitutional	44
limits corporate powers	44
usual powers conferred by	45
is organic law of corporation and ordinance must conform to	15
how ordinance differ as to force and effect from	13
method prescribed by, for enforcement of penal ordinances, is	000
exclusive	303
controls in imposing penalties	169
general rules for construction of	52 81
self-enforcing provisions of	81
provisions of constitutional, in Missouri, supersedes general	214
laws, whenrule in California	
rule in Minnesota	
rules as to repeal of, by general laws	
question of intent	
when provisions of, superseded by general laws	
effect on ordinances by surrender of	
CHARTER AMENDMENTS	
ordinances superseded by, when	911
	211
CHARIVARI	770~
as disturbing peacep. 453n, p. 7	1011
CHICAGO	
(See Illinois.)	.01
form of enacting clause of ordinancep. 2	
ordinance of, regulating department stores, held void	
ordinance of, regulating street parades, held void ordinance of, requiring consent of certain property owners, to	410
erect livery stable, sustained	415
ordinance of, regulating pawnbrokers, valid	
ordinance of, prohibiting discharge of dense smoke within	220
city, sustained	456
ordinance of, forbidding discharge of dense smoke from boats	100
on Chicago River, constitutional	270
ordinance of, imposing a license to navigate Chicago River, void	
wheel tax ordinance of, imposing license tax for use of streets,	
held void	424
ordinance of, fixing street car fares, sustainedp. 9	
authorized to construct river tunnelp.	
CHIEF BURGESS	
of borough in Pennsylvania may question validity of ordinance	
vetoed by him	

(The references are to the sections, except as otherwise indicated.)
CHINESE
ordinance forbidding employment of Chinese labor, void 499 ordinances discriminating against, void
CHRISTMAS DAY
ordinance cannot forbid business on
regulating sale of, is not in restraint of tradep. 30-
ordinance regulating, sùstained in Kansasp. 7581
CIGARETTES
sale of, may be regulated and licensed428, 457
CINCINNATI
omposition of council ofp, 1421
CIRCULARS distributing on streets; regulating188, 46'
CITY
(See Municipal Corporation.) is a public corporation
CITY ATTORNEY (See Trial.)
CITY COURTS
(See Municipal Corporation Courts.)
CITY HALL place of corporate meetings 99
CITIZEN
actions by, to restrain illegal acts; reason for doctrine 283 actions by, to enjoin enforcement of void ordinances and con-
tracts282, 283
mandamus by
of other states, ordinances discriminating against, voidp. 3531
ordinances cannot abridge the privileges and immunities of 21 agreements by, to pay for public improvements 55
CIVIL ACTION
how far proceedings to enforce penal ordinances are 30 ordinances regulating
CIVIL LIABILITIES
ordinances regulating
CIVIL RIGHTS ordinances regulating
CLAIMS
paid, only as law warrants
CLASS
discrimination on account of, void
CHAILE OF MUHICIPAL COLPOLATION IN. CHECK OH OLUMBANCES 410

(The references are to the sections, except as otherwise indicated.)
CLASSIFICATION
reasonableness of, in ordinances
discrimination in, void 193
illustrative cases
CLAUSES
(See Construction; Maxims; Words and Phrases.)
CLEANING
(See Street Cleaning.)
street railways may be required to clean between tracks 474
CLERICAL ERROR
will not invalidate improvement ordinance 558
CLERKS
additional, to be appointed by ordinance, when4, p. 8n
of local court, usually issue execution
when not officers
CLOSING
(See Business; Saloons.)
places of business; ordinances regulating hours of 480
CLOTHING
(See Second-Hand Clothing.)
COAL
(See Weights and Measures.)
may be required to be sold by weight or measure 485
COAL OIL
(See Oil.)
COAL HOLES
in sidewalks, regulation of 458
COASTING
(See Nuisance.)
COKE, SIR EDWARD
definition of monopoly byp. 306n
COLONY ORDINANCE
of Massachusetts
, -
COLORADO
representation in towns and cities ofp. 142n
action to enforce police ordinances, held civil in 304
statute and ordinance may denounce the same act as an offense
in
double punishment authorized
as to forfeiture of license as penalty
COMBINATIONS
(See Monopolies and Exclusive Privileges.)
among bidders for public work, vitiates contractp. 862n
COMBUSTIBLES
keeping of, may be regulated 472

(The references are to the sections, except as otherwise indicated.)	
COMMON LAW—Continued.	
quorum of indefinite corporate bodies under94, p. 1	49n
head officer to preside at corporate meetings under98, p. 1	
mayor to preside at meetings of corporate bodies under.98, p. 1	56n
quorum of corporate meeting under	
of definite body	105
of joint assemblies	
is not abrogated in city by ordinance relating to gamingp. 7	87n
if mode of enforcement of penal ordinances it not prescribed,	
method of, applies	303
rule as to competency of corporators to serve as judges, jurors and witnessesp. 4	700
penal ordinances enforced at, by action of debt or assumpsit	
influence of, in actions to enforce penal ordinances	
costs were unknown to	
COMMON RIGHTS (See Conglitutionality of Ordinances, Liberty of Individual)	
(See Constitutionality of Ordinances; Liberty of Individual.) ordinances in derogation of, void	990
what are?	
use of private property	
use of public property; streets	
COMPENSATION	
(See Salary.)	
COMPETITION	
ordinances restricting—union labor	553
in granting use of streets to public service companies	574
COMPLAINT	
(See Index under titles of various offenses.)	
proceedings by, to enforce penal ordinances	303
COMPLAINT OR INFORMATION	
to enforce police ordinances; formal parts	
allegation of notice of ordinance unnecessary	
must show jurisdiction	
averment as to power to pass	312
requisites of, as to substantial averments	
how tested form of, directed by local laws	313 914
must be in writing	214
verification of, when required	314
conclusion of	314
pleading ordinance violated	315
judicial notice	315
reference to ordinance violated	316
negativing exceptions in ordinance	317
several offenses—joinder	318
joint liability	319
sufficiency for penalty for second offense	320
various illustrations as to sufficiency	321

(The references are to the sections, except as otherwise indicated.)
COMPLAINT OR INFORMATION—Continued.
for offense committed in certain relationp. 506n
on report of police
amendment of
usually disallowed on appeal
how defects in, cured 324
waiver of defects of form 324
doctrine of aider 324
defects of substance, not waived 324
COMPROMISE
city may compromise disputed claims 74
CONCEALED WEAPONS
carrying of, may be punished by ordinance, though condemned
by statute
carrying, ordinance forbidding, valid225, 488
carrying, summary jurisdiction
carrying, informationp. 506n
CONDEMNATION PROCEEDINGS
(See Eminent Domain.)
jurisdiction of local court inp. 468n
CONDUITS
(See Underground Conduits.)
CONFIRMATION
prior corporate acts may be confirmed by resolution, when 5
CONGRESS
act of, forbidding discharge of dense smoke within the District
of Columbia, sustained
CONJUNCTION
transposition of, in constructionp. 448n
CONNECTICUT
matters regulated by statutes cannot be covered by ordinance. 501
ordinance penalty may be recovered by criminal action inp. 478n
CONNECTIONS
descriptions as to, in sewer construction ordinances 542
CONSENT
(See Abutters; Franchise Ordinances; Property Owners; Pub-
lic Improvements.)
CONSPIRACY
definedp. 5231
charge of, trial to be by jury
CONSOLIDATION
of municipal corporations; effect of, on ordinances 218
of suits to recover ordinance penalties
CONTAGIOUS DISEASES
to 141, and conitant populations

	(The references are to the sections, except as otherwise indicated.)	
CON	NTEMPORANEOUS CONSTRUCTION	
	effect of, in construing ordinances	292
CON	NTEMPT	
	power of local courts to punish for	300
CON	VTINUOUS OFFENSE	
	illustrations	179
CON	NSTITUTIONAL LAW	
~~~	(See Forfeiture; Special Assessment or Taxation; Trial.)	
	ISTITUTIONALITY OF ORDINANCES	
	ordinances must be constitutional; enumeration	
	ordinances in derogation of common rights219,	
	use of private property	
	use of public property; streets	
	taking or damaging private property	
	oppressive regulations	
	discriminating on account of class, race, religion, sect, etc	
	San Francisco queue ordinance	
	regulating personal associations, employment, etc	
	public drunkenness	
	respecting mode of trial	
	offices may be changed or abolished	
		495
	pawnbrokers to keep records and submit to police inspection,	
	valid	492
	ordinances forbidding carrying concealed weapons, valid	
	milk inspection ordinances sustained	
	respecting observance of the Sabbath	
:	regulating hours of business	480
	forbidding business on Christmas day, void	479
	law permitting vagrants to be hired out, is voidp. 77	
	must conform to federal and state constitutions	219
	ordinances cannot impair the obligation of contracts. See	
	Contracts; Franchise Ordinances.	
,	ordinances cannot interfere with or regulate foreign or inter-	
	state commerce. See Commerce, Foreign and Interstate.	
•	contract and franchise ordinances, cannot be impaired	197
	reservation of right to alter, etc	197
	New Jersey doctrinerule under Ohio constitution	197
1	penalty of imprisonment, valid	197
	ordinance will not be declared unconstitutional unless clearly	173
•	so219, p. 3	
	ordinances requiring printing to bear union label, void	eeo
	STRUCTION	บอส
	(See Maxims; Words and Phrases.)	
	(See Maxims; words and Phrases.) of municipal charter43,	
	general rule as to municipal powers stated	44
1	Seneral rule as to municipal powers stated	46

(The references are to the sections, except as otherwise indicated.)
CONSTRUCTION—Continued.
of powers New England towns 47
of corporate powers illustrated48 to 55
of specific enumeration as to penalties
the rule of ejusdem generis
of laws as to whether duty discretionary or mandatory82, 83
to be in favor of public, rule applied to continuing power to fix
water rates
of municipal power to impose license404, 409
of grants of exclusive privileges and monopolies 578
CONSTRUCTION OF ORDINANCE
(See Reasonableness of Ordinances.)
rules for, stated
title in construction
title may be resorted to, in ascertaining what streets or parts
thereof are to be improved
preamble in construction
contemporaneous; effect of
penal ordinances
illustrative cases
liability of landlord or tenant
parol evidence of terms used in
construction of words and terms
gender and numberp. 448r
transposition of conjunctionp. 448r
punctuationp. 449r
where ordinance void in part
limiting operation of ordinances as to sale of liquor 30
limiting ordinance as to rate of speed of train to certain ter-
ritory
ordinances construed as apply to cases in futurep. 352n
effect of form of ordinance
CONSTRUCTIVE NOTICE
of corporate meetings, when sufficient
CONTINGENCY
the taking effect of an ordinance may be made to depend upon 36
CONTRACTS
(See Public Work.)
contract ordinances. See Franchise Ordinances.
of contractors for public work, cannot be impaired 243
nature of contract
rights vested in contractor 244
mere change of remedy authorized 244
may change method of payment
reducing sum to be paid, void
illustrative cases
interest on special tay hills as part of obligation 946

(The references are to the sections, except as otherwise indicated.)

ONTRACTS—Continued,	
when new remedy applies	247
when old law controls	248
for public work, authority to let cannot be delegatedp. 8	09n
right to occupy streets by public service companies as	580
for public work, cannot restrain competition	189
void, action by citizens and taxpayers, to prevent enforce-	
ment of282,	283
ment of	400
no impairment of obligation of, to change or abolish office or	001
reduce salary of	231
municipal corporation is bound by	232
impairment of obligation of, forbidden219,	232
ordinance extending fire limits and forbidding erection of	
wooden building, does not impair obligation of contract of	
construction made prior thereto	232
ordinance granting franchise as	
franchises authorized by state	
reservation of right to alter, amend or repeal	
	212
impairment of obligation of, to be determined by United States	000
Supreme Court	
taxation by municipal corporation of its own bonds	
ordinances granting franchises	
imposing additional burdens	
exclusive privileges	240
ordinance as "law" relating to impairment	233
ordinance granting license under legislative act is not a	
"law"	233
ordinance as contract	
the obligation of	
judgment as	
• -	
personal, not commerce	
municipal occupation tax as40, p. 2	
municipal charter is not	
when ordinance conferring privilege is	
impairing obligations of, by amendment	
impairing obligations of franchise ordinances by repeals200,	
price of, cannot be increased, when	219
for removal of garbage, dead animals, etc	452
limiting day's work; eight-hour laws	
ordinance providing for, may include police regulations	
agent may be authorized by resolution to make	5
implied power to make as to water supply	
for employment, ordinance necessary	
waiver of time of performance by resolution, when	
for building sidewalk may be ratified by council	
power of council committee	123
of mayor as to municipal bonds may be ratified by council	89
made without authority cannot be ratified	73

(The references are to the sections, except as otherwise indicated.)	
COOLEY, JUDGE	
views of, relating to exclusive market privileges	192
CORNER LOUNGING	
summary jurisdiction of	329
CORPORATE AFFAIRS	
distinguished from private	39
"CORPORATE AUTHORITIES"	
who arep.	128n
CORPORATE AUTHORITY	
where vested	90
CORPORATE LIMITS	00
fixed by charter	44
change of; effect on ordinances	
public improvements outside of	
how ascertainedp. 8	802n
operation of ordinances restricted to	26
ordinances apply to changes and additions	26
ordinance operating in public or particular places only	31
ordinance applying to part of, valid	32
improvement ordinance	33
CORPORATE FRANCHISE	
distinguished from grants to use streets	563
CORPORATE MEETINGS	
(See Meetings.)	
CORPORATE PURPOSE	
(See Municipal Purpose.)	
power of taxation limited to, what is	400
powers to be confined to	50
implied powers, must relate to54,	55
CORPORATE SEAL	
authority to adopt and alter conferred by charter	45
CORPORATIONS	
(See Foreign Corporations; Municipal Corporations; Private	
Corporations.)	
defined and classified	38
COSTS	
statutes as to security for, do not apply to ordinances in Illinois	339
what they include, when authorized	339
costs on appeal in New Hampshire	339
unknown to the common law174,	
created by statutes	
municipal corporation not liable for in Alabama	
cannot be allowed defendant on acquittal in Massachusetts	
as penalty for violating ordinance	
estimate of, for public improvements	531
CONVEYANCE	
of property may be directed by recolution when	E .

(The references are to the sections, except as otherwise indicated.)	
CONVICTION (See Judgment; Record of Conviction.)	
· · · · · · · · · · · · · · · · · · ·	
CORNICES  outending even sidewells regulation of	<b>ξ Q</b>
extending over sidewalk, regulation of	,0
COUNCIL (Gas Martin and Property)	
(See Meetings; Proceedings of Council; Quorum.) must be legally constituted	96
	)6
	}7
	8
presiding officer of9	8
at common law98, p. 156	n
**************************************	8
	9
when mayor to approve proceedings of	
approval to be in writing	
casting vote by presiding officer of	)Z )7
majority of members of, may organize	-
when presiding officer is "absent"	
as continuous body	
	n
may validate void ordinances 16	4
	2
functions of 9	1
COUNCILMEN	
construed as aldermenp. 4489	
cannot be personally interested in matters in which they act 10	8
COUNTY	
is public corporation 3	8
COUNTY COMMISSIONERS	
may only act as boardp. 145	n
	_
COURTS (See Manisipal Company tion Courts)	
(See Municipal Corporation Courts.) may order amendment of municipal record	4
mandamus will lie	4
will not control exercise of discretionary powers	
	8
cannot question reasonableness of ordinances passed under	
express power	
but may under implied powers	2
position of, in construing ordinances; views of Mr. Justice Field 29	2
defer to judgment of municipal authorities	6
reasonableness of ordinance is question of law for 18	
method of determining	16
with not interfere with mullicipal discretion	6

(The references are to the sections, except as otherwise indicated.)
COURT HOUSE
for county, legislature cannot compel city to erect at its sole
expensep. 806n
implied power to purchase lands for 57
COW STABLES
may be regulated
CRAPS
playing, may be punished by ordinancep. 792m
CREDIT
municipal corporation cannot loan
CREEKS
fouling of waters of, may be prevented 454
CRIME
defined
by the United States Supreme Court
distinguished from municipal police regulations
jury trial
distinguished from misdemeanor
distinguished from municipal offenses
CRIME AGAINST STATE
(See State Offenses.)
CRIMINAL
how far proceedings to enforce penal ordinances are 304
CRIMINAL PROSECUTION
defined, as relates to jury trial
distinguished from municipal police offenses 332
CROSSINGS
(See Grade Crossings.)
of street and steam railroads; regulations 474
safety gates, flagmen and watchmen 474
CRUELTY TO ANIMALS
ordinance may punish, though condemned by statute 509
intent, immaterialp. 772n
general welfare clause will sustain ordinance forbidding 489
CULVERT
(See Sewers.)
ordinance may confer power on city engineer to fix dimensions
ofp. 810n
CURSING
(See Swearing; Oath.)
CUSTODY
of ordinances
CUSTOM AND USAGE
as establishing corporate boundariesp. 802n
English, as precedent to determine reasonableness of ordinance 187
exercise of power by virtue of

(The references are to the sections, except as otherwise indicated.)
DAIRIES AND COW STABLES
may be regulated 449
DAKOTA
same act may be denounced as offense by statute and ordinance 500
DAMAGES
violation of ordinance, as ground of action for40 to 42
DANGER SIGNALS
train servants may be required to give 474
DAY'S LABOR
(See Eight-Hour Laws.)
ordinance cannot prescribe hours of, if regulated by statute.p. 784n
DAY LABORER
is not an officer 4
DEAD ANIMALS
subject to police regulation 452
power to remove, gives authority to direct the manner thereof. 452
ordinances for removal of, by contract 452
DECENCY
(See Public Morals and Decency.)
DECLARATION .
(See Complaint or Information.)
DEBT
action of, to enforce penal ordinances
payment of private, as condition to connect with sewer 183
for water, as condition to obtain
imprisonment for non-payment of fine, valid
DEDICATION
of property, may be accepted by resolution
streets and highways may be established by 527
DEFENDANT
admissions of, of violation, admissible
competency of, as witness 341
DEFENSES
enumeration of, in ordinance violations 348
existence of municipal corporation cannot be raised 349
prosecution under validated ordinance allowed 350
former acquittal or punishment
estoppel
ordinance
miscellaneous defenses
various illustrative cases
method of pleading
bicyclist cannot show that it was customary to violate the law
in riding on sidewalksp. 727m
DEFINITIONS
(See Words and Phrases; and various words in this index.)

(The references are to the sections, except as otherwise indicated.)
DEFINITE BODY
(See Council; Quorum.)
DELEGATION OF POWER
state may delegate power to its municipal corporations 43
of public powers, forbidden
officers cannot delegate their powers
legislative authority cannot be delegated
ministerial duties may be delegated
of power as to omces and omcers, forbidden and a
companies, fatal
of power to provide for public improvements, forbidden 517
of power to inspector, voidp. 763n
of power to establish markets, voidp. 762n
of power as to permits for street parades, etc
of power to levy taxes, forbidden
of power to levy license tax, forbidden
permit to parade streets
requiring consent of citizens, property owners, and compliance
with conditions in granting saloon licenses 420
requiring consent of certain property owners to maintain livery
stables, laundries, etc
DEMURRER
insufficiency of complaint raised by
objection to jurisdiction of subject-matter, raised by 327
DENSE SMOKE
(See Smoke.)
DENVER
ordinance of, forbidding distribution of handbills, etc., on side-
walks, streets, etc., sustained 467
DEPARTMENT STORES
cannot be regulated by ordinance, without express legislative
grant 495
DEPOSIT
of ordinances
DEPOSITS
of earth, stone and gravel in public way, is a nuisance 455
DEPOT
of railroads, etc., regulation of hackmen in and about 184
DESCRIPTION
(See Public Improvements; Public Improvement Ordinances.)
of place, on charge of selling liquor
DETAIL
matters of need not be specified in improvement ordinances 54

(The references are to the sections, except as otherwise indicated.)
DETROIT
form of enacting clause of ordinance
DIMENSIONS
of sewer, determination of, cannot be delegated 87
DIRECTORY PROVISIONS
distinguished from mandatory, respecting council procedure 116
DIRT
(See Filth; House Dirt; Rubbish.) deposit of, may be regulated
DISCOURSE
delivery of, in public places, may be regulated 225
DISCRETION
of officers in letting public workp. 861n
DISCRETIONARY POWER
courts will not control exercise of
limitation of rule
distinguished from mandatory82, 83
distinguished from ministerial85, 86, 89
DISCRIMINATIONS
in ordinance, forbidden
in ordinances because of class, race, religion, etc
against non-residents, void
respecting keeping hog pensp. 704n
in street car fares, forbidden
in laws as to day's labor and wages
void
in license tax, void
in special assessment or taxation, forbidden
DISINFECTION
of second-hand clothing, may be requiredp. 773n
DISOBEYING ORDER
sufficiency of complaint, to recover penalty for 321
DISORDERLY CONDUCT
summary jurisdiction of
under habitual criminal act, summary jurisdiction on charge of 329
sufficiency of complaint for
proof ofp. 537n

(The references are to the sections, except as otherwise indicated.)
DISORDERLY PLACE
(See Bawdy House.)
keeping; complaint in charge ofp. 5061
DISSOLUTION
of municipal corporation; effect on ordinances 21
DISTRICT OF COLUMBIA
act of Congress forbidding discharge of dense smoke in, sus-
tained 45
DISTURBING THE PEACE
ordinance forbidding, sustained under general power 48
charivari is no violation
Salvation Armyp. 770r
beating drum or tambourinep. 770r
public meeting on streetp. 770r
addresses in public placesp. 770r
"noise," construedp. 770r
boisterous and disorderly conductp. 770r
riotous assemblies may be forbidden
molesting religious and other meeting
blowing whistles
parading street with music, etc
ringing bells, playing hand organs
ordinance may punish, though subject covered by statute 509
summary jurisdiction of
molesting religious societies
"riotous" conduct
complaint in charge of
DOCKS
as public improvements 51
DOGS
ordinances regulating, are valid422, 469
may require them to be registered and licensed 469
may be kept from going at large 469
power to kill dogs at large 469
may be impoundedp. 734r
when is a dog at largep. 733r
ordinance licensing and restraining from going at large, limited
to residents
when "going at large"p. 455r
owner may be made liable if one is bitten by, on street 188
DOMESTIC PURPOSES
<del></del>
meaning of, in ordinance as to water ratesp. 907r
DONATIONS
by municipal corporations, forbidden
for celebrations, entertainments, etc., void 69
bounties to soldiers 70

(The references are to the sections, except as otherwise indicated.)
DOORSTEPS
may be regulated, with reference to sidewalk 458
DOUBLE OFFENSE
(See State Offenses.)
DRAINAGE ·DISTRICT
is public corporation
DRAINS
(See Public Improvements; Sewers.)
emptying into a public street is a nuisancep. 707n
may be regulated, to avoid nuisance
DRAM SHOP
(See Liquor Selling; Saloons.)
DRAY
(See Vehicles.)
DRAYMEN
license on, fixed according to capacity of dray, validp. 633n
the state of the s
DRIVERS
of cabs, hacks, etc., subject to police control 184
DRIVING
of animals through streets, may be regulated 468
"drove or droves" as apply to cattle, bad 20
DRIVING AND RIDING
may be regulated
fast and careless, may be punished by ordinance, though cov-
ered by statute
"faster than an ordinary trot," good
"immoderate gait," bad
fast, on streets, etc., may be forbidden189, 464
proof of
character of driver, inadmissible
permit, inadmissible
law of the roadp. 726n
right of wayp. 727n
riding of bicycles and velocipedes on streets, etc., may be regu-
lated 465
DRUGGISTS
reports of sale of liquor by 224
license tax on; reasonableness of amountp. 635n
DRUMMERS
(See Commerce, Foreign and Interstate.)
DRUNKENNESS
(See Public Drunkenness.)
DUTIES
of "tonnage" cannot be levied by ordinance
on imports and exports; ordinances cannot impose 219

(The references are to the sections, except as otherwise indicated.)
EMPLOYES
liability of, in ordinance violations 344
of principal for acts of
EMPLOYMENT
of individuals, ordinances cannot regulate 228
ENACTING CLAUSE
formal part of ordinance
of ordinance, sufficiency 145
forms of various citiespp. 231, 232n
ENFORCEMENT OF ORDINANCES
(See Actions to Enforce Police Ordinances.)
ENGINEERS
stationary and railroad, license of, valid 428
ENGLAND
summary jurisdiction exercised in
municipal corporation courts inp. 462n
highways in early 568
ENGLISH LANGUAGE
(See Publication.)
to be used in ordinance
ENGLISH LAW
(See Common Law.)
corporate meetings under early 92, p. 146n
mayor as presiding officer under
forbids enforcement of ordinances by forfeiture 170
crime in
misdemeanor in
early, monopolyp. 306n
not guide in determining reasonableness of ordinances 187
ENUMERATION
(Specific, Effect of, See Construction.)
EQUALITY
of special assessment on taxation
EQUAL PROTECTION OF THE LAWS
(See Constitutionality of Ordinances.)
cannot be denied citizens by ordinance
EQUITY
(See Injunction.)
jurisdiction in, usually not possessed by municipal and police
courtsp. 467n
is not proper remedy to try title to office
ERROR
clerical, will not invalidate improvement ordinance 558
ERROR. WRIT OF
(See Writ of Error.)

(The references are to the sections, except as otherwise indicated.) ESTOPPEL	
as applied to amendments of municipal records 13	2.5
doctrine of, in questioning validity of the ordinance	
applied to grant of right to erect depot buildingsp. 903	) 13
applies to municipal corporation in regulating rates and	0.4
charges	
of railroad company to lay tracksp. 886	
applies to proceedings for public improvementsp. 829	
as a defense on charge of violation of ordinance 35	
when defendant cannot contest reasonableness of ordinance 35	53
EVIDENCE	
municipal records as 12	
presumptions 126, 12	27
parol to prove	39
to show omissions	30
rights of creditors	31
ordinance changing rule of, voidp. 354	n
proof of acceptance of police ordinance by defendant 37	77
when to be set out in record of conviction 35	58
objections to, made when offered	38
ordinance as, in action of negligence 40 to 4	12
parol, of terms used in improvement ordinances 55	59
to ascertain corporate boundariesp. 802	
EVIDENCE FOR THE CORPORATION IN ACTIONS TO EN-	
FORCE POLICE ORDINANCES	
proof of ordinance	ŧΟ
judicial notice of ordinance	
proof of offense 34	
beyond a reasonable doubt 34	1
preponderance of evidence	1
admissions of defendant admissible 34	1
proof of a number of offenses, when	1
various offenses; illustrations 34	
essential elements of, to be proved	
proof of intent	3
liability of participants, keepers, subordinates, servants, etc 34	
liability of principal for acts of employes, servants, etc 34	5
burden of proof; negative averment	6
variance 34	
proof of ordinance 39	5
EVIDENCE OF ORDINANCES	
proof of authority to enact	2
proof of existence of ordinance, when required	
burden of proof; presumption	
presumption of existence	
judicial notice; appeal from municipal courts	
proof of steps in passage, when required	
proof of record of ordinance	
presumptions as to steps in enactment	

EULDENCE OF OPPINANCES S. P
EVIDENCE OF ORDINANCES—Continued.
proof of publication of ordinance, when required 389
presumptions
how proof of publication made
how ordinance proved
ordinances published by authority
when original record required
sufficiency of authentication
proof in actions for penalty
admissibility of parol testimony
proof of violation of ordinance as evidence of negligence 397
proof of violation by plaintiff in actions for civil liabilities 398
EXCAVATIONS
unauthorized in or near streets, etc., as nuisance 459
in streets and public ways, may be regulated and permits may
be required 458
EXCEPTIONS
in ordinance, negativing in complaint to enforce 317
EXCLUSIVE PRIVILEGES AND MONOPOLIES
(See Monopolies and Exclusive Privileges.)
EXCISE DEPARTMENT
may exercise certain local police powers 88, p. 144n
EXECUTIVE POWER
distinguished from legislative
vested in mayor and officers
EXECUTION
must be judicial finding, to authorize

(The references are to the sections, except as otherwise indicated.)
EX POST FACTO
ordinance, void 219
rule respecting amendment of council proceedings 135
EXPRESS POWER
mode of exercise of, must be reasonable
ordinance passed by virtue of, cannot be held unreasonable 181
EXTRA COMPENSATION (See Salary.)
"FALL"
used in drainage ordinance, construed to mean "rise" 558
FALSE ALARMS
of fire, may be punished
FAST DRIVING AND RIDING
(See Driving and Riding.)
FEDERAL COURTS
(See United States Courts.)
FELONY
at common law
FEMALES
forbidding in saloons at certain hoursp. 758n discrimination as to employment of, voidp. 778n
FENCE
on part of street, as nuisance 459
FENDERS
use of, on street cars, may be compelled 474
FERTILIZING
conducting business of, without license; complaintp. 505n
FERRIES
franchise for, exclusive
license and taxation of, valid
FIELD, MR. JUSTICE
views of, as to position of courts, in construing ordinances 292
views of, as to classification in ordinances
"FILLED"
construction of, as used in street improvement, ordinance 559
FILTH
deposit of, may be regulated
abutter may be required to remove from private passageway 453
suffering to remain on passage way; complaintp. 505n
FINE
(See Forfeiture Penalties.)
power to enforce ordinances by penalty of
to be paid into city treasuryp. 270n

(The references are to the sections, except as otherwise indicated.)
FINE—Continued.
may be provided for, within reasonable limits 175
New Jersey doctrine
North Carolina doctrine
must be reasonable
limit, continuous or separate offense
heavier for second offense, authorized
may be imposed in declaring forfeiture to use streets by rail-
way companyp. 914n unreasonable in amount, void
may be remitted by mayor
offense to be accurately described in
· ·
FIRE
giving false alarms of, may be punished
power to suppress, confers authority to secure means therefor 65
FIRE DEPARTMENT
subject to local control
apparatus of, purchased by resolution, valid 5
FIRE ESCAPES
certificate of official approval of, is defense
FIRE ENGINES
implied power to purchase65
FIRE LIMITS
(See Buildings; Wooden Building.)
power to establish
FIREWORKS
forbidding, does not apply to exhibition by cityp. 538n
FISHING
limiting right of, to town residents, void 222
FLAGMEN
at railroad crossing may be required 474
FLATS
erection of
FLORIDÀ
penal ordinance against non-observance of Sabbath sustained 479
statute and ordinance may punish same act in 500
FOOD PRODUCTS
may be required to be sold by weight and measure 485
FOOTWAYS
. (See Sidewalks.)
•
FORCIBLE ENTRY AND DETAINER
action of, jurisdiction of local courtp. 467n
FOREIGN COMMERCE
(See Commerce, Foreign or Interstate.)
FOREIGN CORPORATIONS
license on, as interference with foreign or interstate commerce 263

(The references are to the sections, except as otherwise indicated.)
FOREST
ordinance of, an English statute
FORFEITURE
(See Fine; Penalties.)
penalty of, power to inflict
right to declare, vested in state 592
when action may be taken by cityp. 914n
private citizen cannot maintain actionp. 915n
quo warranto will liep. 915n
failure to pave street as ground ofp. 899n
fine may be imposed, in declaringp. 914n
proceedings of
animals running at large
of privilege or franchise to use streets for public service com-
panies 592
FORM
of ordinance 137
FORMER ACQUITTAL
as a defense 351
FORMER PUNISHMENT
as a defense 351
FORTHWITH
term as applied to issue of execution
FOURTH OF JULY
appropriation to celebrate, forbidden
FRANCHISE
(See Franchise Ordinances; Forfeiture.)
power to acquire lands beyond corporate limits for a park, held
to be
of municipal corporation, belongs to inhabitants 39
as applied to grants and privileges to use streets by municipal
corporations 563
distinguished from "corporate franchise" 563
meaning illustrated 563
Blackstone's definition 566
Judge Thompson's comments onp. 878n
Mr. Justice Bradley's definition 566
Mr. Chief Justice Taney's definitionp. 878n
various descriptions and definitions 566, 567
distinguished from license or privilege 567
definition of Judge Thompsonp. 879n
right to charge tolls and make agreement for use of subway
space isp. 723n
ordinance granting as contract
imposing additional burdens
exclusive privileges 240
authorized by state

(The references are to the sections, except as otherwise indicated.)	
FRANCHISE—Continued.	
exclusive, cannot be conferred by municipal corporation190, 2	119
irrevocable, forbidden 2	219
water; gas; ferries 1	191
markets 1	192
	87
license to lay water pipes, under legislative act, ordinance	
granting, not a law	233
police regulations authorized 5	582
to use streets, may be regulated under police power 4	173
grants of, cannot surrender police power over streets 5	
public improvements, interfering with 5	521
reservation of right to alter, amend or repeal 2	42
surrender of, by ownersp. 91	
duration of, to use streets by public service companies 5	91
forfeiture of 5	
ED ANGUIGE ODDINANCEO	
FRANCHISE ORDINANCES	
(Treated in Chapter XVII.)	
(See Franchise; Street.)  necessary to grant right to use streets by public service com-	
panies	.74
mandatory legal requirement must be observed 5	
notice for right to lay tracks in streets 5	
omission to publish, fatal	
delegation of power in granting, invalidates	
violation of legal restrictions, invalidates 5	
letting to highest bidder	
consent of abutting property owners	
consent of municipal authorities	
consent of electors	
who may be the grantee	
existence of the corporation	
conditions imposed upon grantee	
paving, repairing, etc., of streets by railway companies	
	11
grant of special privilege is	8
form of	138
grants of exclusive privileges and monopolies	
construction of	578
acceptance of	
right to occupy street, etc., as contract	
amendment of	
repeal of, general powers as to	
reservation of right 200,	20
illustrative cases	201
when constitutes contract	
cannot be impaired	191
validity, as a rule, cannot be questioned by third personsp. 42	

(The references are to the sections, except as otherwise indicated.)
FRAUD
as ground for setting aside municipal acts
FRONT-FOOT RULE in special assessment or taxation, sustained
FURNITURE DEALER regulation ofp. 773n
FUTURES dealers in, may be licensed
GAMBLING
(See various kinds of gambling games in Index.) power of municipal corporation to legislate againstp. 784n ordinance may forbid
GAMBLING DEVICE setting up, may be forbiddenp. 755n
GAMBLING HOUSE keeping; summary jurisdiction on charge of 329
GAME
(See Index under titles of various games.)
means gambling or game of chance 342
forbidding minors to play at, proof of
complaintp. 506n
GAMING
ordinance may punish, though forbidden by statute 509 ordinance relating to, does not abrogate or suspend the com-
mon law on the subjectp. 787n
GAMING HOUSE
ordinance may forbid keeping
evidence to establish keeping commonp. 754n
GARBAGE, OFFAL, ETC.
subject to police regulation
ordinances for removal of, by contract
removal of house dirt, rubbish, refuse matter, etc
license to remove house dirt, offal, etc., may be required 453
GAS
price of, must be fixed at reasonable rate
power to regulate price of
exclusive franchise to supply

(The references are to the sections, except as otherwise indicated.)
GOVERNING LEGISLATIVE BODY
(See Council; Legislative Body; Meeting; Quorum.)
GOVERNOR
cannot pardon one convicted of violating municipal ordinance 359
cannot relieve surety on appeal bond 358
GRADE CROSSING
power to abolish and declare nuisance
GRADE OF MUNICIPAL CORPORATION
effect on change in, on ordinances
GRADE OF STREET
establishment of, required before improvement 528
ordinance for, to be recommended by board 528
when to be fixed by ordinance 528
what constitutes fixing 528
established by resolution, whenp. 834r
sufficient specification of, in improvement ordinance 541
grade lines by reference, may be adopted 541
vote of council to place the grade as reported by committee
does not establish
official, may be established by one general ordinancep. 833r
if grade can be ascertained without difficulty, ordinance is not
uncertain 541
changingpp. 831, 832r
change of, to be by ordinance3, pp. 834n, 842n
by resolution, whenp. 841r
change, without consent of abuttersp. 831r.
change of, held not altering streetp. 807r
power to open street, gives implied power to fixp. 833r
contract to improve before grade fixedp. 833r
legislature may compel city to reduce, whenp. 883n
mandatory law requiring modification ofp. 812n
GRAIŅ
(See Weights and Measures.)
GRAMMAR
in construction
GRANTS
(See Franchises; Franchise Ordinance; License Tax.)
GREAT CHARTER
(See Magna Charta.)
GUILD HALL
place of corporate meetings in ancient England 92
GUILDS
by-laws of, in restraint of trade, voidp. 304n
GUNPOWDER
keeping of, may be regulated472
when nuisance pp. 740 741n

(The references are to the sections, except as otherwise indicated.)
GUTTERS
(See Sewers.)
HABEAS CORPUS
to review prosecutions for violation of ordinances 367
HACKMEN
police control of, affirmed
tions
HACKNEY COACHES
license onp. 642n
HANDBILLS
distributing on streets; regulating 188, 467
HAND ORGAN
playing may be forbidden 486
HARBOR
as public improvement
and local police regulations as inteference with foreign or interstate commerce
HATCHWAYS
in buildings may be regulated
HAWKERS
(See Commerce, Foreign and Interstate; Peddlers.)
may be regulated
HAY
may be required to be sold by weight
construction of ordinance as to weighing for sale 296
HEALTH
public, state may provide forp. 806n
HEALTH, BOARD OF
(See Board of Health.)
HEALTH AND SANITARY REGULATIONS
(See Nuisances; Police Powers.)
power to make 439
contagious diseases, etc.—quarantine 445
general scope of, stated and illustrated 445
require report of contagious diseases 445
HEARING
(See Public Improvements.)
required in public improvements, when 219, p. 353n
in proceedings for improvements, to be before councilp. 829n
HEREAFTER
as to time of street gutteringp. 844n
HIGHWAYS
(See Obstructions; Public Improvements; Streets.)
defined 560
wharf is not

(The references are to the sections, except as otherwise indicated.)
HIGHWAYS—Continued.
power to establish beyond corporate boundaries, denied 58
opening and establishment of
"HIS"
applied to femalesp. 448n
HITCHING POSTS
corporate authorities may control
in public square as nuisance
HOGS
(See Animals; Swine.)
HOGS AND HOG PENS
may be regulated
keeping of, may be confined to certain districts
HOISTWAYS
in buildings, may be regulated
HOLIDAYS
prohibiting the sale of liquor on
7 - 7
HOME RULE of municipal corporations
as relates to public improvements
HOP TEA TONIC
ordinance regulating sale of, validp. 757n
HORSES
(See Animals; Animals at Large.)
objects in streets, etc., calculated to frighten, are nuisances 459
HORSE DEALERS
license of, valid
HORSE RACES
may be licensed 428
HOSPITALS
may be established and maintained 445
private, permission to erect
HOTELS
license on, valid
HOTEL PORTERS
may be regulated 491
HOTEL RUNNERS
may be regulated 491
HOURS
(See Saloon.)
of business, ordinances regulating
of business; cannot be regulated under general power, where
subject is covered by state statutep. 784n
of laundries, may be regulated
for opening and closing marketsp. 763n

(The references are to the sections, except as otherwise indicated.)
HOUSE DIRT
removal of, may be required and controlled 453
license to remove, may be required
HOUSE OF ILL FAME
(See Bawdy House.)
HUCKSTERS
(See Peddlers.)
may be regulated 483
HUSTINGS_COURTS
(See Municipal Corporation Courts.)
ICE
(See Snow.)
on sidewalk, abutters may be required to remove 32, 298, 458
failure to remove from sidewalk, does not give right of action 42
business of cutting, may be regulated
sale of, on street, may be regulatedp. 763n
selling on street, without license; complaintp. 506n
IDAHO
ordinance and statute may punish same act in 500
ILLEGAL ORDINANCES
(See Void Ordinances.)
ILL FAME, HOUSE OF
ILL FAME, HOUSE OF (See Bawdy House.)
(See Bawdy House.)
(See Bawdy House.) ILLINOIS
(See Bawdy House.)  ILLINOIS  council may prescribe time and place of corporate meet-
(See Bawdy House.)  ILLINOIS  council may prescribe time and place of corporate meetings
(See Bawdy House.)  ILLINOIS  council may prescribe time and place of corporate meetings
(See Bawdy House.)  ILLINOIS  council may prescribe time and place of corporate meetings
(See Bawdy House.)  ILLINOIS  council may prescribe time and place of corporate meetings
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(See Bawdy House.)  ILLINOIS  council may prescribe time and place of corporate meetings
(See Bawdy House.)  ILLINOIS  council may prescribe time and place of corporate meetings
(See Bawdy House.)  ILLINOIS  council may prescribe time and place of corporate meetings
(See Bawdy House.)  ILLINOIS  council may prescribe time and place of corporate meetings
(See Bawdy House.)  ILLINOIS  council may prescribe time and place of corporate meetings

(The references are to the sections, except as otherwise indicated.)
same act may be made penal by statute and ordinance in 500 but mere general grant of power is insufficient to authorize
an ordinance 503
double punishment authorized 508
IMPERATIVE DUTIES
(See Mandatory Powers.)
IMPLIED POWERS
of municipal corporations recognized
to enact ordinances recognized 53
general doctrine of 54
must relate to municipal affairs 55
respecting offices and officers 56
to acquire and hold property 57
beyond corporate limits 58
to dispose of property 59
held for particular purposes 60
to transfer, donate or dedicate for particular uses 61
as to police and sanitary regulations
to supply water 64, p. 798n
to purchase engines to prevent and suppress fires 65
respecting lighting 66, p. 798n
to regulate price of light
appropriations as donations forbidden
for celebrations, entertainments, etc., void 69
bounties to soldiers 70
expenditures to obtain or oppose legislation
by virtue of usage or custom
to borrow money
to purchase on credit
to purchase market grounds 57, 74
to forbid beating animals
to provide for election, to vote to establish waterworks 74
to establish smallpox hospitals
to compromise or settle disputed claims
to submit disputed controversies to arbitration
to offer rewards for arrest, etc., of offenders against local reg-
ulations authorized
but not against state statutes
to establish fire limits
to enforce ordinances by penalties
power to restrain, gives power to punish
to construct drains and sewers beyond corporate limits, recog-
nized
ordinances passed by virtue of, must be reasonable 182
no, to grant exclusive franchises or privileges 190
IMPLIED REPEALS .
of ordinances, general doctrine
general and special ordinances 204

(The references are to the sections, except as otherwise indicated.)
IMPLIED REPEALS—Continued.       205         effect of; revival       206         of penal ordinances       206         of public improvement ordinances       207
IMPORTS duties on, cannot be imposed by ordinance
IMPRISONMENT
(See Penalties.)  power to impose as punishment
IMPROVEMENT ORDINANCE (See Public Improvement Ordinance.)
INCIDENTAL POWERS (See Implied Powers.)
INDECENT EXPOSURE of person may be forbidden, irrespective of intentp. 753n in public, proof of
INDECENT MANNER ordinance forbidding conducting bawdy house in, sufficient
INDEBTEDNESS
municipal corporation may incur
right to indemnify municipal officers for loss
INDIANA nature of action, to enforce police ordinances 304
license tax on vehicles in
INDICTMENT
for violation of ordinance, if offense is a misdemeanorp. 478n
INFECTIOUS DISEASES (See Health and Sanitary Regulations.)
INFERIOR COURTS
(See Municipal Corporation Courts.) INFORMATION
(See Index under titles of various offenses.) proceedings by, to enforce penal ordinances

(The references are to the sections, except as otherwise indicated.)
INFORMATION—Continued.
(For violation of police ordinance, See Complaint or Infor-
mation.)
INITIATIVE
(See Electors.)
INJUNCTION
to restrain passage of ordinance
to restrain illegal council from organizing 97
is not the remedy to try title to office
to test validity of ordinance
by citizens and taxpayers, to test validity of ordinances. 282, 283
to prevent violation of ordinance
to restrain enforcement of ordinances, to avoid multiplicity
of suitsp. 437n
to review prosecutions for violations of ordinances 368
by abutters, to prevent use of streets for railroad tracks 572
by property owners to prevent change of location of water
mains, denied 581
to prevent operation of street railwayp. 429n
to restrain removal of wooden buildingp. 738n
to restrain erection of livery stablep. 704n to restrain discharge of sewage, etcp. 707n
to restrain placing obstructions in streetsp. 720n
to prevent erection of poles, wires, etcp. 885n
INSPECTION
regulations relating to market products may be established 481
illustrations of regulations
delegation of power to inspector, voidp. 763n
of milk 484
of laundries and wash houses, may be prescribed 491
refusal to permit; complaint in charge of 321
allegation of, on charge of unsafe building 321
INSTALLMENTS
sufficiency of ordinance providing for payments in 548
INSURANCE COMPANIES
may be licensed, and their agents 428
license on basis of amount of premiums, held unequalp. 631n
INSURANCE CONTRACTS
are personal, not commerce
INTELLIGENCE OFFICE
may be regulated 491
license of, to be uniform and equalp. 631r
INTENT
proof of, in ordinance cases
on charge of cruelty to animalsp. 772r
knowledge of adulteration of milk need not be shownp. 767r
ordinance may forbid indecent exposure irrespective of n 753r

(The references are to the sections, except as otherwise indicated.)
INTEREST
of members, how quorum affected by
INTERPRETATION
(See Construction; Construction of Ordinances.)
INTERSTATE COMMERCE
(See Commerce, Foreign and Interstate.)
INTOXICATING LIQUORS
(See Liquor Selling; Saloons.)
INTOXICATION
(See Public Drunkenness.)
INTRODUCTION
of ordinance, time of
double board147
ITINERANT VENDORS
(See Commerce, Foreign and Interstate; Peddlers.) amount of license tax onp. 635n
IOWA violation of ordinance, a public offensep. 478n
certiorari, to test validity of ordinance, denied in
ordinance and statute may denounce same offense 500
JAIL
implied power to purchase lands for
JOINDER
of several offenses, in action to enforce penal ordinance 318
joint liability
JOINT ASSEMBLIES
of definite bodies, quorum
JOINT DISTRICT SEWER
under St. Louis charter
JUDGES
(See Municipal Corporation Courts.)
JUDGMENT
(See Penalties; Record of Conviction.)
must be for precise offense
where ordinance imposes several penalties 357
charge of several violations, separate sentences 357
reduction of, on appeal
should cover all penalties
imprisonment, only when authorized
jail sentence where defendant has no property
must be definite and certain; illustrations
error in form of entry does not invalidate
cannot be set aside at subsequent term
if two penalties are prescribed, judgment must show for which
given
record of conviction should show

(The references are to the sections, except as otherwise indicated.)
JUDICIAL NOTICE
of ordinance 340
municipal court will take, of ordinances
state court will not take, of ordinances
of ordinances; pleading ordinance violated 315
of ordinance on appeal 363, 385
of meaning of "policy," in penal ordinancep. 448n
JUDICIARY
(See Courts.)
JURISDICTION
(Of Offenses, See Municipal Offenses; State Offenses.)
must appear on face of record
of municipal corporation and local courts
of subject-matter, objection to raised by demurrer 327
of subject-matter, cannot be waived or given by consent 324
complaint must show, in action to enforce police ordinance 311
of same act as offense against state and municipal corporation 500
of offenses, state or municipal 498
of federal courts, to restrain enforcement of ordinancesp. 437n
of superior courts over inferior
method of exercising
JURORS
who may act as in municipal corporation courts 302
JUNK SHOPS
may be regulated 491
may be licensed 428
"junk shop" definedp. 653n
JUSTICES OF THE PEACE
jurisdiction of, for violation of ordinancesp. 468n
distinction between, and judges of local courtsp. 470n
exercise of summary jurisdiction by
as "police justice" or "police magistrate"p. 449n
JURY
may determine reasonableness of ordinances 185
JURY TRIAL
(See Trial.)
KANSAS
statute and ordinance may denounce as offense the same act in 500
statute of, limiting day's work to eight hours, construed 495
ordinance regulating street parades, held void 416
ordinance regulating sale of cider sustained inp. 758n
appeals in prosecutions for violation of ordinances 361, p. 563n
KANSAS CITY (MO.)
council of, composed of two branchesp. 142
violations of ordinances of, triable summarily 331
merchant defined under charter ofp. 657m
ordinance of forbidding sale of skimmed milk sustained p 767n

(The references are to the sections, except as otherwise indicated.)
KEEPERS
liability of, in ordinance violations 344
KENTUCKY
constitution of, authorizes license tax on lawyers
of first classp. 436n
KILN
(See Brick Kiln.)
KITE FLYING
within business portion, may be forbidden 458
KNOWLEDGE
(See Intent.)
LABOR
(See Eight-Hour Laws; Union Labor.) regulating price of common
LABOR AGENT ordinance requiring bond of, void where charter did not au-
thorizep. 773n
LAMP POSTS
in streets, etc., as nuisancesp. 719n
placing and maintenance of, may be regulated 462
LANDINGS
as public improvements
LANDLORD AND TENANT
who liable for nuisance, etc., on premises
which liable, for bawdy house, on premisesp. 752n
LANGUAGE
English, to be used in ordinance
ordinance in French, sustained in early Louisiana case 137, p. 219n "wanton or obscene"; proof ofp. 537
LARCENY
(See Petit Larceny.)
LAUNDRIES
ordinances regulating; discriminationp. 361n
regulations of, to be uniform 194
location and hours of, may be regulated 194
may be regulated, as to location, character of building, sanitary
conditions and hours
inspection of, may be prescribed
orumance may regulate nours 01

(The references are to the sections, except as otherwise indicated.)
LEVEE DISTRICT
as a public corporation 38
LEWD CONDUCT
(See Public Morals and Decency.)
may be forbidden 475
LEWD WOMEN
(See Bawdy Houses; Prostitution; Street Walking.)
ordinance forbidding renting property to, void 225
LIABILITIES. CIVIL
ordinances regulating
LIBERTY OF INDIVIDUAL
oppressive regulations
ordinances relating to
discriminating ordinances 226
personal association, employment, etc
ordinance may punish public drunkenness
LICENSE
(See Franchise; Franchise Ordinance; Permit.)
LICENSE TAX
(See Commerce, Foreign and Interstate.)
municipal power to license and regulate trades, occupations, etc. 403
mode of delegation of power by state
how power construed 404
enumeration followed by general words 405
power "to regulate," as power to license 406
as power to prohibit 407
distinction between license to regulate and tax to raise revenue 408
license taxes distinguished from general taxes 409
as a contract
limited to municipal purpose
power to impose on non-residents
to be levied by ordinance
resolution may prescribe fee under general ordinance 5
delegation of power to impose, forbidden
consent of property owners
reasonableness of amount
illustrative casesp. 635r
application for license
license to firm, good for term
how far granting of, discretionary 419
mandamus 419, p. 643r
conditions respecting granting 419, 420, 426
revocation of license or permit
method of enforcement of payment of 423
on dogs 422, 463
on lawyer 423
on vehicles—double taxation

(The references are to the sections, except as otherwise indicated.)
LICENSE TAX—Continued.
on saloons and liquor selling 30, 425, 426, 477
on street railways and cars
on street railway under power to amend franchise 197
on miscellaneous trades, occupations, avocations, etc 428
discriminating, void
different rates for, discriminating and void
uniform rule for, requiredp. 294n
to maintain well in public street, may be revoked 455
doctrine of estoppel applies
forfeiture of, as penalty
as denying due process of law 219, p. 353n
as restraint of trade
of vehicles; construction of general and particular words 297
of auctioneers, history of, in New Yorkp. 772n
ten pin alleys; power must be expressly givenp. 756n
to remove contents of privies, etc., may be required 453
also to remove house dirt, offal, etc
under police power as interference with foreign or interstate
commerce 260
on foreign corporations as interference with foreign or inter-
state commerce 263
of ferries, constitutional 267
on brokers, agents, etc., engaged in interstate commerce 258
on non-residents, on occupation, held constitutional 257
keeping dog without; complaintp. 506n
selling milk without; complaintp. 506n
selling meat without; complaintp. 506n
conducting show without; complaintp. 506m
conducting business without; complaintp. 505n
refusal to produce on request; proof ofp. 538n
carrier without; proof ofp. 538n
for vehicle; proof of failure to obtain
selling second-hand goods without; proof ofp. 537n
LIGHT
(See Gas.)
obstructing, may be forbidden
power to regulate price of
on cars running in street, may be required
on railroad tracks, may be compelled
LIGHTING
as public improvement; power to provide
council power to provide for, cannot be delegated 87
ordinance delegating power to make contract for, void 516
plant to supply, submission to voters
implied powers respecting
to regulate price
supplying to residents, is a municipal purposep. 798n

(The references are to the sections, except as otherwise indicated.)
LINCOLN (NEB.)
ordinance of, regulating sale of street car tickets and trans-
fers sustained 590
LIQUOR
ordinance declaring keeping of, voidp. 757n
LIQUOR SELLING
(See Saloon.)
municipal power to regulate and prohibit
may be forbidden on Sunday
may be punished by ordinance, though condemned by statute 509
same on Sunday 509
license tax for 425
conditions 426
by druggists; compelling reports by, void
without license, sufficiency of complaint in charge of 321
summary jurisdiction on charge of
on Sunday, proof of
sufficiency of complaint
unlawful; proof of
charge against two partners; proof of
LIVERY STABLES
power to regulate
not nuisance per se
regulating location of
location of, power of property owners to determine 87
may be forbidden in resident districts
injunction to restrain erection ofp. 704n
license of, valid
LOADS
for teams, regulatingp. 303n
LOANS
municipal corporation may negotiate
LOBBYING
expenditures of municipal corporation for, generally void 71
LOBSTERS
unlawfully taking, proof of
LOCAL COURTS
(See Municipal Corporation Courts.)
LOCAL ASSESSMENT
(See Special Assessment or Taxation.)
LOCAL IMPROVEMENTS
(See Public Improvements; Public Improvement Ordinances;
Special Assessment or Taxation.)
LOCAL SELF-GOVERNMENT
of municipal corporations43 and notes
as relates to local public improvements 514, 515

(The references are to the sections, except as otherwise indicated.)
LOCOMOTIVES
may be exempt from operation of law forbidding discharge of
dense smoke 194
LOTTERIES .
ordinance may forbid conducting 476
newspaper advertising scheme asp. 756n
LOTTERY TICKETS
ordinance may prohibit sale of, when476, p. 784n
selling; summary jurisdiction on charge of
ordinance may forbid sale of tickets for, though subject covered by statute
•
LOUISIANA statute and ordinance may condemn same act as offense 500
double punishment authorized
appeals in proceedings for violations of ordinances 361
MAGNA CHARTA
guarantees legal procedure
right to jury trial, declared by
purpose ofp. 514n
forbids penalty of forfeiture, unless expressly granted 170
MAJORITY
(See Quorum.)
MAINTENANCE
of street, ordinances providing for, for a term of years 555
distinguished from repairs55
MANDAMUS
to try title to office
proper to require amendment of municipal records 13
to compel granting of license will lie
if granting permission to build sidewalk is discretionary, will
not lie
to require a board to issue permit, to erect poles, wires, etc.p. 8851
to compel street railway to pave streetp. 8999
by citizens and taxpayers, to test validity of ordinances282, 28
city court of New York, has no jurisdictionp. 467
MANDATORY POWERS
distinguished from discretionary82, 8
MANDATORY PROVISIONS
distinguished from directory, respecting council procedure 11
as to subject and title of ordinance 14
MANHOLES
for sewers, description of, in ordinances for construction 54
MANUFACTURERS
may be licensed
nuisances arising from 44

(The references are to the sections, except as otherwise indicated.)
MAPS
may be used as evidence in ascertaining corporate boundaries
p. 802n
direction to make includes surveyp., 454n
MARKETS
establishment of
may be regulated
private may be forbidden, and certain sales confined to public. 482
private, within specified distance from public, may be for-
biddenp. 353n
inspection regulations may be established 481
cheats and frauds in weights and measures may be forbidden. 481
hours for opening and closingp. 763n
regulation of hucksters, hawkers, etc
milk inspection and adulteration
weights and measures may be required and regulated 485
implied power to purchase grounds for, on credit
privileges for, exclusive forbidden
occupiers of stands and stalls of, may be licensed 428
license tax on, reasonableness of amountp. 636n
delegation of power to establish, voidp. 762n
in public streets, constitute nuisancep. 762n
ordinance giving space for, on streets, etc., voidp. 718n
violating regulations; summary jurisdiction on charge of 329
private forbidden; summary jurisdiction on charge ofp. 517n
selling on street; proof of
violating regulations as to stands; complaintp. 506n
MARRIED WOMAN
jointly liable with husband for keeping bawdy housep. 540n
MARSHALL, CHIEF JUSTICE
construction of commerce clause of federal constitution 250
MARYLAND
statute and ordinance may condemn as offense same act 500
double punishment
MASSACHUSETTS
where corporate authority of cities of, vestedp. 142p
statute of, relating to withholding wages of weavers, uncon-
stitutionalp. 778n
on acquittal on charge of violation of ordinance, defendant is
not entitled to costs in
conclusion of complaint for violation of ordinance 314 statute and ordinance may condemn as offense same act 500
MASSACHUSETTS COLONY ORDINANCE relating to right of property on waters
A OTROCITIVE OF LIBITE OF DEPOSITE OF ALMOST MANAGEMENT OF THE ATTENDED

(The references are to the sections, except as otherwise indicated.)
MATERIAL
for streets, sewers, etc., how far selection of discretionary with
municipal authorities 519
specification of, in improvement ordinances 544
for streets, sewers, sidewalks, etc., delegation of power to name 517
"MAY"
when construed as "must" or "shall"
read as "must," relating to service of resolution 294
MAYOR
chief executive officer of municipal corporation 90
when part of legislative power
as member of council
as presiding officer of council
as presiding officer at common law
right of mayor to vote at council meetings
5
when his approval of proceedings necessary
approval must be in writing
casting vote by, in event of tie
presiding officer of council in Illinois
presiding officer of board of supervisors in San Francisco
when to sign and approve ordinance and resolutions 149
time and manner of approval
veto of bill, ordinance or resolution by
return of bill or ordinance by
power to approve or veto ordinance cannot be delegated by 85
consideration of veto of, by legislative body 160
power to call corporate meetings
may grant reprieves and remit fines
offense must be described
may question validity of ordinance, when
MAYORS' COURTS
(See Municipal Corporation Courts.)
MAXIMS
delegatus non potest delegare
ejusdem generisp. 81n, p. 82n
expresio unius est exclusio alteriusp. 79n, p. 271n, p. 614n
falsa demonstratio non nocetp. 852n
noscitur á socüsp. 82n
qui cito dat bis dat
qui serius solvit, minus solvit
quorum aliquem vestrum * * * unum esse volumus. p. 164n
salus populi suprema est lex84, 430
sic utere tuo ut alienum non lædas
volenti non fit injuria
MEASURES
(See Weights and Measures)

(The references are to the sections, except as otherwise indicated.)
MEAT
(See Markets.)
sold for food, inspection of, authorizedp. 762n
selling without license; complaintp. 506n
may be required to be sold by weight
offering for sale tainted, indictable at common lawp. 762n
MEAT SHOPS
may be licensed 428
MECHANICAL TRADES
may be licensed
MECHANIC'S LIEN
action of, cannot be entertained by municipal court of New
Yorkp. 467n
MEETING
(See Public Meeting.) of municipal corporation, required
,
Carrotte of Botton and State and
2012201 000002 00, 104010000
- OB
stated meeting of municipal corporation
adjourned meeting of municipal corporation
notice of
corporate meetings at common law92, p. 146r
place of
of New England towns99
notice or warning
sufficiency of
specification of
when council may prescribe time of
MERCHANDISE
display of, on sidewalk, is a nuisance
- • •
MERCHANTS
may be licensed
classification of, to license, valid
discrimination against those selling by sample, voidp. 6321
itinerantp. 6321
transient
to keep book of sales, open for police inspection, void 22
METER
user of water, may be required to providep. 356r
MICHIGAN
common law origin of municipal corporations declared in 4
implied power to construct drains and sewers beyond corporate
limits, recognized 51
ordinance regulating street parades, held void 410
statute and ordinance may condemn as offense same act 500

(The references are to the sections, except as otherwise indicated.)
MILK
ordinance forbidding sale of impure, is void where subject is regulated by statute
in street, is nuisancep. 719n
MILWAUKEE
charter of, recognizes common law powers
court will not inquire into motive in performing 162
MINISTERIAL POWERS
may be delegated85, 89
MINNESOTA
statute of, gives common law powers to municipal corporations 45 rule as to effect of general laws on municipal ordinances 214 statute and ordinance may condemn as offense same act 500 double punishment authorized
forbidden from participating in certain games, where liquor is
sold; complaint
MISDEMEANOR
defined
MISDEMEANOR AGAINST STATE (See State Offenses.)
MISSISSIPPI statute and ordinance may condemn as offense same act 500
MISSOURI doctrine in, as to mandamus, to prevent illegal public acts 284 nature of action to enforce ordinances

(The references are to the sections, except as otherwise indicated.)
MISSOURI—Continued.
ordinances directed against non-observance of Sabbath, sus-
tained in 478
doctrine in, as to repeal of ordinances and revival 205
summary trial for police offenses, authorized 331
appeals in prosecutions for violation of ordinancesp. 563r
tax on non-resident wagons, void 224
statute and ordinance may condemn as offense same act 500
ordinance must conform to statute 505
double punishment authorized 510
rule as to effect of general laws on municipal ordinances 214
MISTAKE
as ground for setting aside municipal acts
MOBILE (ALA.)
ordinance of, imposing license tax on telegraph companies, held
void 257
MONOPOLIES AND EXCLUSIVE PRIVILEGES
essence ofp. 307n
difficulty in defining
common law definitionp. 306n
exclusive market privileges
described; power to grant190, 219
to supply water; gas; ferries
Judge Cooley's views as relates to markets 192
in slaughtering animals
in removing dead animals
exclusive privileges; impairment of
ordinances authorizing monopolized and patented articles 554
exclusive privileges in licensing, forbiddenp. 613n
contracts for removal of dead animals, garbage, etc., as 452
municipal corporations cannot grant190, 219, 578
construction of such grants 578
MORALS
(See Bawdy House; Public Morals and Decency.)
MORTGAGE
of property, implied power of municipal corporation 62
MOTIVE
(See Legislative Motive.)
MUNICIPAL
definedp. 622n
MUNICIPAL AFFAIRS
ordinances are designed to regulate 497
distinguished from state matters 497
as applied to offenses
distinguished from private
implied powers must relate to 55
as relates to public improvements

index. 977

(The references are to the sections, except as otherwise indicated.)  MUNICIPAL BONDS  (See Bonds.)	
MUNICIPAL CHARTER (See Charter, MUNICIPAL.)	
defined and classified—kinds	352 436 299 232 578 219 219 219 219 219 216 216 217
MUNICIPAL CORPORATION COURTS  establishment and continuance of	$300 \\ 301 \\ 302$
MUNICIPAL OFFENSE (See State Offense; Trial.)	
MUNICIPAL ORDINANCE (See Ordinances.)	

(The references are to the sections, except as otherwise indicated.)
MUNICIPAL ORGANIZATION
kinds of 90
examples of various forms of90 and notes
form of, contained in charter 44
MUNICIPAL POLICE POWERS
(See Police Powers.)
MUNICIPAL POWERS
(See Charter; Implied Powers; Powers.)
MUNICIPAL PURPOSE
municipal definedp. 622n
powers to be limited to
power of taxation limited to; what is? 400
supplying light to residence, held to bep. 798n
license tax, limited to
relating to jurisdiction of local court
MUSIC
parading with in streets, may be forbidden
playing hand organ, may be prohibited
forbidding in saloons at certain hoursp. 758n
"MUST"
construction of
"may" read as, relating to service of resolution 294
NAME
of municipal corporation, given by charters
in warrant for violation of ordinance should be brought 309
NAPHTHA
violation of ordinance, as to keeping, as evidence of negligence 41
NATIONAL BANKS
license tax cannot be imposed on, by cityp. 613n
NAVIGATION
license for privilege of, ordinances imposing, void 266
regulating, uniform rule requiredp. 294n
NAYS
(See Yeas and Nays.)
NEBRASKA
statute and ordinance may condemn same act as offense 500
statute of, limiting day's work to eight hours, unconstitutional
NECESSITY
for the enactment of ordinances, need not be recited 140 declaration of necessity in improvement ordinance 534
NEGATIVE AVERMENT
nroot of 940

(The references are to the sections, except as otherwise indicated.)
NEGLIGENCE
municipal liability for failure to enact and enforce police regu-
lations 43
nuisances 43
relating to streets, etc
violation of ordinance, as ground of action for40 to 4
in creating or permitting nuisances and obstructions on streets
and highways40 to 4
in violation of ordinance, pleading
proof of acceptance
relating to public safety
railroads and street cars
removal of snow and ice
by plaintiff in action for civil liability
leaving animal unfastened isp. 732r
NEGRO
ordinance directing arrest of, when on street after 10 o'clock,
p. m., void
NEW CHARTER
when will supersede ordinances
NEW ENGLAND CITIES
legislative body of, composed of aldermenp. 142r
NEW ENGLAND TOWNS
powers of, vested in inhabitants
notice or warning necessary93
quorum93, 104
sufficiency of notice or warning
specification of notice or warning 95
legislative body of, composed of selectmenp. 142n
powers of47 and notes
NEW HAMPSHIRE
where corporate authority of municipal corporations vested.p. 142n
costs on appeal, in ordinance cases
conclusion of complaint for violation of ordinance 314
general power held sufficient to require restaurants to close at
10 p. m 486
NEW JERSEY
nature of action, to enforce police ordinances 304
doctrine of, as to certainty of penalties
doctrine in, as to certiorari, to test validity of ordinances 287
certiorari in, to review prosecutions for violation of ordinances 364
statute and ordinance may condemn same act as offense 500
rule in, as to change of contract and franchise ordinances 197
NEW ORLEANS (LA.)
form of enacting clause of ordinancep. 232n
ordinance limiting day's work to eight hours, construed 495

(The references are to the sections, except as otherwise indicated.)
NEW ORLEANS (LA.)—Continued.
ordinance of, imposing license for running boats to and from
the Gulf of Mexico, void
milk inspection ordinance of, sustained 484
NEWSPAPER
ordinance forbidding sale of specified, unconstitutionalp. 354n
NEW YORK
nature of action, to enforce police ordinances 304
history of licensing and regulating auctioneers inp. 772n
statute and ordinance may condemn same act as offense 500
double punishment authorized
statute of, relating to eight hours as day's workp. 778n
laws of, regulating tenement houses, sustained
grants to individuals to lay down railroad tracks in streets,
forbidden
NEW YORK CITY
form of enacting clause of ordinancep. 231n
city court of, has no jurisdiction in mandamusp. 467n
nor action of mechanic's lien
_
NITROGLYCERIN
keeping of, may be regulated 472
NOES
(See Yeas and Nays.)
NOISE
as disturbance of the peacep. 770
NON-PENAL ORDINANCE
defined 10
distinguished from penal ordinance 10
NON-RESIDENTS
when bound by ordinance
rule as applied to license
discriminations against, in license taxes, voidp. 631n
power to impose license tax on
denying right to fish in navigable river, void 222
ordinance requiring penning at night of cattle, not applicable to 297
same, forbidding dogs on streets
contra, permitting horses to go at large
NON-USER
(See Forfeiture.)
NORTH CAROLINA
license tax on residents and non-residents, valid 224
early case of, asserts right of trial de novo on certiorari 363
doctrine of, as to certainty of penalties
violation of ordinance, criminal, whenp. 478n
statute and ordinance cannot condemn same offense 506
ordinance requiring business houses to close at 7:30 p. m., held
void 480

(The references are to the sections, except as otherwise indicated.)
NORWOOD v. BAKER
rule of, relating to special assessment or taxation, stated 522
NOTICE
(See Judicial Notice.)
of corporate meetings, when required
sufficiency of
of New England town meetings 93
sufficiency of94
specification of 95
of corporate meetings personal, when required 92
of regular meetings, members charged with notice of 92
of special meeting
members to take notice of adjourned meeting 111
of petition for right to lay tracks in streets 574
to property owners, of proceeding for public improvements 523
to property owners, to make improvements, repairs of side-
walks, etc 518
of public improvements, when required219, p. 353n
in proceedings to forfeit property
animals running at large 171
record of conviction should show, when required 358
to remove wooden buildingp. 738n
of ordinance; allegation of, unnecessary in action to enforce 311
to recover penalties for violation of ordinance, required 305
not required if defendant appears
to joint defendantsp. 481n
of pendency of ordinance, when required
to be taken of ordinances 22
NORTH-WEST ORDINANCE
law for territorial government of northwest territory1, p. 3n
NUISANCES (See Obstructions)
(See Obstructions.) general municipal powers as to
what constitutes
two kinds of public nuisances
municipal power to declare and define
illustrative cases
doubt as to nuisance 443
municipal power to abate
cemeteries as
arising from trade, manufactures, etc
illustrations
power to abate
method of abating to be reasonable
markets in public streets asp. 78
obstructions, etc., in streets, corporate authorities may remove 460
Obstructions, etc., in streets, corporate authorities may remove 400

(The references are to the sections, except as otherwise indicated.)
NUISANCES—Continued.
awnings, signs, projections over sidewalk, streets, etc 461
summary jurisdiction on charge of
summary removal of railroad tracksp. 720n
essential elements of, to be proved
pond, owner of abandoned quary, liablep. 537n
complaint, suffering filth to remain on passagewayp. 505n
municipal liability for authorizing or permitting 437
relating to highways
on premises; liability of landlord or tenant 298
declaring dead animals, not slain for food, void 223
burning tan to annoyance of persons, etc., complaint in charge
of 321
maintaining; sufficiency of complaint in charge of 321
gunpowder, explosives, powder magazines, as 472
created by sinks, cesspools, privy vaults, etc., may be abated 453
arising from creeks, brooks, ponds, etc., may be abated 454
arising from drains and sewers may be abated 454
fouling of water is publicp. 707n
drain emptying into public street isp. 707n
abatement by establishment of grades and drainage system 454
wells, when constitute, may be abated 455
dense smoke as 456
in streets, etc., may be removed by corporate authorities 458
obstructions in streets, etc., as; illustrations 459
bawdy house is public, per se 751n
in public ways, as ground of action 42
ordinance declaring keeping of liquor a nuisance, voidp. 757n
ordinances may condemn, though covered by statute 509
street railroad tracks, gas and water pipes, poles, wires, etc., as 570
power to declare grade crossings a 582
power to abate as authority to inflict penaltyp. 271n
NULLIFICATION
ordinance of, p. 3n
NUMBER
plural, construction ofp. 448n
OATH
(See Profane Oath.)
OBSCENE LANGUAGE
in public, may be forbiddenp. 771n
what is, as employed in ordinancep. 537n
OBSCENE PUBLICATION
may be forbiddenp. 753n
OBLIGATIONS
(See Contracts,)
of contract, defined
or continue, denued

(The references are to the sections, except as otherwise indicated.)	
OBSTRUCTIONS	
railroad tracks, gas and water pipes, poles, wires, etc., in	
streets as	570
ordinance prohibiting, applied to railroad cars	297
by wagons from which products are sold	
of public ways, ordinances authorizing, void	222
of streets, with steam and street cars	474
by railroadsp.	
of sidewalk; summary jurisdiction on charge of	329
of harbor	329
of sidewalk; proof of	
in public way; action for damages	
on highway, ordinance may condemn, though forbidden by	
statute	
in street or water way; complaintsp. {	
stopping vehicle for more than specified timep. 8	
of street by vehicles; state license as a peddler is no defense.	
of streets by "public meetings"; salvation armyp.	537n
in streets, etc., corporate authorities may remove	
in streets, etc., as nuisances; illustrations	
of streets, etc., with vehicles; ordinances may regulate	
on streets, may be removed by corporate authorities	
streets, etc., may be kept free from	
OCCUPATION TAX	
(See License Tax.)	
ordinance imposing, on non-residents, constitutional	257
OFFAL	201
(See Garbage, Offal, Etc.)	
OFFENSES	
(See State Offenses; Penalties; and various offenses in this	
Index.)	<b>F</b> 00
double regulations, state and municipal	500
OFFICE	
public, is not property	
may exist without an incumbent	4
OFFICES AND OFFICERS	
implied powers as to	<b>5</b> 6
do not constitute municipal corporation	90
are to be trustees39,	90
of municipal corporation, belong to inhabitants	39
has no vested right in office	
office may be changed or abolished	231
municipal, how far agents of property owners in authorizing	
improvementsp. 8	13n
to be created by ordinance, when	4
power to create is legislative act	4
difference between office and clerical positions	4
when officer may appoint additional help	4

(The references are to the sections, except as otherwise indicated.)
OFFICES AND OFFICERS—Continued.
legislative power to provide for, cannot be delegated 87
who to appoint4 and n
aldermen and councilmen are civil, in Rhode Islandp. 143n
cannot be deprived of power to select subordinates, when 15
election of, method by council
defects in election or appointment defeats salary4, p. 9n
cannot recover compensation for services under void statute
4, p. 9n
providing for time of election of, to be reasonable 183
election of, casting votep. 163n
additional duties may be imposed on
right of corporation to indemnify for losses
wo /wood
F
of municipality, may question validity of ordinance 281 extra compensation to, forbidden
increase of during term, prohibited
city cannot extend term of
ordinance making it unlawful to insult, while in the discharge
of duty, not authorized under general charter power 496
resisting; summary jurisdiction on charge of 329
ОНІО
house of legislation exists in principal cities ofp. 142n
statute and ordinance may condemn same act as offense 500
nature of action, to enforce police ordinances 304
appeals in prosecutions for violation of ordinances 361
right to amend franchise ordinance under constitution of 197
statute of, limiting day's labor to eight hours, unconstitutional
p. 778n
OIL
violation of ordinance as to keeping, as evidence of negligence 41
storage and keeping of, may be regulated 472
manufacture of, regulationp. 698n
keeping crude petroleum; proof ofp. 538n
OLEOMARGARINE
regulating sale of, constitutional
laws forbidding sale of, as imitation of butterp. 763n
OMISSIONS
in municipal record, parol to prove
creditors' rights to show when municipal record imperfect 131
OPENING .
(See Saloons; Streets.)
places of business; ordinances regulating hours of 480
OPIUM SMOKING
power of municipal corporation to forbidp. 784n
"OR"
transposition of conjunction in constructionp. 448n

(The references are to the sections, except as otherwise indicated.)	
ORDAINING CLAUSE	
(See Enacting Clause.)	
ORDER	
(See Disturbing the Peace; Public Order and Peace.)	
defined	6
distinguished from ordinance	6
for public improvements, when authorized and sufficiency535,	536
ORDINANCE	
(See Actions to Enforce Police Ordinances; Reasonableness of	
Ordinances; Validity of Ordinances.)	
defined1,	6
distinguished from by-law	1
distinguished from public laws	1
various use of term ordinance	3n
distinguished from resolution	2
all legislative acts must be by	2
illustrations as to when ordinance necessary	3
when ordinance necessary to create offices and situations	4
distinguished from regulations, orders, resolutions, etc	6
distinguished from rules of procedure	7
classification of	8
general and special9,	10
penal and non-penal	10
may combine contractual and police regulations	11
force and effect of	12
how they differ from charter or statute	13
requisites of valid ordinance stated  must conform to charter	14 15
must be consistent with general laws of the state	16
exception	17
must harmonize with public policy and common law of	
state	18
must be enacted in good faith	19
must be definite and certain	20
ordinances of cities of same class may vary	21
notice to be taken of	22
who bound by	23
operate upon property within corporate limits	24
rule as applied to license	25
territorial operation of	26
place within municipal jurisdiction	27
wharves—private property	28
regulating speed of trains	29
judicial limitation of operation of	30
public or particular places only	31
applying to part of city, valid	32
improvement ordinances	33
time of taking effect of	34
illustrations	35

	(The references are to the sections, except as otherwise indicated.)	
or	DINANCE—Continued.	
	contingency in taking effect	36
	expiration and suspension of	37
	recital of authority to enact, not required	139
	need not recite necessity of enactment	140
	subject and title141,	142
	title in revision of ordinance	143
	preamble not necessary	144
	ordaining or enacting clause, sufficiency	145
	time of introduction and passage	146
	double board	147
	reference to and report on by committee	
	signing and approval of, by mayor, when required2,	150
	veto of, by mayor	100
	consideration by legislative body	
	· ·	151
		152
	recording	
		154
	publication of and notice of pendency	<b>15</b> 5
	time and frequency of	156
	method of	157
	, , , ,	158
	publication of, amendments on passage	159
	legislative motive in passage not inquired into by courts	161
	rule limited to ministerial acts	162
	injunction to restrain passage of	163
	validating void ordinance by municipality	164
	public improvement ordinances	556
	curative power of legislature	165
	proceeding to subscribe for railroad stock	166
	to collect taxes	
	public improvement ordinances	
	when necessary to exercise power	79
	legislative or executive power	80
	self-enforcing charter provisions	81
	necessary to grant right to use streets by public service com-	01
	panies	E79
	can be repealed by ordinance only	
	necessary to authorize bond issue, when	
	usually necessary to exercise power of taxation	
	necessary to establish building regulations	
	necessary to change grade of street, whenpp. 834, 8	
	necessary to levy license tax	
	fixing from time to time by resolution	
	purpose is to regulate municipal affairs	497
	cannot deal with state offensep. 2	
	relating to civil rights and liabilities40 to	42
	to subserve private interest is bad	

(The references are to the sections, except as otherwise indicated.)
ORDINANCE—Continued.
primary object of, is public, not private
charter method of enactment of, exclusive
form of
to be in writing
to be in English language
to be by bill, when
in form of resolution
when to be read on different days before council prior to
passage 119
may refer to books, maps, etc
may refer to prior ordinance and carry forward 137
formal parts of, penal
of franchise, administrative and improvement 138
public corporations empowered to pass
cannot discriminate; classification of
illustrative cases 194
proof of, in action for violation 340
courts will determine validity of
presumed to be valid
as contract, relating to impairment
as "law," respecting impairment of obligation of contract 233
power to enforce by penalties
charter method of enforcing exclusive 169
reasonableness of, under express powers
under implied powers
valid if fairly within implied powers 182
when supersede general state laws 215
effect on, by surrender of special charter 216
change of class or grade 216
by dissolution and reorganization 217
by consolidation and change of corporate limits 218
ORAL ORDER
committal by virtue of, illegalp. 560n
OREGON
general power insufficient to sustain penal ordinance against
non-observance of the Sabbath
statute and ordinance may condemn same act as offense 500
double punishment authorized 510
"OWNER OR OCCUPIER"
denouncing blazing chimneys, means tenant and not landlord. 298
OYSTERS
sale of, may be regulatedp. 763n
business of packing and canning, may be licensed 428
PAPER
forbidding casting on streets and private hallways, excepting
newcroners and addressed envelopes n 213n

(The references are to the sections, except as otherwise indicated.)
PARADES
on streets, may be regulated
discretionary power to regulate cannot be conferred on officers 88
PARDON
governor can not pardon one convicted of violating municipal ordinance
unauthorized by governor, will not prevent issuance of execu-
PARISH
is public corporation
PARKS
(See Public Parks.)
PARLIAMENT
ordinance of, a temporary act
PARLIAMENTARY LAW failure to conform to, does not invalidate action 115
PAROL (See Evidence; Evidence of Ordinances; Records.)
PARTICIPANTS
liability of, in ordinance cases 344
PARTNERS
charge of selling liquor; evidence against one is evidence against all
PATENTED ARTICLES
ordinances authorizing, to be used in public work 554
PAVING
(See Public Improvements; Public Improvement Ordinances.) of streets by railway companies
of street or part by street railway company
duty "to repair" as obligation to "repave"
street railway may be relieved of duty of
cannot be imposed by amendmentp. 318n
PAWNBROKER
definedp. 774n
reasonable regulations may be imposed on 492
power to regulate, to be conferred by state 492
may be required to keep records and submit to police in-
spection 492
license of, valid 428
reasonableness of license tax onp. 636n
daily reports open for police inspection 224
refusal to permit police inspection; complaint in charge of., 321
when estopped from questioning reasonableness of ordinance, 278

(The references are to the sections, except as otherwise indicated.)
PAYMENT
of public improvement, ordinance must provide method of 54
installments 540
basis of apportionment
PEACE
(See Disturbing the Peace; Public Order and Peace.)
PEDDLERS
(See Commerce, Foreign and Interstate.)
ordinances regulating, not in restraint of tradep. 304r
of food products, may be regulated
may be licensed
reasonableness of license tax onp. 636r
without license; sufficiency of record of conviction
license on; discrimination, voidp. 6321
PENAL ORDINANCES
(See Actions to Enforce Police Ordinances; Ordinances; Police
Ordinance.)
defined 10
distinguished from non-penal ordinance 10
form of
formal parts of
when to take effect
construction of
effect of repeal of, on actions under
injunction to restrain enforcement of
PENALTIES  (See Pines Barfaitures Immirrorment Indoment)
(See Fine; Forfeiture; Imprisonment; Judgment.) of ordinances, power to enforce by
implied
charter method exclusive
forfeiture
proceedings
animals running at large
by imprisonment
various penalties
of costs
must be certain
New Jersey doctrine
North Carolina doctrine 177
must be reasonable—limit
limit of fine
continuous or separate offense
heavier for second offense authorized 180
duration of imprisonment 173
ordinance without, is nugatory 168
may be provided for within reasonable limits 175
terms of grant, limits power to imposep. 271r
construction of specific enumeration
alarge for part of ordinance

(The references are to the sections, except as otherwise indicated.)
PENNSYLVANIA
chief burgess of borough in, may question validity of ordinance
vetoed by him 281
PERMIT
may be required, to obstruct streets temporarily with goods,
building material, etc
to make excavations in streets, etc 458
to erect buildings 471
to tap sewer, may be requiredp. 622n
to build vault, charge for, held voidp. 622n
to open streets, reasonableness of fee forp. 636n
for street parades
to parade streets, ordinance authorizing granting must be uni-
form 416
consent of property owners as to granting
revocation of
term construed, in ordinance directed against swine on side-
walks
to connect with sewer, payment of special tax bill
to open street; how construedp. 453n construed in ordinance forbidding horses, etc., from going at
large
selling ice on street without; complaintp. 506n
- · · · · · · · · · · · · · · · · · · ·
PERSONAL ASSOCIATION
ordinance cannot regulate 228
PEST HOUSE
may be established and maintained 445
PETITION
(See Complaint or Information; Public Improvements.)
PETIT LARCENY
summary jurisdiction on charge of
PETROLEUM
(See Oil.)
regulating storage of, validp. 304n
PETTY OFFENSE
defined by Texas penal codep. 791n
affray is 508
PHILADELPHIA
form of enacting clause of ordinancep. 231n
ordinance of, forbidding thieves, pickpockets, about central
station, valid 329
ordinance of, forbidding casting of circulars, etc., on streets,
vestibules of dwellings, excepting newspapers and addressed
envelopes, sustained 467
ordinance of, limiting speed applied to vehicle carrying U.
S. mail

(The references are to the gestions, except on otherwise indicated)
(The references are to the sections, except as otherwise indicated.) PHRASES
(See Maxims; Words and Phrases.)
PICKPOCKETS
summary jurisdiction of
associated with, forbidden; complaintp. 506n
PIERS
as public improvements 511
PISTOLS AND CARTRIDGES
dealers in, may be licensed 428
PLACARDS
forbidding displaying of, on sidewalks, streets, etc 467
carrying on street, forbidding
-
PLACE
of corporate meetings 92
PLEA
of defendant, on charge of violation of ordinance, not required 325
PLEADING
(See Complaint or Information.)
PLEADING ORDINANCES IN CIVIL PROCEEDINGS
when cause of action founded thereon371, 372
state courts will not take judicial notice of ordinances 373
pleading substance of ordinance
by title and date of passage
negligence in violation of ordinance
proof of acceptance of, by defendant
relating to public safety
railroads and street cars 379
removal of snow and ice
in action on special tax bills
PLEDGE
of property, implied power of municipal corporation 62
POLES, WIRES, ETC.
in streets, as nuisances 570
placing of, may be regulated458, 462, 511, p. 904r
validity of ordinance directing removalp. 720r
reasonableness of charge for maintainingp. 6361
discriminations as to location and use of, void 194
POLICE
delegating power to regulate itinerant musicians in streets, sus-
tained as to Boston
sufficiency of report of, of violation of ordinance322, p. 506r
oral charge, held sufficientp. 5061
need not ask for specific sum
amendment of, permittedp. 5071
report of signing of

(The references are to the sections, except as otherwise indicated.)	
POLICE BOARD	
(See Board of Police.)	
power to regulate uses of streets	88
POLICE COURTS	٠.
(See Municipal Corporation Courts.)	
POLICE JURY	
in Louisiana may pass ordinancep. 14	14r
POLICE JUSTICE	
same as "police magistrate" or "justice of peace"p. 44	19n
POLICE LAWS	- /-
describedp. 35	) <b>6</b> E
POLICE MAGISTRATE	
same as "police justice" or "justice of the peace"p. 44	9n
POLICE ORDINANCES	
(See Actions to Enforce Police Ordinances; Ordinances; Penal	
Ordinances.)	
defined	8
distinct class	8
	138
may include contract regulations	11
violation of, as ground of action for negligence 40 to	42
POLICE POWER	
(See Penal Ordinances; Police Ordinances.)	
defined	
general nature and scope of	
basis of	
extends to destruction of property 4	
limitations of	
under general welfare clause 4	
within and without corporate limits 4	
municipal liability for failure to exercise	
for negligent exercise of	
nuisances relating to streets, etc	
surrender or delegation of, forbidden	
scope of, as affects foreign and interstate commerce 2	
license tax under, as interference with foreign or interstate	11
commerce 2	e n
what it comprehends as to use of streets 4	
to regulate public service companies	69
to abolish railroad grade crossings	04
as a rule, to be exercised by ordinance	
how exercise of, may be questioned	77
	"
POLICE REGULATIONS	
(See Penal Ordinances; Police Ordinances, and various titles	
in this Index )	

(The references are to the sections, except as otherwise indicated.)	
POLICE REGULATIONS—Continued.	
local, as interference with foreign or interstate commerce	270
scope of	271
quarantine laws	273
harbor regulations	274
implied powers respecting	63
delegation of power to provide and enforce	88
"POLICY"	
game of, sufficiency of ordinance denouncing	20
in penal ordinance, forbidding "policy playing"; current use of	
term judicially noticedp. 4	48n
keeping place to carry on game of; complaintp. 5	06n
POLL TAX	
names of persons liable to, may be required to be furnished by	
keepers of hotels, etc	496
PONDS	
ordinance may order filling up, when constitute nuisancesp. 7	08n
fouling of waters of, may be prevented	454
POOL ROOMS	
may be licensed	428
POOL SELLING	
may be limited to certain localities	32
PORTERS	
at stations, ordinance may regulate, though covered by statute	509
POSTS	
(See Hitching Posts; Lamp Posts; Poles, Wires, etc.)	
POWDER MAGAZINES	
may be regulated	472
as nuisancesp. 740, 74	
license to keep; discriminationp. 63	
POWERS	
(See Discretionary Powers; Express Powers; Implied Powers;	
Mandatory Powers; Police Powers.)	
method prescribed for exercise of, to be followed	75
court will not control exercise of discretionary	76
illustrations	77
limitation of rule of non-judicial interference	78
when ordinance necessary to exercise	79
legislative or executive powers	80
	81
self-enforcing charter provisions	
mandatory and discretionary powers distinguished 82,	83
mandatory and discretionary powers distinguished 82, surrender or delegation of, forbidden	83 84
mandatory and discretionary powers distinguished 82, surrender or delegation of, forbidden officer or department cannot delegate	83 84 85
mandatory and discretionary powers distinguished 82, surrender or delegation of, forbidden officer or department cannot delegate legislative authority cannot be delegated 86 to	83 84 85 88
mandatory and discretionary powers distinguished 82, surrender or delegation of, forbidden officer or department cannot delegate legislative authority cannot be delegated 86 to ministerial duties may be delegated	83 84 85 88 89
mandatory and discretionary powers distinguished 82, surrender or delegation of, forbidden officer or department cannot delegate legislative authority cannot be delegated 86 to	83 84 85 88 89

(The references are to the sections, except as otherwise indicated.)
POWERS—Continued.
difficulty in determining 45
of New England towns
rules of construction of
effect of specific enumeration 50
construction of power "to regulate" 51
source of the enactment of ordinances need net be recited 139
exercise of, is in nature of public trust
reasonable exercise of, always required
conferred by charter
usual powers conferred on municipal corporations 45
Common to the position of management of providing
to be exercised as prescribed
designation of manner of execution, excludes other methods 169
-
PRACTICE (See Professor, Tried.)
(See Defenses; Trial.)
PREAMBLE
formal part of ordinance
in construction of ordinance
of ordinance, rarely used
forbidding smoking in street cars 144, p. 231n
PRELIMINARY STEPS
(See Public Improvements; Public Improvement Ordinances.)
· · · · · · · · · · · · · · · · · · ·
PRESCRIPTION as warrant for exercise of municipal powers
relating to corporate meetings in early England 92, p. 146n
rule applied to powers of New England towns
highways and streets, may be established by
PRESIDING OFFICER
of council, power to call corporate meetings 92
PRESUMPTIONS
(See Evidence.)
of authority to enact ordinance, exists
indulged in favor of exercise of power
in favor of validity of ordinance
PREVENT
(See Injunction; Prohibition.)
authority, implies power to inflict penaltyp. 271n
PRICE of light, implied power to regulate
PRINCIPAL
liability of, for acts of employes, servants, etc 345
PRINTING
license of business of, valid
ordinances requiring printing to bear union label, void

(The references are to the sections, except as otherwise indicated.)	
aiding to escape, ordinance may punish, though covered by	
statute	
ordinance may punish attempting to rescue from officer, though	
covered by statute	509
PRIVATE AFFAIRS	
distinguished from corporate or municipal	39
ordinances cannot interfere with	39
PRIVATE CORPORATIONS	
defined	38
by-laws of, in restraint of trade, voidp. 3	304n
PRIVATE INTERESTS	
ordinance designed to promote, bad	19
PRIVATE MARKETS	
(See Markets.)	
PRIVATE NUISANCE	
(See Nuisance.)	
PRIVATE PROPERTY	
may be regulated under the police power 220,	221
taking and damaging	
when ordinances operate on	28
ordinance may regulate hackmen, etc., in and about landings,	
depots, stations, etc	28
ordinance does not apply to inner fence between farms	28
ordinance making it unlawful to rent to lewd women, uncon-	
stitutional	
ordinances forbidding trespasses on	
ordinance to protect, is bad	
nuisances on, who liable, landlord or tenant regulating hours for occupancy of, unlawful	
may be destroyed by virtue of police power	
PRIVILEGES	101
(See Franchise; Franchise Ordinance; License Tax; Monopo-	
lies and Exclusive Privileges Permit.)	
PRIVY VAULTS	
removal of contents of, may be compelled and regulated	459
if nuisance results from, it may be abated	
license to remove contents of, may be required	
PROCESSIONS	
(See Parades.)	
PROCEDURE	-
rules of, defined	7
distinguished from ordinance	•
PROCEEDINGS OF COUNCIL	
when presiding officer to sign bills of	
when mayor to approve	
approval to be in writing	
vote of presiding officer in case of tie	TUZ

(The references are to the sections, except as otherwise indicated.)	
PROCEEDINGS OF COUNCIL—Continued.	
special meetings—notice	110
method of calling 110 and no	tes
presumptions as to regularityp. 17	77n
power to adjourn meetings	111
business that may be transacted at an adjourned meeting	112
council as continuous body	113
action of legislative body consisting of two branches	
rules for conduct of business—parliamentary law	
mandatory and directory provisions	
taking yeas and nays	117
reasons for requiring	
record of	
reading bills on different days	
ratification of void acts	
power as to reconsideration	
power to rescind prior act	
committees, appointment and reports of	
record of	
who to keep	
sufficiency of—presumptions	
as evidence	
• · · · · · · · · · · · · · · · · · · ·	129
parol to show omissionsimperfect record—rights of creditors	
amendment of	
	133
court may order, mandamus	
after lapse of time	
charter method of enacting ordinances, exclusive	
in passing public improvement ordinance	
in public public improvement of discussion of the public public in the public public in the public p	000
PROFANE OATH	
swearing same, on same day, separate convictions for each,	
not required	357
PROFANE SWEARING	
sufficiency of complaint on charge of	321
sumotioney of complaint on charge of	02
PROHIBITION	
to try title to office	9
authorized in Kentucky to test validity of ordinances of cities	
of first classp. 4	361
to review prosecutions for violations of ordinances	
when writ may issue	
the writ of, described	
power of, implies power to punish	168
PROOF	
(See Evidence)	

(The references are to the sections, except as otherwise indicated.)
PROPERTY
(See Forfeiture; Private Property; Public Property; Trespass.) power to acquire, manage and dispose of, conferred by charter 45
implied power to acquire and hold
beyond corporate limits
implied power to dispose of
held for particular purposes 60
to transfer, donate or dedicate, for particular uses
implied power to mortgage or pledge
public office is not
lease of, to be executed as prescribed
power to hold may only be questioned by state 58
of municipal corporation, belongs to inhabitants 39
PROPERTY OWNERS
(See Abutters; Public Improvements; Public Improvement Ordinances.)
consent of, as to permits and licenses 415
cannot enjoin change of location of water mains 581
agreements by, to pay for public improvements
may be required to provide water pipes
permission to construct sidewalks
PROSECUTIONS
(See Actions to Enforce Police Ordinances.)
PROSTITUTION
(See Bawdy Houses.)
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.)  municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.)  municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.) municipal power to suppress
(See Bawdy Houses.) municipal power to suppress

(The references are to the sections, except as otherwise indicated.)	
PUBLICATION—Continued.	522
of preliminary resolution or order for improvement	979
of ordinance, when city estopped from denying	210 52n
of obscene matter, may be forbiddenp. 78	ооп
PUBLIC AFFAIRS	
(See State Affairs.)	
PUBLIC AUCTION	
(See Auction.)	
PUBLIC BUILDINGS (See Implied Powers.)	
constitute public improvements	F11
constitute public improvements	OII
PUBLIC CORPORATION	
(See Municipal Corporation.)	
defined and classified	38
PUBLIC DRUNKENNESS	
ordinance may forbid and punish	229
may be punished by ordinance, though condemned by statute.	
general power, sufficient to sustain ordinance forbidding	
sufficiency of complaint for	
PUBLIC HEALTH	
(See Health and Sanitary Regulations; Nuisances; Police	
(See Health and Sanitaly Regulations, Nulsances, Folice	
Powers \	
Powers.)	)6n
state may provide forp. 80	)6n
state may provide forp. 80 PUBLIC IMPROVEMENTS	
state may provide forp. 80  PUBLIC IMPROVEMENTS  nature and purpose of	514
state may provide forp. 80  PUBLIC IMPROVEMENTS  nature and purpose of	514 511
state may provide for p. 86  PUBLIC IMPROVEMENTS  nature and purpose of 511, 8  usual, enumerated 6  public building constitute	514 511 511
state may provide forp. 86  PUBLIC IMPROVEMENTS  nature and purpose of	514 511 511 511
state may provide for	514 511 511 511 511
state may provide for p. 86  PUBLIC IMPROVEMENTS  nature and purpose of 511, a usual, enumerated 9  public building constitute 9  of streets, sewers, drains, lighting, water supply 9  providing parks and pleasure resorts 9  harbors, wharves, docks, landings, etc 9	514 511 511 511 511
state may provide for p. 86  PUBLIC IMPROVEMENTS  nature and purpose of 511, a usual, enumerated 510  public building constitute 510  of streets, sewers, drains, lighting, water supply 510  providing parks and pleasure resorts 510  harbors, wharves, docks, landings, etc 510  regulation of poles, wires, conduits, subways, etc 510	514 511 511 511 511 511
state may provide for	514 511 511 511 511 511
state may provide for p. 86  PUBLIC IMPROVEMENTS  nature and purpose of 511, a usual, enumerated 9  public building constitute 9  of streets, sewers, drains, lighting, water supply 9  providing parks and pleasure resorts 9  harbors, wharves, docks, landings, etc 9  regulation of poles, wires, conduits, subways, etc 9  municipal power to make and provide for 10  to condemn property for 9	514 511 511 511 511 511 512
state may provide for	514 511 511 511 511 512 512 512
state may provide for	5514 511 511 511 511 512 512 512 513
state may provide for	5514 5511 5511 5511 5512 5512 512 512 514
state may provide for p. 80  PUBLIC IMPROVEMENTS  nature and purpose of 511, a usual, enumerated public building constitute for streets, sewers, drains, lighting, water supply providing parks and pleasure resorts for harbors, wharves, docks, landings, etc regulation of poles, wires, conduits, subways, etc municipal power to make and provide for to condemn property for by special assessment or taxation 512, 522 to power to make or provide for outside of corporate limits power of courts over	5514 5511 5511 5511 5512 5512 5514 5514
state may provide for p. 80  PUBLIC IMPROVEMENTS  nature and purpose of 511, a usual, enumerated public building constitute for streets, sewers, drains, lighting, water supply providing parks and pleasure resorts harbors, wharves, docks, landings, etc regulation of poles, wires, conduits, subways, etc municipal power to make and provide for to condemn property for by special assessment or taxation 512, 522 to power to make or provide for outside of corporate limits power of courts over state control over 514, state control over	514 511 511 511 511 512 512 514 514 514
state may provide for p. 80  PUBLIC IMPROVEMENTS  nature and purpose of 511, a usual, enumerated public building constitute for streets, sewers, drains, lighting, water supply for providing parks and pleasure resorts for supply and the providing parks and pleasure resorts for regulation of poles, wires, conduits, subways, etc for municipal power to make and provide for for to condemn property for for power to make or provide for outside of corporate limits power to provide cannot be surrendered power of courts over 514, only officers duly authorized may provide for	514 511 511 511 511 512 512 514 514 515 516
state may provide for	514 511 511 511 511 512 512 514 514 516 516
state may provide for	514 511 511 511 511 512 512 514 514 516 516 516
PUBLIC IMPROVEMENTS  nature and purpose of	514 511 511 511 511 512 512 514 514 516 516 517
State may provide for	514 511 511 511 511 512 512 512 514 514 515 516 516 517 517
PUBLIC IMPROVEMENTS  nature and purpose of	514 511 511 511 511 511 512 512 514 514 515 516 517 517 518
State may provide for	514 511 511 511 511 512 512 512 514 515 516 516 517 518 518

(The references are to the sections, except as otherwise indicated.)
PUBLIC IMPROVEMENTS—Continued.
discretion of municipal authorities as to
how far subject to judicial control
discretion includes extent and nature of
material for construction
vacation of streets and public ways
interfering with franchise rights
preliminary steps, regulated by local laws
strict adherence to laws required
irregularitiesp. 8281
notice to, and hearing of, property owners 52
when hearing must be before councilp. 829
objections and remonstrances of property owners 52
petition or consent of property owners affected 52
street to be established before improved
opening and establishment of
law respecting to be strictly followed 52
establishment of street grade 52
recommendation of ordinance for 52
water and gas pipes in advance
estimate of cost of
submission to, and approval of, electors
when property owner is estopped from objectingp. 8291
when ordinance necessary to provide for 3, 81, 53
ordinances for, to be passed as charter directs
when not necessary, tax bill void
reasonableness of power exercised 18
where concurrence of two boards required approval of one in-
sufficient 8
power to determine material for streets or sewers cannot be
delegated 8
council cannot delegate the manner of making 8'
of streets ordered by resolution, when 5, 53
contract for making may be ratified by council
may apply to part of city only
PUBLIC IMPROVEMENT ORDINANCES
(Considered in Chapter XVI.)
defined
the three general classes
when to be recommended by board
fixing grade of street
endorsement of estimate of cost on
approval of, by electors
preliminary resolution or order 533
declaration of necessity of improvement
when ordinance necessary
when resolution or order will answer
sufficiency of order 530
ordinance for each distinct improvement

(The references are to the sections, except as otherwise indicated.)
PUBLIC IMPROVEMENT ORDINANCES—Continuéd.
recital of authority to pass
description of the improvement
sufficiency of description in street improvement ordinances 541
sewer construction ordinances 542
joint district sewers 543
specification of material 544
description by reference to documents, etc 545
matters of detail need not be specified in 546
must provide method of payment 547
sufficiency of, as to payment in installments 548
sufficiency as to basis of apportionment of tax 549
must be reasonable, how tested 550
certainty as to validity 551
agreements of citizens and taxpayers to pay for improvements 552
ordinances restricting competition—union labor 553
authorizing patented and monopolized articles 554
providing for maintenance for term of years 555
validating void
curative power of legislature
construction of
parol evidence of terms used in
need not recite improvement is within corporate boundaries 540
when courts will not interfere with
failure to provide for notice and hearing 219, p. 353n
amendment of         198           repeal of         202
effect of
procedure in passage
PUBLIC LANDINGS
- · - · - · - · - · · - · · · · · · · ·
(See Wharf; Wharfage.)
as public improvements
PUBLIC LAW
ordinance distinguished from
PUBLIC MARKETS
(See Markets.)
PUBLIC MEETINGS
as used in ordinance, forbidding street obstructionsp. 537n
on street, as disturbance of peacep. 770n
PUBLIC MORALS AND DECENCY
(See Bawdy Houses; Gambling; Liquor Selling; Prostitution;
Public Drunkenness; Saloons.)
lewd and indecent conduct may be forbidden 475
prostitution, bawdy and assignation houses may be suppressed 475
street walking may be punished475, p. 753n
conversing with lewd womenp. 753n
municipal power to suppress, punish lewd conduct, etc.—
state control
publication of obscene matterp. 753n

(The references are to the sections, except as otherwise indicated.)
PUBLIC NUISANCE
(See Nuisance.)
PUBLIC ORDER AND PEACE
(See Disturbing Peace; State Offense.)
acts affecting, may be forbidden
PUBLIC PARKS
as public improvements; power to provide
bicycles may be excluded from
power to acquire lands beyond corporate limits must be con-
ferred 5
municipal corporation may establish and control 51
when board to recommend establishment of 8
PUBLIC PLACES
operation of ordinances confined to, when
public drunkenness 3
PUBLIC PROPERTY
use of; streets
PUBLIC POLICY
ordinances must harmonize with 1
PUBLIC SAFETY
in the interests of, streets may be regulated and kept free from
obstructions, etc
PUBLIC SCALES
(See Weights and Measures.)
PUBLIC SCHOOLS
rule denying admission to, because of deficient knowledge of
grammar, unreasonablep. 3011
PUBLIC TRUST
exercise of municipal powers in nature of
PUBLIC WAYS  (See Alleva: Highwaya: Obstructiona: Sidewalka: Streets)
(See Alleys; Highways; Obstructions; Sidewalks; Streets.)
PUBLIC WORK
(See Board of Public Works; Labor.) contracts for, nature of
cannot be impaired
rights vested by
changing method of payment, valid
changing method of levying tax authorized 24
reducing sum, void 24
illustrative cases
interest on special tax bills as part of obligation 240
when new remedy controls
when old law to be followed
illegal contracts for, may be enjoined
ordinances limiting competition in bids for, void 189, 553
ordinances requiring union labor on

(The references are to the sections, except as otherwise indicated.)
PUNCTUATION
in ordinances, must yield to manifest intentionp. 449n
PUNISHMENT
(See Fine; Forfeiture; Imprisonment; Penalties.)
for ninety days, not cruel and unusualp. 350n
double authorized for violating statute and ordinance con-
demning same offense503, 510
but denied 504, 510
ordinance authorizing clipping hair of Chinese, held cruel 227
QUARRY
regulation of, authorizedp. 698n
QUARANTINE
regulations may be established 445
regulations of as interference with foreign or interstate com-
merce272, 273
QUASI-CIVIL
how far proceedings to enforce penal ordinances are 303
QUASI-CRIMINAL
how far action to enforce penal ordinance is 304
QUASI-PUBLIC CORPORATION
defined 38
QUESTION OF LAW
reasonableness of ordinance is
QUEUE ORDINANCE
of San Francisco, directed against Chinese, void 227
QUORUM
presence of will not constitute corporate meeting, when 92
defined 103
origin of term 103, p. 164n
at common law 104
in New England town meetings 93, 104
of definite body 105
when definite vote required 106
vote necessary in suspending rules
how quorum affected by interest of members
of joint assemblies of definite body
rule in England
method of counting
in the national House of Representatives 105, p. 167n of council committee
majority of members of council may organize 97, p. 154n
of indefinite corporate bodies at common law 94, p. 140
QUO WARRANTO
to try title to office
to forfeit street railway franchise, will lie
police courts have no jurisdiction in proceedings by 300
position that is justification in proceedings by 300

(The references are to the sections, except as otherwise indicated.)
RACE
discriminations on account of, void
RAG PICKERS
may be regulated and forbidden in certain districts 491
RAIL
particular kind may be required to be used by street railways 474
RAILROAD
(See Steam Railroads; Street Railways.) grade crossings of; power to abolish
RAILROAD COMPANY
is a quasi-public corporation
RAILROAD ENGINEERS
license of, valid 428
RAILROAD STOCK
irregularities in subscribing for, may be cured by legislature 166
RAILROAD TRACKS
in streets, as nuisances
in streets; summary removal ofp. 720n
RATE OF SPEED regulatingp. 303n
may be prescribed for steam and street cars
reasonableness of ordinance limitingpp. 744 to 747n
violating; that railroad was carrying the United States mail is
no defense
regulation as applied to whole corporate limits 29
court may limit ordinance to certain municipal territory 29
RATES OF PUBLIC SERVICE COMPANIES
power to regulate 583
under general grant of power
• estoppel 584
reasonableness of water rates 585
regulating price of gas and light
street car fares
doctrine of U. S. Supreme Court
reasonableness of street car fares
place of sale of tickets; transfers
RATIFICATION
(See Public Improvement Ordinances.) of irregular and void acts
of unwarranted allowance of salary, denied
of unwarranted expenditure for legal services, denied 72
of contract of mayor relating to municipal bonds
of council of contract for building sidewalk

(The references are to the sections, except as otherwise indicated.)
READING BILLS before council on different days, when
REAL ESTATE BROKERS may be licensed
REASONABLE DOUBT as applied to proof of violation of ordinance 341
REASONABLENESS OF ORDINANCES (See Monopolies and Exclusive Privileges; Rates of Public Service Companies; Validity of Ordinances.)
under express power to pass
mode of exercise must be reasonable
under implied or incidental power
grounds of unreasonableness
under express power—illustrations
ordinance must provide a uniform rule
illustrationsp. 294n
question of law for court
when jury may determine
ordinance is prima facie valid
English cases—custom and usage
restraint of trade
monopolies and exclusive privileges
water and gas franchises
ferries
exclusive market privileges
discriminations—classification
various illustrations
penalties must be reasonable
of amendments of franchise and contract ordinances 197
of amount of license tax 418
illustrative casesp. 635n
regulating street parades 466
as to rate of speed of steam and street cars29, pp. 744 to 747n
various illustrations
defense of, to be specific
when defendant estopped from contesting
when pawnbroker estopped from questioning
RECEIVER
action by, jurisdiction of local courtp. 467n
RECLAMATION DISTRICT
is a public corporation 38
RECOMMENDATION
of certain improvement ordinances by board of public works
required

(The references are to the sections, except as otherwise indicated.)	
RECONSIDERATION	
general power respecting	1
power to rescind prior acts 12	2
RECORDS	
of council or governing body	4
when municipal records to be kept	
who to keep	
sufficiency of, presumptions	
of taking yeas and nays	
as evidence	
parol evidence to prove	
parol evidence to show omissions	
imperfect record—rights of creditors	
amendment of	
method of making	
court may order, mandamus	
after lapse of time	
of ordinance, proof of 387	
RECORD OF CONVICTION	
what it should show; enumeration	Z
when evidence and names of witnesses to be set out 358	
jurisdiction must appear on face of	
must show specific charge	
must show precise penalty for which judgment is given 358	
RECORD ON REVIEW	
(See Appeal; Review.)	
RECORDING ORDINANCE	_
when required and method of	3
RECORDER'S COURT	
(See Muncipal Corporation Courts.)	
RE-ENACTMENT OF ORDINANCES	
effect of	2
	,
REGULAR MEETING	
(See Meetings.)	
REGULATION	
defined 6	5
distinguished from ordinance	;
REFERENCE	
description by, in public improvement ordinances 545	
	'
REFERENDUM	
(See Electors.)	
REFUSE	
(See Dirt; Filth; House Dirt; Rubbish.)	
RELIGION	
MELIGIUN  discriminations on account of void 226 p. 202n	

(The references are to the sections, except as otherwise indicated.)
RENT
reasonable, in lease of real estate to be fixed by council 76
REORGANIZATION
of municipal corporation; effect of, on ordinances 217
REPAIRS
(See Buildings; Street Railways.)
compelling property owners to make
duty of street railway, as obligation to repave 577
of streets, distinguished from maintenance for a term of years 555
REPEAL OF ORDINANCES
general powers respecting
franchise and contract ordinances
illustrative cases
reservation of right to repeal
of public improvement
effect of
by implication; general doctrine
general and special ordinances
effect of repeal and re-enactment
effect of repeal of penal ordinance
of improvement ordinance
effect of revision of ordinances
by ordinance only
by charter amendments
by general laws
question of intent
when charter superseded by
when ordinances superseded by
by surrender of special charter
by change in class or grade
by dissolution and reorganization
by change of corporate limits
by consolidation
REPLEVIN
action on bond; jurisdiction of local courtp. 467n
REPORTS
of street railways, may be required 474
REPRIEVE
(See Pardon.)
RESCIND
(See Reconsideration.)
·
RESERVATION
(See Amendment of Ordinances; Franchise Ordinances; Repeal
of Ordinances.)
RESIDENCES
(See Dwelling Houses.)

(The references are to the sections, except as otherwise indicated.)	
RESISTING ARREST sufficiency of allegation in charge of	321
RESOLUTION (See Ordinances; Public Improvements; Public Improvement Ordinances.)	
distinguished from ordinance	2
when action may be taken by, illustrations5 and	
when and when not to be signed by mayor	
change of grade of street byp. 8 fixing grade of street byp. 8	
ordinance cannot be repealed by	
ordinance cannot be amended by	
taxes may be levied by, when	
when sufficient to fix license tax from time to time	
sufficient to authorize bond issue, when	
when public improvements may be provided for by	535
RESTRAINT	
power of, implies power to punish	168
RESTRAINT OF TRADE	
ordinances in restraint of trade, void	
monopolies and exclusive privileges	
water and gas franchises; ferriesexclusive market privileges	
	10.
RESTRICTING COMPETITION ordinances having such effect	559
confining bidding to union labor	
RETROSPECTIVE ORDINANCE	
judicial view of	219
RETURN	45.
of bill or ordinance by mayor	19.
REVENUE .	
(See License Tax; Taxation.)	
municipal, discretionary power as to control of	77
municipal, state control ofp.	801
REVIEW	
right of, in prosecutions for violations of ordinances	36
methods of	
by appeal	368
by certiorari	
by habeas corpus	
by injunction	
by prohibition	369
sufficiency of record for	

(The references are to the sections, except as otherwise indicated.)
REVISION OF ORDINANCES
provisions for
REVIVAL
of ordinance by repeal
REVOCATION
(See Forfeiture.) of license to maintain well in public street, may be revoked 455 of license or permit
REWARDS
for apprehension and conviction of offenders 74
RHODE ISLAND
aldermen and councilmen are civil officers inp. 143n ordinance and statute cannot condemn same offense 507
RICE
cultivation of, may be regulatedp. 698n
RICHMOND (VA.)
ordinance of, licensing lawyers, sustained 423
RIDING (See Driving and Riding.)
RIGHTS, CIVIL
ordinances regulating 40 to 42
RIOTOUS ASSEMBLIES
forbidding of, valid
RIOTOUS CONDUCT
summary jurisdiction of
"RISE"
"fall" construed to mean, in drainage ordinance 558
ROAD DISTRICT
is public corporation 38
ROCHESTER (N. Y.)
ordinances of, regulating bill boards, sustained 463
ROCK-CRUSHING MACHINE
use of, may be regulated 491
ROOM
meaning of, in ordinance as to water ratesp. 907n
ROWBOATS
kept for hire, may be licensed
reasonableness of license fee onp. 636n
RUBBISH
deposit of, may be regulated
removal of, may be directed and controlled

(The references are to the sections, except as otherwise indicated.)
RULES OF PROCEDURE
suspension of, vote necessary
power of municipal body to adopt
RURAL WAYS
distinguished from urban
SABBATH
(See Sunday.)
ST. JOSEPH (MO.)
merchant defined under charter ofp. 657n
ST. LOUIS
form of enacting clause of ordinance under charter ofp. 231n
legislative powers of, vested in two housesp. 142n
ordinances of, to be by bill
sufficiency of improvement ordinances under charter ofp. 851n
charter of, requirement as to description of improvement paid
for by special taxation 540
charter of, requires grade of street to be fixed by ordinance
prior to improvement
joint district sewer under charter of
ordinances of, imposing a license on boats running from Mis-
souri to Illinois, void
ordinance of, forbidding discharge of dense smoke, held void 456
Missouri legislative act, applies top. 710n
ordinance of, regulating dairies and cow stables, sustained 449
ordinance requiring consent of certain property owners to erect
livery stable, held void
ordinance of, relating to permission to property owners to
construct sidewalks, construed
ordinance of, requiring all dressed rock, stone, etc., to be
dressed within the state, declared void
powers of commissioner of public buildings of
appeals in prosecutions for violation of ordinances ofp. 563n
SALADIN TITHE
ordinance of, early English personal tax law 1, p. 3n
SALARY
permanent, to be fixed by ordinance
change of, to be by ordinance
need not be fixed by ordinance, when4, p. 8n
may be prescribed by resolution, when 5
extra, to public officers, forbidden 4, 72, 219
increase of, during term prohibited 219
unwarranted allowance of, cannot be ratified
cannot be recovered for services rendered under void statute
4, p. 9n
cannot be implied promise to pay officer4, p. 9n
aldermen cannot provide for themselves

(The references are to the sections, except as otherwise indicated.)
SALES STABLE
keeping without license; complaintp. 505n
SALOONS
(See Liquor Selling.)
license tax on
conditions 426
license of, to be uniformp. 631n
may be forbidden in certain sections
designation of districts forp. 757n
screens, blinds, etcp. 757n
forbidding other businessp. 758n
to "keep open," implies a readiness to carry on the usual busi-
ness thereinp. 760n
keeping open on Sunday; proof of
ordinance may regulate the time of opening and closing of 480
forbidding sale of liquor on holidaysp. 758n
forbidding music inp. 758n
forbidding females in, at certain hoursp. 758n
keeping open; sufficiency of complaintp. 505n
SALVATION ARMY
public meetings of, in streets, etcp. 537n
violation of ordinance forbidding disturbance of peacep. 770n
SAN FRANCISCO
board of supervisors is legislative body ofp. 141n
form of enacting clause of ordinancep. 231n
ordinances of, to be in form of bill
mayor presiding officer of board of supervisors in 98 p. 156n
hours of day's work and wages may be fixed by ordinancep. 776n
queue ordinance of, directed against Chinese, void 227
appeals from municipal court of, allowedp. 562n
SANITARY DISTRICT
is a public corporation
SANITARY REGULATIONS
(See Health and Sanitary Regulations; Nuisances.)
implied powers respecting
SCALES
(See Weighing Scales; Weights and Measures.)
SCAVENGERS
city, may be licensed
regulation and license of, held void because unreasonable 225
·
SCHOOL DISTRICT
is public corporation 38
SCREENS
in bar roomsp. 757n
SEAL
(See Corporate Seal.)
Contract to the second

(The references are to the sections, except as otherwise indicated.)
SEAMEN
harboring and enticing, ordinance cannot forbidp. 785n
SECESSION
ordinances of, passed by Confederate States 1, p. 3n
SECOND-HAND CLOTHING
ordinance may require disinfection ofp. 773n
SECOND-HAND DEALERS
may be regulated
license tax on, sustained
book seller, is notp. 773n
SECOND-HAND GOODS
selling, without license; proof ofp. 537n
SECOND OFFENSE
heavier penalty for, authorized
action to recover, sufficiency of complaint or information 320
SECURITY FOR COSTS
not required in ordinance cases, in Illinois
SELECT ASSEMBLY
at common law the presence of mayor was not necessary 98, p. 156n
SELF-DENYING ORDINANCE
early English ordinance
SELF-GOVERNMENT
of municipal corporations
SELLING BEER
(See Saloons.)
sufficiency of complaint on charge of
SELLING LIQUOR
(See Liquor Selling; Saloons.)
SEPARATE OFFENSES
illustrations
SERMON
delivery of, in public places, may be regulated 225
SERVANTS
liability of, in ordinance violations
liability of principal for acts of
SEWER
(See Public Improvements.)
may be regulated, to prevent nuisance
legislature may regulate manner of constructionp. 806n
power to make or provide for beyond corporate limits 513
construction of, as interference with franchise rights 521 determination of material for, cannot be delegated 85
determination of material for, cannot be delegated
materials, dimensions, etc., delegation of power to name 517
construction of, ordered by ordinance
resolution to construct sufficient when

(The references are to the sections, except as otherwise indicated.)	
SEWER—Continued.	
payment of cost of construction as condition to connect	183
connecting with private, costs to be equally apportionedp. 2	294n
SEWER CONSTRUCTION	
(See Public Improvements; Public Improvement Ordinances.)	
SEWING MACHINE AGENT	-
may be licensed	428
SEX	
ordinance discriminating on account of, void	228
discriminations in employment of labor, on account of, void.p. 7	778n
SHADE TREES	
(See Trees.)	
"SHALL"	
· · · · · · · · · · · · · · · · · · ·	83
construction of	83
	00
SHEEP	
(See Animals at Large.)	
SHOW	:06-
conducting without license; complaintp. 5	,0011
SHOW BOARDS	400
carrying on streets; prohibiting	407
SIDEWALK	
(See Nuisances; Obstruction; Public Work; Public Improve-	
ment Ordinances.)	F 00
defined	
compelling property owners to make	
construction and repair of, by abutters	
snow and ice on, removal of may be required of abutters	00
	458
ordinance providing for improvement of must prescribe width	
altering width of, to be by ordinance	3
may be kept free from obstruction, etc	
temporary deposit of goods, merchandise, etc., on may be au-	
thorized and regulated	458
material for, delegation of power	517
forbidding display of signs on 188,	467
construction of, may be given to officer, whenp. 8	308n
cellar doors, coal holes, etc., in, may be authorized and regu-	
lated	458
SIGNALS	
of danger, servants of trains may be required to give	474
SIGNS	
ordinances may regulate	461
as nuisances	
ordinances directing removal, validity	
violating ordinance regulating, as evidence of negligence	
forbidding displaying of on sidewalks streets etc 188.	

(The references are to the sections, except as otherwise indicated.)
SIGNING
of ordinance by mayor 14
of resolution by mayor
time and manner of
SINKS
removal of contents of, may be compelled and regulated 45
if nuisance results from, it may be abated
SITUATIONS
(See Offices.)
SKIFFS
reasonableness of license fee onp. 6361
SLAUGHTER HOUSES
power to regulate
may exclude from corporate limits
may declare to be a nuisance
ordinances regulating, not in restraint of tradep. 3041
location of, power of property owners to determine
unlawful erection of; proof of
SLAUGHTERING ANIMALS
killing and dressing one, insufficient proofp. 5381
SMOKE
dense, emission of, in populous community as a public nuisance 456
Chicago ordinance forbidding, sustained
St. Louis ordinance forbidding, held void 456
power of legislature to declare discharge a public nuisance is
undoubted
emitting dense, uniform rule requiredp. 294r
act of Congress forbidding discharge of, within the District
of Columbia, sustained
dense, law forbidding discharge of, may contain exemptions 194
ordinance forbidding emission of dense, may exempt resident districts
districts
SMOKING
in street car forbidden, uniform rule requiredp. 294r
SNOW
on sidewalk, abutters may be required to remove 32, 458
violation of ordinances requiring removal of, does not give
cause of action 42
requiring removal of, from sidewalk; Boston ordinance ap-
plied to tenant
street railways may be required to remove from tracks 474
SOCIETIES
by-laws of, in restraint of trade, voidp. 304r
SOLDIERS
bounties to, power to provide for

(The references are to the sections, except as otherwise indicated.)
SOLICITING
of patrons, cannot be forbidden by ordinancep. 356n patronage for hotel unlawfully; proof ofp. 537n
SOURCE OF POWER for the enactment of ordinances need not be recited 139
SOUTH CAROLINA statute and ordinance may condemn same act as offense 500
early rule of, as to forfeiture of license
early rule of, as to forfeiture of ficense
jury trial allowed in misdemeanors
appeals in prosecution for violation of ordinances
SOUTH DAKOTA
nature of action, to enforce police ordinances 304
statute and ordinance may condemn same act as offense 500
charter denying jury trial in certain cases, held unconstitu-
tional 331
SOVEREIGNTY
municipal corporations do not possess elements of 46
resides in state
not possessed by New England towns
SPECIAL ASSESSMENT OR TAXATION
for local improvements, generally prevail 522
sustained under taxing power 522
have no relation to right of eminent domainp. 818n
differ from general taxesp. 818n
theory and principles.of 522
sustained on ground of benefit
rule of Norwood v. Baker 522
decisions of U. S. Supreme Court in April, 1901 522
benefits as a legislative question 522
front foot rule, without judicial inquiry, valid 522
hearing of property owners as to benefits, need not be provided 522
special taxing districts may be created 522
levies according to value, superficial area or frontage, sus-
tained 522
uniformity and equality of 523
may be levied for what purposes 524
object must be public
power to declare what are local improvements 524
for street sprinkling and cleaning 524
ordinance must provide method of payment 547
payment in installments 548
basis of apportionment 549
can only be exercised by express grant 512
legislature may authorize, for local improvementsp. 805n
for local improvements; state control ofp. 805n
for street improvements, subject to local control 515
for sewer beyond corporate limits, authorized in Illinois 513

(The references are to the sections, except as otherwise indicated.)
SPECIAL ASSESSMENT OR TAXATION—Continued.
for sidewalk in uninhabited part, void
payment of, for sewer, as condition to connect therewith 183
SPECIAL MEETING
defined 92, p. 146n
in Illinois council may call
notice of 110
method of calling 110 and note
when purpose of, to be stated
power to adjourn 111
SPECIAL ORDINANCE
defined 9, 10
disfinguished from general ordinance
repeal of
SPECIAL TAX BILLS
duty to sign cannot be delegated85
pleading ordinance in action on
interest on, as part of contract obligation 246
for unnecessary public improvements
payment of, as condition to connect with sewer 183
SPECIAL TAXING DISTRICT
may be created, for local improvements paid by special as-
sessment or taxation 522
SPECIFIC ENUMERATION
(Effect of, See Construction.)
of municipal powers, effect of 50
SPEED
(See Rate of Speed.)
SPRINKLING
(See Street Sprinkling.)
SPRINKLING CART
may be licensed as vehiclesp. 642n
STABLE
(See Livery Stable; Sales Stable.)
STAGES may be licensed; amountp. 353n, p. 642
may be incensed; amountp. 555n, p. 642
STAGNANT WATER
abutter may be compelled to remove from private passageway 453
STANDS
for goods, confectionery, etc., on sidewalk as nuisance 459
STATE AFFAIRS ordinance cannot regulatep. 785n
ordinance cannot regulate
state laws designed to regulate
distinguished from municipal matters
HINCHERING IIVII IIIIIICIPAL IIIACCENS, , , , , , , , , , , , , , , , , , ,

(The references are to the sections, except as otherwise indicated.)  STATE CONTROL  (See Franchises; Public Improvements; State Offenses.)  over local public improvements
STATE LAWS (See Statutes.) distinguished from municipal ordinances
STATEMENT (See Index under titles of various offenses.) (For violation of police ordinance, see Complaint or Information.)
STATE OFFENSES (See Trial.) distinguished from municipal
STATED MEETING defined 92, p. 146n
STATION drivers of cabs, etc., in and about, may be regulated 184
STATIONARY ENGINEERS license of, valid

(The references are to the sections, except as otherwise indicated.)	
STATUTE	
(See State Laws.)	
how ordinance differs as to force and effect from	13
creating civil liability, distinguished from ordinance40 to	
of state, ordinance must conform to	16
exception	16
STEAM	
use of, to propel trains in streets, may be forbidden32,	474
STEAMBOATS	
spark catcher	'4() _Y
may be exempt from operation of law forbidding discharge of	101
dense smoke	194
STEAM BOILERS	
may be regulated	471
ordinance regulating, to be uniform	
STEAM RAILROADS	10
trains and cars on, may be regulated	475
enumeration of regulations	
use of steam on certain streets may be forbidden32,	
STONE COLUMNS	*13
within limits of street, as nuisance	456
	408
STONE STEPS	40.
on sidewalk, is nuisancep. 7	191
STONE THROWING	
may be forbidden	458
STORES	
department, cannot be regulated by ordinance without special	
legislative grant	491
STRANGERS	
when bound by ordinances	23
STREET BROKERS	
contract of, not commerce	257
STREET CAR FARES	- 05
power to regulate	
rules of United States Supreme Court	
reasonableness of	
discrimination in, forbiddenplace of sale of tickets	
transfers	
	000
STREET CLEANING	
special assessments for, sustained in Indiana	524
STREET IMPROVEMENTS	
(See Public Improvements; Public Improvement Ordinances.)	
STREET PARADE (See Parade.)	
(DEC Talauc.)	

(The references are to the sections, except as otherwise indicated.)
STREET RAILWAYS
(See Franchises; Franchise Ordinance; Rate of Speed.)
power to grant franchise for, cannot be delegated 87
repeal of ordinance granting franchise
trains and cars on, may be regulated
enumeration of regulations
reasonable conditions may be imposed on, when ordinance
grants right to use streets
ordinance granting right to use streets may forbid carrying of
freight
paving and repairing of streets by
may be required to run cars at stated times
time of running of cars, public necessity
may regulate transfers of
may be required to report at stated times
requiring sale of tickets on carsp. 313n
may be required to use specified rail
to keep street between rails clean 474
to remove snow and ice 474
to water tracks, to lay dust194, 474
reports of, may be requiredp. 304n
requirement as to paving streets or parts 577
new corporation formed by merger 577
kind of material577
"repair" as obligation to "repave"
city may relieve of duty to pave
operation will be enjoined, if license to run is voidp. 429n
right to lay double track cannot be limited to single
not in existence when ordinance passed, binding effectp. 352n license on property of, cars, etc
imposing license fee, under power to amend franchise ordinance 197
STREET RAILWAY COMPANY
is a quasi-public corporation
STREET SPRINKLING
as local improvement
special assessment for, sustained
street railway may be required to water tracks, to lay dust 474
STREET WALKING
may be forbidden and punishedp. 753n
may be punished by ordinance, though condemned by statute. 509
summary jurisdiction on charge of
STREETS
(See Franchise; Franchise Ordinance; Grade of Street;
Nuisances; Obstructions; Public Improvements; Public Improvement Ordinances; Vacating Streets.)
defined 561

(The references are to the sections, except as otherwise indicated.)
STREETS—Continued.
distinguished from rural ways 56
uses of, stated and illustrated 564
management of, relate to governmental affairs 568
municipal control of 569
right to use by public service companies, usually granted by
local authorities 569
municipal corporation is trustee of, for public 569
railroad tracks, gas and water pipes, poles, wires, etc., in, as
nuisances 570
use of, must be public 571
exclusive private use, forbidden 571
illustrations of public usep. 889n
public and private uses illustrated572, p. 887n, p. 889n
rights of abutters 572
legislative control of 568
legislature may grant use of, to public service companies,
when 568
opening and establishment of 527
municipal corporation may determine width of, and assign
carriage and foot ways 458
new uses of; illustrationsp. 892n
determination of material for construction of, cannot be dele-
gated 85
repairs of, as interfering with franchise rights
exclusive franchises or privileges to use, forbidden
regulating opening of, to lay gas pipes
regulating use of, generally 222
may be kept free from obstructions, etc
may forbid water, etc., from flowing onto
obstructions of, with steam and street cars
obstructions of, with railroad cars, may be regulated 458
may regulate stands for cabs, hacks, etc
may regulate temporary obstructions of
may require permits for excavations
obstructions in, as nuisances; illustrations
corporate authorities may remove
distributing hand bills, etc., on, regulating188, 467
STRUCTURES FOR ADVERTISING
(See Billboards.)
SUBJECT
when ordinance to contain but one and when not141, 142
SUBORDINATES
liability of, in ordinance violations 344
liability of principal for acts of
SUBWAYS
(See Underground Conduits.)
may be regulated

(The references are to the sections, except as otherwise indicated.)
SUMMARY TRIAL
(See Trial.)
SUMMONS
for violation of ordinance
sufficiency of 307
SUNDAY
validity of ordinances requiring observance of
general power is insufficient to support ordinance forbidding
business on, where subject is covered by state statutep. 784n
but regulations as to, may be made by ordinance, though
covered by statute 509
liquor selling on, may be punished by ordinance, though con-
demned by statute 509
ordinance forbidding sale of goods on, held void because of
conflict with statutep. 791n
selling liquor on; sufficiency of complaint on charge of 321
selling liquor on; summary jurisdiction on charge of 329 violating regulations concerning; summary jurisdiction on
charge of
selling liquor on; proof of
keeping open tippling house on; proof of
"keeping open" on; proof ofp. 537n
SURETY
(See Appeal Bond.)
SURRENDER
of public powers, forbidden
SURVEY
included, in direction to prepare mapp. 454n
SUSPECT
just cause to, allegation of, sufficiency
SUSPENSION
of ordinances 37
of rules, vote necessary
SWINE
(See Animals; Animals at Large.)
keeping of, may be regulated
keeping of, may be confined to certain districts 32
SWEARING
loud and boisterous, may be made penal
same profane oath several times on same day, separate con-
viction for each oath, not required
profane; complaint in charge of
ΓΑΜΡΑ (FLA.)
form of enacting clause of ordinancep. 232

(The references are to the sections, except as otherwise indicated.) TAXATION (Special, see Special Assessment or Taxation.) limited to municipal or corporate purposes................. 399 power of, limited to municipal or corporate purposes...... 400 must be uniform; discrimination forbidden...... 417 powers of, differ from regulation of commerce................ 251 impairing power to levy, by ordinance, void.................. 201 by municipal corporation of its own bonds, is impairment of of property employed in foreign or interstate commerce...... 262 right to exercise power of, tested by quo warranto...... 288 TAX BILLS (See Special Tax Bills.) TAXES (See License Tax; Taxation; Special Assessment or Taxation.) special assessment or taxation differ from general....... 818n irregularities in collecting, may be cured by the legislature.. 167 assessment and rating of cannot be made by council clerk.... 87 TAXING DISTRICT (See Special Taxing District.) as a public corporation..... 38 TAX PAYER action by, to prevent illegal acts; reason for rule.......... 283 actions by, to enjoin enforcement of void ordinances and con-agreements by, to pay for public improvements........... 552 TEAMS attached to vehicles, to be hitched, violation of ordinance as negligence ..... 41 TENANT (See Landlord and Tenant.) TELEGRAPH COMPANY is a quasi-public corporation..... 38

(The references are to the sections, except as otherwise indicated.)
TELEGRAPH AND TELEPHONE COMPANIES
may be licensed 428
TELEGRAPH AND TELEPHONE POLES
(See Poles, Wires, Etc.)
charge for maintaining in streets, etc., may be imposed 261
must be reasonable
TELEPHONE COMPANY
must obtain consent of local authorities in Virginia 201
right of repeal may be reserved
is a quasi-public corporation
TENEMENT HOUSES
sanitary regulations of, are authorized
TENNESSEE
action to enforce police ordinances is civil 304
statute and ordinance may condemn same act as offense 500
double punishment authorized 510
union label ordinance declared void in 553
TEN-PIN ALLEYS
cannot be licensed without express authority476, p. 756n
TERM OF OFFICE
cannot be extended by municipal corporation 219
TERMS
(See Construction; Construction of Ordinances; Maxims;
Words and Phrases.)
TENT
within limits of highway is a nuisance
TEXAS
ordinance authorizing summary trial, held unconstitutional 331
power to pass ordinances condemning state offenses
-
THEATERS
may be licensed
compelling proprietor, to pay for attendance of officer at, void. 188
THEATRICAL EXHIBITIONS
may be licensed 428
THIEVES
summary jurisdiction of
associating with, denounced; complaintp. 506n
TICKETS
transfer, of street cars; regulation of
TIE VOTE
when and who to cast
TIME
(See Meetings; Notice.)

(The references are to the sections, except as otherwise indicated.)
TITLE
formal part of ordinance
when subject of ordinance to be expressed in
sufficiency of
illustrative cases
in revision of ordinance
amendment of, on passage of ordinance
of ordinance, in construction291, 541
TONNAGE
distinguished from wharfage
TOPEKA (KAN.)
ordinance of, regulating billboards, held unreasonablep. 726n
scavenger ordinance of, void
"TO REGULATE"
(See Construction.)
construction of power
power of, as power to impose license tax 406
as power to prohibit
power, as applied to marketsp. 764n
TORTS
(See Negligence; Nuisances.)
TOWN
(See Municipal Corporation; New England Towns.)
is a public corporation 38
TOWN HALL
place of corporate meetings 92
providing, is a public improvement
TOWNSHIP
is public corporation 38
corporate authority of, where vestedp. 142n
Illinois systemp. 143r
form of enacting clause of ordinance ofp. 232n
TRACKS
(See Railroad Tracks.)
TRADE
(See Nuisances; Restraint of Trade.)
nuisances arising from 447
TRAINS
running of, in streets, may be regulated 473
enumeration of regulations 474
TRANSFERS
of street railways, may be regulated474, 590
TRANSIENT
(See Peddlers.)
as applied to license on merchantsp. 632r
TREASON
in the English law

(The references are to the sections, except as otherwise indicated.)	
TREES	
planting of, may be controlled, within limits of streets and	i
public grounds	. 458
on sidewalk, as nuisance	459
in streets, when nuisance, they may be cut downp.	720n
mutilation or destruction of, may be prohibited	
cutting down and making use of; allegations of complaint	321
TRESPASS	
on private property, ordinances forbidding	493
complaint for, must contain description of the locus in quo	
on property, ordinance may punish, though covered by statute.	509
TRIAL	
summary, authorized; origin	328
essentials of summary trial	305
necessity for	328
municipal offenses enumerated	329
jury trial, not applicable, when	
construction of constitutional provisions as to	
when jury trial allowed	
crimes and criminal prosecutions	
crimes, misdemeanors and municipal offenses distin-	
guished misdemeanor defined as relates to jury trial	
jury trial on appeal, unreasonable restrictions	
application for jury; conditions; waiver	
manner of conducting jury trial	
practice; technical rules, disregarded	
costs	
formal arraignment and plea of defendant, not required	
mode of conducting—civil or criminal	
pleading defense; method	
mode of; regulation of, does not violate federal constitution	230
power and duties of city attorney	
service of copy of information or complaint on defendant	
consolidation of suits, to recover ordinance penalties	
prosecution abates on death of defendant	
for violation of ordinance, in absence of defendant	
mode of, whether summary or jury, should be shown in record	
of conviction	358
record of conviction to show defendant's presence at, when	358
TUNNEL	
river, Chicago authorized to constructp. 7	'99n
TURNPIKE COMPANY	
is a quasi-public corporation	38
UNDERGROUND CONDUITS	
for wires, tubes, cables, etc., may be required and regulated .462,	511
UNIFORM RULE	
ordinance must provide	184

(The references are to the sections, except as otherwise indicated.)
UNIFORMITY of special assessment or taxation
UNION LABEL
ordinance requiring printing to bear, void219, p. 353n, 553
UNION LABOR ordinance restricting bidding to
UNLAWFUL DETAINER action of, jurisdiction of local courtp. 467r
UNITED STATES COURTS jurisdiction of, to restrain enforcement of ordinancep. 437n same act may be an offense against a state and the federal government
double punishment authorized
URBAN WAYS distinguished from rural
USAGE (See Custom and Usage.)
UTAH
statute of, limiting day's work to eight hours in mines, sustained
•
VACATING STREET
kato, Minnp. 838n rights of abuttersp. 883n
action for damages by abutting ownerp. 892n
for benefit of individual or corporationp. 814n
validity ofp. 814n
how far discretionary with municipal authorities 519
VACCINATION
may be required 445
VAGRANCY
ordinance may forbid and punish
to conform to state law
ordinance may punish, though condemned by statute 509
complaint in charge of
sufficiency of verdict on charge of
VAGRANTS
law permitting vagrants to be hired out, unconstitutionalp. 772n
VALIDITY OF ORDINANCES
(See Reasonableness of Ordinances; Rules of Construction;
see Construction of Ordinances.)
of public improvement ordinances, see Public Improvement
Ordinances.

(The references are to the sections, except as otherwise indicated.)
VALIDITY OF ORDINANCE—Continued.
courts will determine
methods of considering 27
police power, how exercise of, may be questioned 27
doctrine of estoppel
presumed 27
franchise, as a rule third persons cannot questionp. 429
when rival companies may questionp. 4291
municipal officers may question
those not affected in person or property cannot question 28:
those affected or about to be affected by enforcement may
question
defendant prosecuted under may question
doctrine stated and illustrated285 and notes
injunction to prevent violation
certiorari, to test; New Jersey doctrine
quo warranto, to test
prohibition authorized in Kentucky to testp. 436r
citizens and taxpayers may question
when courts will not interfere at instance of 283
VALUATION
special assessment or taxation levied according to, valid 522
VARIANCE
in name of corporation in enacting clause
between complaint and proof
in improvement ordinances 558
VEHICLES
(See Obstructions; Streets.)
license tax, for use of streets 424
Chicago wheel tax ordinance, held void 424
license tax on, when authorized 424
double taxation
license on; reasonableness of amount
license on; discriminations, void
licensing, construction of general and particular words 297
license of non-resident
width of tires of, ordinances cannot discriminate 194
ordinances to prevent obstructions of streets, etc., by, valid 458
VELOCIPEDES
riding of, on streets, etc., may be regulated 465
VENUE
changes of, allowed
VERBAL ORDER
committal by virtue of, illegalp. 560n

(The references are to the sections, except as otherwise indicated.)
VERDICT T
sufficient, if responsive to the issue
given in open court and entered by clerk, valid 356
of guilty in action of debt, sufficient
on charge of vagrancyp. 555n
when given, record of conviction should show 358
VERMONT
conclusion of complaint for violation of ordinance 314
VESTED RIGHTS
(See Franchise Ordinances.)
are protected 521
cannot be destroyed by amendment of ordinancesp. 317m
nor by repeals
of contractor for public work244, 245
interest on special tax bills
political powers of municipal corporation are not
grant of right to build private sewer, held to bep. 915m
VETO
of bill, ordinance or resolution
consideration of by legislative body
VIGILANT WATCH
ordinances requiring, of servants of steam and street cars, are valid
VILLAGE (See Municipal Corporation)
(See Municipal Corporation.) is a public corporation
chief officer is designated village presidentp. 1431
form of enacting clause of ordinance ofp. 2321
VIOLATION OF ORDINANCE
(See Actions to Enforce Police Ordinances.)
injunction, to prevent
VIRGINIA
telephone company to obtain local consent in
may reserve right to repeal
VOID ACTS
when municipal corporation cannot legalize
VOID ORDINANCES
may be validated by municipality
curative power of legislature over
proceedings to subscribe to railroad stock
to collect taxes
validating improvement 55
curative power of legislature 55
cannot be amended
amendment of, by striking out void parts
is no offense to violatep. 270
in part only; valid parts sustained 29
9

(The references are to the sections, except as otherwise indicated.)	
VOLUNTARY APPEARANCE	
of defendant, on charge of violation of ordinance	305
VOTE	
(See Quorum.)	100
casting, in event of tie	102
method of giving and council procedure	110
VOTERS	
(See Electors.)	
WAIVER	
of right to jury trial	336
of defects in statement, information or complaint	324
of right to forfeit privilege or franchise to use streets	992
WALL	
(See Buildings.)	
"WANTON"	
what is, as applied to use of language, in ordinancep.	537
WANTONLY	
doing a given thing; proof of	342
WARD LINES	
usually fixed by charter	44
changing, to be by ordinance	3
WARRANT	
for violation of ordinance, when required	
necessary to authorize arrest, when	
sufficiency of	
for violation of ordinance, criminal in New Yorkp.	41011
WARRANTY	4 C 27
action for false, jurisdictionp.	40 ( II
WARNING	
(See New England Town; Notice.)	
WASH HOUSES	
(See Laundries.)	
WASHINGTON	
statute and ordinance may condemn same act as offense	. 500
WASTE	
abutter may be compelled to remove, from private passageway	. 453
WATCHMEN	
at railroad crossings, may be required	. 474
WATERBURY (CONN.)	
ordinance of, forbidding sale of impure milk, held void a	
subject was regulated by statutep.	788n
WATER	
exclusive franchise to supply	
refusing to supply, allegation in charge of	
right to supply, cannot be impaired	
when not a mere license	
user of, may be required to provide meterp.	356n

(The references are to the sections, except as otherwise indicated.)
WATER BASINS
meaning of, in ordinance as to water ratesp. 9671
WATER-CLOSETS. See PRIVY VAULTS.
meaning of, in ordinance as to water ratesp. 907n
WATER COMPANY
is a quasi-public corporation
WATER METERS
consumers may be required to providep. 9071
WATER PIPES
in streets, as nuisances
in advance of public improvements
change of location of, authorized
property owner cannot enjoin
users of water, may be required to provide, at their own
expense 51:
WATER RATES
power to regulate
under general grant of power 58
estoppel applied to municipal corporation 58
reasonableness of
power to fix by ordinance, held continuing 24
construction of terms regulatingp. 9071
illegal reduction; injunction
WATER SUPPLY .
implied power to providep. 7981
implied power to furnish by contract
as public improvement; power to provide
proposition, submission to, and approval of, electorsp. 8371
pollution of, may be forbidden 45
WATER WAY
(See Obstructions.)
WATERWORKS
power to establishp. 7981
implied power to hold election to establish
establishing, submission to voters
sufficiency of ordinance
implied power to purchase lands for, denied
power to establish, to be exercised by ordinance
•
WAYS
(See Alleys; Highways; Nuisances; Obstructions; Streets.)
rural distinguished from urban
WEIGHERS
city, may be licensed
WEIGHING SCALES
public, may be established
on etroote ote as nilisance

(The references are to the sections, except as otherwise indicated.)
WEIGHTS AND MEASURES ordinances may regulate and require articles to be sold by 189, 485
weighing privately is no violation
construction of ordinance as to weighing hay
public scales may be established
reasonable charge for weighing, valid
WELLS
may be ordered filled up, when nuisances
in public streets, may be abolished
license to maintain may be revoked 455
WHARF .
is not a highway
as public improvements
when ordinance does not apply to private
WHARFAGE
how right to collect arises
charge for, valid
distinguished from tonnage
WHISTLE
of locomotive, to be sounded
blowing of, may be forbidden 486
WHORE HOUSE
(See Bawdy House.)
WINDOWS
obstruction of, may be forbidden 493
WISCONSIN
nature of action, to enforce police ordinances 304
jury in, may determine reasonableness of ordinance 185
ordinances as to street parades, etc., held void for discrimina-
tion
WITNESSES
who may act as, in municipal corporation courts 302
competency of defendant on charge of violation of ordinance 341
objections to competency of, to be made when offered 338
when names of, to be set out in record of conviction 358
WOOD
may be required to be sold by cord or measure 485
WOODEN BUILDINGS
(See Buildings.)
"frame," held to bep. 736n
may be forbidden within certain limits 32
WORCESTER (MASS.)
ordinance of, relating to rag pickers, sustainedp. 773n
WORDS AND PHRASES
(See Maxims, and various words in this Index.)
"absent," when presiding officer is
Compared as time in distillable infilliance

	(The references are to the sections, except as otherwise indicated.)
W(	ORDS AND PHRASES—Continued.
	"filled," as used in improvement ordinance 559
	"hereafter," as to time of street gutteringp. 844n
	to "conduct a house of ill-fame in an indecent manner" 20
	"policy," forbidding game of
	"residence portion" and "business portion," relating to sale
	of liquor 20
	small ware, regulating sale of
	"faster than an ordinary trot," applying to driving 20
	"immoderate gait"
	"drove or droves," relating to driving cattle through streets 20
	when dog is "going at large"p. 455n
	"may," "must," "shall," etc., construction of
	"it shall be lawful," construction of
	"not less than," used in improvement ordinance 541
	the "obligation" of the contract
	"owner or occupier," forbidding blazing chimneys, applied to
	tenant only
	"permit," in ordinance forbidding horses, etc., from going at
	large
	"to keep open" implies a readiness to carry on the usual busi-
	nessp. 760n in municipal charter, how construed
	terms in ordinances regulating water ratesp. 907n
	in ordinances, construction of
	construction of, as used in improvement ordinances558, 559
•	-
W	RIT OF ERROR
	to try title to office
	to review prosecutions for violation of ordinances 366
W	YOMING
	action to enforce police ordinance is civil 304
v	EAS AND NAYS
-	in council proceedings, when required to be taken 117
	reasons for requiring taking of
	sufficiency of record of taking 127

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Tide A treatise on the law of Copy
municipal ordinances.

